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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1941.

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TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	PAGE.
Appa Trimbak Deshpande *v.* Waman Govind Deshpande ..	733
Bhowanipur Banking Corporation, Ltd. *v.* Durgesh Nandini Dasi.	726
Commissioner of Income-tax, Punjab *v.* Krishna Kishore ..	972
Hemanta Kumari *v.* Gauri Shankar ..	1
Jagadamba Loan Co. *v.* Prasad Singh ..	53
Jagat Narayan Singh *v.* Khartar Sah ..	227
Krishnaswami Aiyangar *v.* Kamalamma ..	894
Maung Sin *v.* Maung Byaung ..	223
Ramanna *v.* Jagannadha Rao ..	58

FEDERAL COURT.

In the matter of The Hindu Women's R. P. Act ..	12
Subrahmanyam Chettiar *v.* Muthuswami Goundan ..	33

HIGH COURT (FULL BENCH).

Adilakshmi Ammal, *In re* ..	41
Cannanore Bank, Ltd. *v.* Madhavi ..	956
Chidambaram Chettiar *v.* Sellakumara Goundan ..	684
Commissioner of Income-tax, Madras *v.* Annamalai Chettiar ..	890
Commissioner of Income-tax, Madras *v.* Jamal Mohamed Sahib.	148
Commissioner of Income-tax, Madras *v.* Lakshmanier ..	891
Commissioner of Income-tax, Madras *v.* National Cycle Importing Company ..	152
Commissioner of Income-tax *v.* Ramaswamy Chettiar ..	900
Hamidgani Ammal *v.* Ammasahib Ammal ..	622
Kanakaratnam *v.* Narasimha Rao ..	803
Kandaswami Thambiran *v.* Vagheesam Pillai ..	463
Kayambu Pillai, *In re* ..	500
Mohana Reddi *v.* Gangaraju ..	311
Munuswami Mudali *v.* Narasappa Mudali ..	79
Narayanan Chettiar *v.* Commissioner of Income-tax, Madras ..	172
Rangaswami Aiyangar *v.* Sivaprakasam Pillai ..	883
Secretary of State for India *v.* Jagannadham ..	47
Sundaresa Aiyar, *In re* ..	663
Thiruvengada Mudaliar *v.* Rajabathar Mudaliar ..	35
Velagala Srirama Reddi *v.* Karri Srirama Reddi ..	855
Venkatanarasimhacharyulu *v.* Secretary of State for India in Council ..	904
Venkayya *v.* Sreeramulu ..	798

OTHER CASES.

Abdul Huq *v.* Usman Khan ..	939
Ahmed Mohideen *v.* Yusuf Ali ..	486

		PAGE.
Aiyar and Co. *v.* Srinivasalu Naidu	..	145
Alagappa Chettiar *v.* Ramakrishna Aiyar	..	493
Alagappa Mudaliar *v.* Veerappan Chettiar	..	665
Appanna Sastri *v.* Raja Sobhanadri	..	947
Arunagiri Goundan *v.* Ramaswami Pillai	..	537
Arunagiri Mudaliar *v.* Radhakrishna Aiyar	..	520
Athiappa Chettiar *v.* Ibramsa Pulavar	..	690
Athinarayana Konar *v.* Subramania Aiyar	..	722
Baron Von Dincklage, *In re*	..	748
Bhuloganatham Pillai *v.* Rajagopala Pillai	..	105
Bhuvaraha Aiyangar, *In re*	..	1014
Chandanmal *v.* Ramakrishnayya	..	827
Chelliah Pillai *v.* Ramiah Thevar *alias* Ramalinga Thevar	..	375
Chenna Reddi, *In re*	..	644
Cherappan *v.* Sankara Aiyar	..	63
Chidambaram Pandaram *v.* Lakshminarayana Chettiar	..	109
China Kondayya *v.* Ramalinga Reddi	..	1060
Chinna Papanna, *In re*	..	1070
Chinnappa Reddi *v.* Venkataramanappa	..	695
Chitravelu Thevar, *In re*	..	207
Commissioner, Tirumalai Tirupati Devasthanams *v.* Commissioner, Tirupati Municipal Council	..	1093
Curtis, *In re*	..	845
D'Cruz *v.* Viswanathan	..	94
Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E. Madras	..	175
Devarajulu Naidu *v.* Jayalakshmi Ammal	..	222
Devarayan Chettiar *v.* Subramania Iyer	..	257
Dhanalakshmi Weaving Works *v.* Abdul Azeez Sahib	..	435
Ekambara & Dhandayudhapani Temples *v.* Arunachala Goundar	..	587
Ekambara & Dhandayudapani Swami Temples *v.* Veerappa Gounder	..	568
Enayatullah Saheb *v.* Jeelani Saheb	..	740
Ethiraja Mudaliar *v.* Murugesa Mudaliar	..	1088
Ethirajulu Naidu *v.* Ranganatham Chetty	..	711
Examiner of Local Fund Accounts, Madras, *v.* Ramaswami Chettiar	..	403
Fatima Bibi *v.* Pentu Saheb	..	548
Gangayya *v.* Lakshmi Devi	..	510
Gangi Reddi *v.* Narasimha Reddi	..	362
General Agencies & Trades, Ltd. *v.* Viswanathan	..	417
Gopala Maller *v.* Krishnan	..	340
Govindacharyulu *v.* Seshagiri Rao	..	674
Guruswami Gounder, *In re*	..	209
Hamedia Madrasa School *v.* Municipal Council, Tiruvarur	..	347
Inspecting Asst., Commissioner of Income-tax *v.* Javerbhai	..	475
Ismail Sahib *v.* Ethikasha Sarguru	..	541
Kailasa Aiyar *v.* Sundaram Pattar	..	986
Karuppa Goundan *v.* Narayanaswami & Co.	..	808
Karuppannan, *In re*	..	446
Karuppayya Thevar, *In re*	..	999
Kayambu Pillai *v.* The Court of Wards	..	873
Kesavalu Naidu *v.* Venkatarama Chettiar	..	450

	PAGE.
Konda Boyan *v.* Palaniswami Goundan ..	640
Kora Vathan, *In re* ..	694
Krishnamachariar *v.* Lakshmi Ammal ..	507
Krishna Menon *v.* Karunagara Kunhu *alias* Devu Amma ..	287
Krishna Menon *v.* Kunjandi ..	351
Krishnan Chettiar *v.* Ammalu Amma ..	472
Krishna Rao *v.* Official Receiver, East Godavari ..	698
Krishna Reddy *v.* Satyam ..	91
Kunjithapatham Pillai *v.* Saraswathi Ammal ..	66
Kuppan Chettiar *v.* Kaliammal ..	360
Kuppiah Chetty *v.* Saraswathi Ammal ..	571
Kuppuswami Naidu *v.* Kuppuswami Naidu ..	255
Lakshmi Amma *v.* Krishnakurup ..	254
Lakshminarasimhacharyulu *v.* McLaurin High School, Cocanada ..	270
Land Acquisition Officer, Calicut *v.* Subba Rao ..	75
Linga Reddi *v.* Subbarami Reddi ..	1008
Lingeshwara Devara Bhandaram *v.* Nagappa ..	636
Madhava Rao *v.* Administrator-General of Madras ..	677
Madhavlal Desai *v.* Bala Bhai & Sons ..	598
Maha Latchayya *v.* Adi Seshayya ..	244
Mahanandi Reddi *v.* Venkatappa ..	631
Maharajah of Cochin *v.* Thupran ..	792
Mallayya *v.* Jagannadhamma ..	567
Mallayya *v.* Mallayya ..	1085
Manikyam *v.* Manikyamma ..	671
Mannengath Ittichiri *v.* Appu Menon ..	424
Moideen Saheb *v.* Gaffoor Sahib ..	962
Moongan *v.* Roshan Ali ..	534
M. & S.M.Ry. Co., Ltd., *c.* Municipal Council, Bezwada ..	189
Murthuza Sahib, *In re* ..	1042
Muthukaruppan Chettiar *v.* Subbiah Chettiar ..	653
Muthukumaru Maniakarar *v.* Pethia Maniakarar ..	717
Muthyalu *v.* Bolla Chinnayya ..	1010
Nadershaw Chinnoy *v.* Nargesh Chinnoy ..	935
Nagabushanam *v.* Venkayya ..	261
Nagarajan *v.* Krishna Aiyar ..	298
Nagore Durga *v.* Kannu Pillai ..	604
Naina Muhammad Rowther *v.* Periappa Rowther ..	167
Nallappa Goundan *v.* Chinnammal ..	618
Namberumal Naidu *v.* Muthukalathi Mudali ..	1038
Narasimhamurti *v.* Maharajah of Pittapur ..	99
Narasimhamurti *v.* Satyanandam ..	386
Narasimha Rao *v.* Venkataramana Rao ..	439
Narayanamma *v.* Venkatachalam ..	703
Narayanan Chettiar *v.* Veeru Goundar ..	658
Narayanan Nambiar, *In re* ..	787
Narayanan Nambudiripad *v.* Achuthan Nayar ..	584
Narayanaswami *v.* Narayya ..	1049
Narayanaswami Aiyar *v.* Sevadappa Goundar ..	932
Narikkal Chathan *v.* Veethiyottillath Kesavan ..	455
Nataraja Pillai *v.* Rangaswami Karamundar ..	682
Natesa Naicker *v.* Sambanda Chettiar ..	390
Navaneetha Krishna *v.* Ramanujulu Naidu ..	159

	PAGE.
Nellore Permanent Fund, Ltd., *v.* Subba Rao ..	388
Official Assignee of Madras *v.* D'Silva ..	591
Official Assignee *v.* Natesa Achari ..	460
Official Receiver, East Godavari *v.* Veereddi ..	951
Official Receiver of Ramnad *v.* Narayanaswami Thevar ..	1018
Padmanabha Nayar *v.* Appu *alias* Theyyan ..	242
Palaniappa Chettiar *v.* Nachiappa Chettiar ..	558
Palaniappa Chettiar *v.* Periaswami Konar ..	447
Palani Kangayya Gounder *v.* Muthuswami Gounder ..	344
Palayan, *In re* ..	401
Panchapakesa Aiyar, *In re* ..	847
Pandalai *v.* South Indian General Assurance, Co., Ltd ..	595
Pandarasannadi, Tiruvannamalai Adhinam *v.* Corporation of Madras ..	544
Panthanam *v.* Abdul Rahiman ..	529
Papaiah *v.* Ramapunniah ..	566
Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji ..	923
Parameswara Menon *v.* Narayana Menon ..	580
Pattu Achi *v.* Rajagopala Pillai ..	134
Perianna Mudali, *In re* ..	420
Pethuraju Kone *v.* Muthuswami Aiyar ..	784
Ponnuchami Goundar *v.* Muthusami Goundar ..	968
President, Panchayat Board, Mangalagiri *v.* Kottayya ..	1034
Province of Madras *v.* Paidanna & Sons ..	607
Public Prosecutor *v.* Jevan ..	349
Public Prosecutor *v.* Krishnaswami ..	1040
Public Prosecutor *v.* Lury Co. ..	487
Rajeswara Rao Garu *v.* Venkata Rayanim Garu ..	304
Raji Bai Ammal *v.* Nathar Sahib ..	693
Rama Aiyar *v.* Madhava Rao ..	376
Ramachandra Aiyar, *In re* ..	187
Ramakrishna Aiyar *v.* Official Liquidator ..	910
Ramalinga Aiyar *v.* Swaminatha Aiyar ..	68
Rama Naidu, *In re* ..	746
Ramanathan Chettiar *v.* Muthuraman Naidu ..	816
Ramanathan Chettiar *v.* Subramaniam Chettiar ..	123
Ramanatha Sastrigal *v.* Krishna Menon ..	514
Rama Subbayya *v.* Thimmiah ..	754
Ramaswami Chettiar *v.* Kesavan Chettiar ..	248
Ramaswamy Chetty, *In re* ..	110
Ramaswami Reddiar *v.* Official Receiver of South Arcot ..	382
Ramayya *v.* Anjayya ..	848
Ramayya *v.* Bollanka Co-operative Society ..	72
Ramayya *v.* Kotayya ..	557
Raminaidu *v.* Secretary of State for India ..	577
Ranga Rao *v.* Collector of Trichinopoly ..	428
Ranga Rao Naidu *v.* Janaki Prasad ..	452
Rangaswami Nadar *v.* Pichaimani Nadar ..	291
Rangiah Chettiar *v.* Syed Karim Sahib ..	453
Reddy, *In re* ..	852
Rex. *v.* Jaggopal Prasad ..	397
Sambasiva Aiyar *v.* Official Receiver, West Tanjore ..	918
Samuel Nadar *v.* Thangayya Nadar ..	490

	PAGE.
Sankaranarayana Aiyar *v.* Paramasivam Pillai ..	650
Santhappa *v.* Holiappa Bulla ..	295
Saradambal *v.* Subbarama Aiyar ..	862
Sattiraju *v.* Venkataratnam ..	646
Satyanarayanamurthi *v.* Papayya ..	834
Secretary of State for India in Council *v.* Godaraj Dhupajee ..	993
Sehu Mohammed Maraikayar, *In re* ..	356
Sepulchre Bros. *v.* Khushal Das ..	481
Seshayya *v.* Swamireddi ..	795
Seshayya *v.* Venkataramayya ..	309
Sha Moolchand Kesarimull *v.* Associated Agencies ..	281
Shanmugham Chettiar *v.* Nagaswami Aiyar & Co. ..	550
Singaracharyulu *v.* Sesharao ..	432
Sitaramayya *v.* Venkanna ..	768
Sivasubramania Thevan *v.* Kalankarayan Konar ..	301
Somanna, *In re* ..	253
Somappa *v.* Nagi Reddy ..	1050
Sorimuthu Pillai, *In re* ..	399
Srinivasalu Reddiar, *In re* ..	1036
Srinivasa Rao *v.* Seshacharlu ..	406
Srinivasayya *v.* Obula Raju ..	164
Subba Rao *v.* Satyanarayanamurthi ..	170
Subba Rao *v.* Venkatapuram Panchayat Board ..	216
Subbaraya Chettiar *v.* Debt Conciliation Board ..	581
Subbayya *v.* Chandrayya ..	442
Subbayya *v.* Venkatadri ..	395
Subbayya *v.* Venkata Hanumantha Bhushanarao ..	125
Subramania Aiyar *v.* India Equitable Insurance Co., Ltd., ..	509
Subramaniam Chettiar *v.* Batcha Rowther ..	751
Subramanian Chettiar *v.* Official Receiver, West Tanjore ..	212
Subramanya Sarma, *In re* ..	156
Suryanarayanamurthi *v.* Municipal Council, Cocanada ..	338
Suryanarayana Raju *v.* Viswanadharaju ..	1047
Surya Rao Bahadur *v.* Mangamma ..	781
Swaminatha Aiyar, *In re* ..	1045
Swaminatha Pillai *v.* Krishna Padayachi ..	601
Thangammal *v.* Veerama Reddiar ..	1024
Thayyanayaki Ammal *v.* Sundarappa ..	913
Thimmappa Chettiar *v.* Thangavelu Chetty ..	119
Thiruvengadam Pillai *v.* Koolai ..	1002
Thiruvengadatha Aiyangar *v.* Sannappan Servai ..	307
Tirugnanavalli Ammal *v.* Venugopala Pillai ..	497
Travancore National Bank Subsidiary Co., Ltd. *v.* Venkataraman ..	908
Valliappa Chettiar *v.* Muthu Koundan ..	943
Vanjeeswara Aiyar *v.* District Board of South Arcot ..	469
Varadaraja Pillai *v.* Rukmani Ammal ..	359
Varadiah Chetty *v.* Province of Madras ..	564
Vasudevan Nambudripad *v.* Maria Kutti Umma ..	293
Veerappa Chettiar *v.* Sivagami Achi ..	1064
Veeraraghava Rao *v.* Debt Conciliation Board, Bezwada ..	366
Veeraswami *v.* Nammayya ..	121
Vedangi Veera Raghava Rao *v.* Gopalrao ..	707
Velayutha Pandaram *v.* Suryamurthi Pillai ..	770

	Page.
Venkatachalam Chetty, *In re* ..	661
Venkatachalamiah *v.* Venkatiah ..	588
Venkatachellam *v.* Subrahmanyam ..	219
Venkataraghava Aiyar, *In re* ..	348
Venkata Rajagopala Krishna Yachendra Bahadur Varu *v.* Venkata Seshacharlu ..	655
Venkatarama Chetti, *In re* ..	854
Venkataratnam Chetti *v.* Venkatayya ..	778
Venkatasubba Row *v.* Stanley Philip ..	505
Venkataswami *v.* Pedda Madduleti ..	155
Venkatramayya *v.* Seshayya ..	877
Venkayya *v.* Official Receiver, Guntur ..	810
Venkayya *v.* Raghavamma ..	263
Venugopala Mudaliar *v.* Embaru Naidu ..	378
Venugopala Pillai *v.* Thirugnanavalli Ammal ..	866
Vinaitheerthal Achi, *In re* ..	774
Viswanatha Sastri *v.* Murugappa Chetti ..	115
Yegnanarayaniah, *In re* ..	256
Yelumalai Chetti, *In re* ..	353

TABLE OF CASES CITED.

A

	PAGE.
Abdul Hadi *v.* Abdul Latiff, A.I.R. 1937 Nag. 135 ..	542
Abdulkadar *v.* Mahomed, (1891) I.L.R. 15 Mad. 15 ..	466
Abdul Kadir Sahib *v.* Somasundaram Chettiar, (1922) 43 M.L.J. 467=I.L.R. 45 Mad. 827 ..	959
Abdul Karim *v.* Eastern Bengal Railway, (1934) I.L.R. 61 Cal. 508 ..	668
Abdul Khadir *v.* Subramanya Pattar, (1940) 2 M.L.J. 760 ..	352
Abdul Majid Khan *v.* Saraswati Bai, (1933) 66 M.L.J. 65=L.R. 61 I.A. 90 (P.C.) ..	820
Abdul Matin *v.* Bidesi Rajwar, (1938) I.L.R. 17 Pat. 658 ..	668
Abdul Rahman *v.* Nihal Chand, (1935) I.L.R. 58 All. 132 (F.B.) ..	838
Abdul Rahman *v.* The King-Emperor, (1926) 52 M.L.J. 585=L.R. 54 I.A. 96=I.L.R. 5 Rang. 53 (P.C.) ..	535, 536
Abdul Razack Sahib *v.* Kilpatti Co-operative Society, (1935) 70 M.L.J. 31.	590
Abraham *v.* Abraham, (1863) 9 M.I.A. 195 ..	879
Adams *v.* Lindsell, (1818) 1 B. and Ald. 681=106 E.R. 250 ..	484
Adamson's case, (1874) L.R. 18 Eq. Cases 670 ..	598
Ahmed Bux *v.* Fazal Karim, (1940) 1 M.L.J. 676=I.L.R. (1940) Mad. 195 ..	483
Ahobilachariar *v.* Thulasi Ammal, A.I.R. 1927 Mad. 830 ..	710
Alagammai *v.* Arunachalam, A.I.R. 1935 Mad. 543 ..	652
Alagiri Chetty *v.* Muthusami Chetty, (1940) 50 L.W. 571.	408, 410, 411
Alluri Subbaraju *v.* Alluri Ramabhadra Raju, (1916) 4 L.W. 440 ..	1048
Amarendra Man Singh *v.* Sanatan Singh, (1935) 65 M.L.J. 203=L.R. 60 I.A. 242=I.L.R. 12 Pat. 642 (P.C.) ..	141, 807
Annamalai Chettiar *v.* Muthukaruppan Chettiar, (1930) 60 M.L.J. 1=L.R. 58 I.A. 1=I.L.R. 8 Rang. 645 (P.C.) ..	225
Annapurnamma *v.* Appayya Sastri, (1928) 56 M.L.J. 760=I.L.R. 52 Mad. 620 (F.B.) ..	806, 808
Anne Brahmayya *v.* Chelasami Rattayya, (1924) 20 L.W. 503.	799, 800, 801
Appadurai Nainar, *In re,* (1935) 69 M.L.J. 812=I.L.R. 59 Mad. 165 ..	620, 621
Appalaraju *v.* Krishnamurthy, (1931) 34 L.W. 949 ..	101
Appovier *v.* Rama Subbien, (1866) 11 M.I.A. 75 (89) ..	62, 982
Appu Pillay *v.* Perumal Pillay, (1912) 23 M.L.J. 118 ..	466, 467
Arunachalam Chetty *v.* Arunachalam Chetty, (1888) I.L.R. 12 Mad. 19=L.R. 15 I.A. 171 (P.C.) ..	556
Arunachalam Chetty *v.* Jagannatha Pillai, (1926) 24 L.W. 659 ..	540
Arunachala Nadar *v.* Srivilliputhur Municipal Council, (1934) 67 M.L.J. 38=I.L.R. 58 Mad. 65 ..	217
Arunagiri Mudali *v.* Ranganayaki Ammal, (1897) I.L.R. 21 Mad. 40 ..	445
Ashna Bibi *v.* Awaljadi Bibi, (1916) I.L.R. 44 Cal. 698 ..	786
Asia Bibi *v.* Malik Aziz Ahmad, (1931) I.L.R. 54 All. 448 ..	1029
Asmutunnissa Begum *v.* Ashruff Ali, (1888) I.L.R. 15 Cal. 488 (F.B.) ..	65
Atchamma *v.* Subbarayudu, (1903) 15 M.L.J. 496 ..	989, 990
Attorney-General for Manitoba *v.* Attorney-General for Canada, (1925) A.C. 561 at 562 ..	17, 19
Attorney-General *v.* Biphosphated Guano Company, (1879) 11 Ch.D. 327 at 337 ..	724
Attorney-General for N.S.W. *v.* Brewery Employees' Union of N.S.W., (1908) 6 Com.L.R. 469 ..	17
Attorney-General *v.* Jackson, (1932) A.C. 365 at 370 ..	1030
Attorney-General *v.* West Ham Corporation, (1910) 2 Ch. 560 ..	218

PAGE.

Aubhoy Churn Mohunt *v.* Shamont Lochun Mohunt, (1889) I.L.R. 16 Cal. 788 .. 645
Authinarayana Aiyar *v.* Krishnaswami Aiyar, 1924 M.W.N. 755 .. 941
Ayyamudali Velalan *v.* Sourimuthu Udayan, (1927) 53 M.L.J. 222 .. 86
Ayyanna *v.* Nagabushanam, (1892) I.L.R. 16 Mad. 285 .. 503, 504
Ayya Pattar *v.* Attupurath Manakkal Karnavan, 1919 M.W.N. 805 .. 959

B

Babu *alias* Govinddoss Krishnadoss *v.* Gokuldoss Goverdhandoss, (1928) 55 M.L.J. 132 .. 880
Badri Das *v.* Pasupati Banerji, (1932) I.L.R. 12 Pat. 93 .. 916
Baijnath Prasad Singh *v.* Tej Bali Singh, (1921) 40 M.L.J. 387=L.R. 48 I.A. 195=I.L.R. 43 All. 228 (P.C.) .. 18, 29, 976
Baijnath Sahai *v.* Ramgut Singh, (1896) L.R. 23 I.A. 45=I.L.R. 23 Cal. 775 (P.C.) .. 905, 906, 907, 908
In re Baker, Nichols *v.* Baker, (1899) 44 Ch.D. 262 at 272 .. 1027
Balakrishna Menon *v.* Uma, (1928) 55 M.L.J. 873=I.L.R. 52 Mad. 263 .. 114
Balamba *v.* Krishnayya, (1913) 25 M. L. J. 65=I. L. R. 37 Mad. 483 (F.B.) .. 742, 743, 744
Balaram *v.* Naktu, (1928) 54 M.L.J. 462 (P.C.) .. 721
Balarami Reddi *v.* Official Receiver, Nellore, (1939) 1 M.L.J. 205=I.L.R. (1939) Mad. 343 .. 922
Baldeo Sonar *v.* Mobarak Ali Khan, (1902) I.L.R. 29 Cal. 583 .. 1052
Balusami Aiyar, *In re,* (1928) 55 M.L.J. 175=I.L.R. 51 Mad. 417 (F.B.). 316, 324, 330, 336, 952, 954
Banarsi Das *v.* Maharani Kuar, (1882) I.L.R. 5 All. 27 .. 1028
Bapineedu *v.* Venkayya, (1910) 21 M.L.J. 82 .. 724
Barendra *v.* Martin & Co., (1920) 33 C.L.J. 7 .. 921
Basivi Reddi *v.* Ramayya, (1916) 31 M.L.J. 394=I.L.R. 40 Mad. 733 .. 757
Bateman *v.* Countess of Ross, (1813) 1 Dow. 235=3 E.R. 684 .. 265
Beck *v.* Pierce, (1889) L.R. 23 Q.B.D. 316. 326, 327, 331, 338
Bell *v.* The Municipal Commissioners for the City of Madras, (1902) 12 M.L.J. 208=I.L.R. 25 Mad. 457 .. 130, 132
Benoy Krishna Roy *v.* Emperor, A.I.R. 1941 Cal. 32 .. 355
Bhagchand Dagadusa *v.* Secretary of State for India in Council, (1927) 58 M.L.J. 81=L.R. 54 I.A. 338=I.L.R. 51 Bom. 725 (P.C.) .. 970
Bhandari *v.* Ramchandra, (1906) 17 M.L.J. 391 .. 634
Bhaskaradu *v.* Subbarayudu, (1913) 26 M.L.J. 60=I.L.R. 38 Mad. 674 .. 508
Bheri Dorayya *v.* Maddipatu Ramayya, (1881) I.L.R. 3 Mad. 35 .. 387
Bhide *v.* The Travancore National and Quilon Bank, Ltd., in Liquidation, (1940) 2 M.L.J. 697=I.L.R. (1941) Mad. 328=52 L.W. 635 .. 419, 420
Bhimabai's case, (1932) 64 M.L.J. 34=L.R. 60 I.A. 25=I.L.R. 57 Bom. 157 (P.C.) .. 737
Bhooburi Moyee Debia *v.* Ram Kishore Acharjee, (1865) 10 M.I.A. 279. 139, 144
Bhup Narain Singh *v.* Gokul Chand Mahton, (1933) 66 M.L.J. 255=L.R. 61 I.A. 115=I.L.R. 13 Pat. 242 (P.C.) .. 724
Bhurabhai *v.* Bai Ruxmani, (1908) I.L.R. 32 Bom. 394 .. 563
Biddal Bros. *v.* Clemens Horst Co., (1911) 1 K.B. 934 .. 284
Bindeshari *v.* Banshi Lal, (1931) I.L.R. 54 All. 399 .. 672
Bishan Dayal *v.* Kesha Prasad, I.L.R. (1937) All. 113 at 121 .. 719
Blackwood *v.* The Queen, (1882) A.C. 82 at 98 .. 26
Board of Education *v.* Rice, (1911) A.C. 179 .. 182
Bolding *v.* Lane, (1863) 1 De G. J. & S. 122=46 E. R. 47 .. 916
Bombay Company, Limited *v.* Official Assignee of Madras, (1920) 40 M.L.J. 404=I.L.R. 44 Mad. 381 .. 753
Bomman Chetty *v.* Emperor, 1936 M.W.N. (Crl.) 1095 .. 536
Bonamali Roy *v.* Jagat Chandra Bhowmick, (1905) 15 M.L.J. 267=L.R. 32 I.A. 80=I.L.R. 32 Cal. 669 (P.C.) .. 137, 139
Bridges *v.* Longman, (1857) 53 E.R. 267 .. 928
Brij Indar Singh *v.* Kanshi Ram, (1917) 33 M.L.J. 486=L.R. 44 I.A. 218 =I.L.R. 45 Cal. 94 .. 874

PAGE.

Brij Narain v. Tej Bikram Bahadur, (1910) 20 M.L.J. 587=L.R. 37 I.A. 70=I.L.R. 32 All. 295 .. 1068
British Coal Corporation v. The King, (1935) A.C. 500. 129, 132, 133
British Imperial Oil Co., Ltd. v. Federal Commissioner of Taxation, (1925) 33 Com. L.R. 422 .. 29
Bunwari Lal v. Daya Sunker Misser, (1909) 13 C.W.N. 815 .. 776
Butchiah Chetti v. Tayar Rao Naidu, (1930) 60 M.L.J. 721=I.L.R. 54 Mad. 184 .. 346

C

Chairman of the Howrah Municipality v. Khetra Krishna Mitra, (1906) I.L.R. 33 Cal. 1290 .. 10
In re, The Central Provinces and Berar Act XIV of 1938, (1939) 1 M.L.J. 609, 611, 612, 613, 615, 616, 617
Chakkra Kannan v. Kunhi Pokker, (1915) 29 M.L.J. 481=I.L.R. 39 Mad. 317 (F.B.) .. 289, 290
Chelimi Chetti v. Subbamma, (1917) 34 M.L.J. 213=I.L.R. 41 Mad. 442 .. 953, 954
Chemudu case, (1934) 67 M.L.J. 306=I.L.R. 57 Mad. 1023 (S.B.) .. 982
Chennappa v. Onkarappa, (1939) 2 M.L.J. 884=I.L.R. (1940) Mad. 358 (F.B.). 1091, 1092
C. A. P. C. S. Chettiar v. V. V. R. Chettiar Firm, (1935) I.L.R. 13 13 Rang. 686 .. 600
Chhaganlal v. Firm Mangal Sainraj Narain, A.I.R. 1938 Lah. 767 .. 971
Chidambaram v. Murugesan, (1939) 2 M.L.J. 671=I.L.R. (1940) Mad. 60 at 66. 1021, 1022
Chidambaram Chettiar v. Sami Aiyar, (1906) 16 M.L.J. 427=I.L.R. 30 Mad. 6 .. 102, 103
Chidambaram Chettiar v. Srinivasa Sastrigal, (1914) 26 M.L.J. 473=I.L.R. 37 Mad. 227 (P.C.) .. 103
Chidambaram Pillai v. Thangathammal, (1918) 16 L.W. 678 .. 1029
China Pitchiah v. Peda Kotiah, (1911) I.L.R. 36 Mad. 29. 101, 102, 103
Chinnakannu v. Paramasiva, A.I.R. 1927 Mad. 1135 .. 945
Chinnammal Achi v. Saminatha Malavaroyan, (1907) I.L.R. 30 Mad. 367. 906, 907
Chinnathayee v. Lakshmi, (1936) 71 M.L.J. 511 .. 625, 630
Chinna Veera Reddi v. Emperor, 1939 M.W.N. (Cr.) 86 .. 747
Chinnayya v. Gurunatham, (1882) I.L.R. 5 Mad. 169 (F.B.) .. 885
Chinnayya v. Ramanna, (1913) 25 M.L.J. 228=I.L.R. 38 Mad. 203 .. 643
Chockalingam Chetty v. Annamalai Chetty, (1915) 34 I.C. 417 .. 941
Chockalingam Chettiar v. Muthiah Chettiar, (1938) 2 M.L.J. 390 .. 779
Chockalingam v. Palaniappa, (1932) 63 M.L.J. 689=I.L.R. 55 Mad. 960. 539
Chotalal Lakshmiram v. Manohar Ganesh Tambekar, (1899) L.R. 26 I.A. 199 .. 3
Chotelal v. Phulchand, I.L.R. (1937) Nag. 425 .. 622
Chowdhury Bibhuti Narayan Singh v. Maharaja Sri Guru Mahadev Asram Prasad Sahi Bahadur, (1940) I.L.R. 19 Pat. 208 .. 107
Chowdhury Chintamun Singh v. Mussamut Nowlukho Konwari, (1875) 2 I.A. 263 .. 18
Chudammal v. Nadamuni Naidu, (1909) 3 I.C. 77 .. 413
Clarke Brothers v. Knowles, (1918) 1 K.B. 128 .. 483
Cohen v. Mitchell, (1890) 25 Q.B. 262. 836, 838, 839 840, 841, 842, 843, 844,
In re, Cohen, (1924) 2 Ch. 515. .. 813, 814
Collector of Gorakhpur v. Ram Sundar Mal, (1934) 67 M.L.J. 274=L.R. 61 I.A. 286=I.L.R. 56 All. 468 (P.C.) .. 980
Collector of Kistna v. Zamindar of Challapali, (1937) 2 M.L.J. 744: I.L.R. (1938) Mad. 431 .. 76, 77
Collector of Madura v. Mootoo Ramalinga Sethupathy, (1868) 12 M. I.A. 397. 137, 143, 144, 804, 805, 806, 807
Collector of Masulipatam v. Cavaly Venkata Narrainapah, (1861) 8 M.I.A. 529 .. 411
Collector of Monghyr v. Hurdai Narain Shahai, (1879) I.L.R. 5 Cal. 425 .. 554
Collett v. Emperor, 1929 M.W.N. 395 .. 790
In re, Collier, (1930) 2 Ch. 37 .. 744

PAGE.

Collman *v.* Mills, (1897) 1 Q.B. 396 at 399 .. 27
Colquhoun *v.* Heddon, (1890) 25 Q.B.D. 129 at 134 .. 25
Commissioner of Income-tax, Bengal *v.* Mercantile Bank of India, Ltd., (1936) 71 M.L.J. 525=L.R. 63 I.A. 457=I.L.R. (1937) 1 Cal. 180 (P.C.). 902
Commissioner of Income-tax, Bombay *v.* Abubacker Abdul Rehman, I.L.R. (1939) Bom. 284 .. 976
Commissioner of Income-tax, Bombay Presidency *v.* Bombay Trust Corporation, Ltd. (1929) 58 M.L.J. 197=L.R. 57 I.A. 49=I.L.R. 54 Bom. 216 (P.C.) .. 994
Commissioner of Income-tax, Madras *v.* Binny & Co. (1924) 47 M.L.J. 242 =I.L.R. 47 Mad. 837 (S.B.) .. 902
Commissioner of Income-tax *v.* Meyyappa Chettiar, (1940) 1 M.L.J. 543 (S.B.) .. 175
Commissioner of Income-tax, Madras *v.* Rajah of Bobbili, (1937) 1 M.L.J. 707=I.L.R. (1937) Mad. 797 (F.B.) .. 974
Commissioners for Special Purposes of Income-tax *v.* Pemsel, (1891) A.C. 531 .. 150
The Committee of Direction of Fruit Marketing *v.* Collins, (1925) 36 Com. L.R. 410 .. 17
Commonwealth and Commonwealth Oil Refineries, Ltd. *v.* South Australia, (1927) 38 Com.L.R. 408 .. 612, 614
Compton, Norton *v.* Compton, (1885) 30 Ch.D. 15 at 19 .. 1027
Cope *v.* Earl De La Warr, (1873) 8 Ch. A. 982 .. 16
Corporation of Calcutta *v.* Binoy Krishna Bose, (1910) 12 C.L.J. 476 .. 1095
In the matter of Corporation of Calcutta *v.* Jogeswar Laha, (1903) 8 C.W.N. 487 .. 1095
Cousins *v.* Sun Life Assurance Society, (1933) Ch. 126 at p. 139 .. 744, 745
Cowan *v.* O'Connor, (1888) 20 Q.B.D. 640 .. 485
Coxwell *v.* Franklinski, (1864) 11 L.T. 153 .. 562
Croft *v.* Dunphy, (1933) A.C. 156 .. 132

D

Dakhina Mohan Roy *v.* Saroda Mohan Roy, (1893) L.R. 20 I.A. 160= I.L.R. 21 Cal. 142 (P.C.) .. 870
Dansk Rekylriffel Syndikat Aktieselskab *v.* Snell, (1908) 2 Ch. 127 .. 113
Daulat Ram *v.* Mehr Chand, (1887) L.R. 14 I.A. 187=I.L.R. 15 Cal. 70 (P.C.). 825, 1053
Dawood Mohideen Rowther *v.* Sohabdeen Sahib, (1937) 2 M.L.J. 223 .. 970
Deendyal's case, (1877) L.R. 4 I.A. 247=I.L.R. 3 Cal. 198 (P.C.) .. 1053
D'Emden *v.* Peddar, (1904) 1 Com.L.R. 91 .. 27
Deojit *v.* Pitambar, (1876) I.L.R. 1 All. 275 .. 387
Devarayan Chettiar *v.* Subramania Aiyar, (1941) 2 M.L.J. 257 .. 262
Ex parte, Dewhurst, (1873) L.R. 7 Ch. 185 .. 839
Dhalbum case, (1927) 53 M.L.J. 30=L.R. 54 I.A. 289 (P.C.) .. 979
Din Mohammad *v.* Mt. Walait Begum, A.I.R. 1938 Lah. 856 .. 688
Diravyam Pillai *v.* Veerannan Ambalam, (1939) 2 M.L.J. 822 .. 724
Diwan Chand *v.* Manak Chand, (1934) I.L.R. 16 Lah. 392 .. 838
Dixson, *In re,* Heynes v. Dixson, (1900) 2 Ch. 561 .. 562
Doe *v.* Hare, (1833) 2 C and M. 145=149 E.R. 709 .. 869
Donepudi Subramanyam *v.* Nune Narasimham, (1928) 56 M.L.J. 489. 685, 686, 688, 689, 690
Don Lal Sahu *v.* Roshan Dobay, (1906) I.L.R. 33 Cal. 1278 .. 916
Doraisami Odayar *v.* Veerasami Padayachi, (1940) 2 M.L.J. 651 .. 258
Dorte *v.* South African Super-Airation, Ltd., (1904) 20 Times Law Reports, 425 .. 489
Re Drage (John) and Sons *v.* Knight, (1926) 134 L.T. 765 .. 813
Duncan *v.* Topham, (1849) 8 C.B. 225=137 E.R. 495 .. 484
Dundappa *v.* Bhimawa, (1920) I.L.R. 45 Bom. 557 .. 445
Dunlop Pneumatic Tyre Co., Ltd. *v.* The Dunlop Lubricant Co., 16 Rep. of Patent, Design and Trade Mark Cases, 12 .. 436
Dunmal Parshotumdas *v.* Baburam Chhotelal, (1935) I.L.R. 58 All. 495 .. 971
In re Duraiswami Aiyar, I.L.R. (1937) Mad. 980 .. 776

PAGE.

E

Eastman Photographic Materials Co., Ltd. *v.* (John) Griffiths Cycle Corporation, Ltd. and the Kodak Cycle Co., Ltd, 15 Rep. of Pat., Des., and Trade Mark Cases, 105 .. 437
Ebrahim Rowthan *v.* Abdul Rahiman Mohamed, (1898) 8 M.L.J. 182 .. 303
Edangapurandar *v.* Narasimhachariar, (1939) 1 M.L.J. 68=I.L.R. (1939) Mad. 140 .. 887
Edwards *v.* Attorney-General for Canada, (1930) A.C. 124 .. 132
Edwards *v.* Glyn, (1859) 2 E. L. and E. L. 29=121 E. R. 12 .. 911
Ekambara and Dandayuthapaniswami Temples *v.* Arunachala Goundar, (1941) 2 M.L.J. 587 .. 569
Ellappa Chettiar, *In re,* (1939) 2 M.L.J. 727 .. 124
Ellaprayyan *v.* Nagaswami Aiyar, (1926) 50 M.L.J. 612=I.L.R. 49 Mad. 691 .. 250, 252
Ellen Ma Noo *v.* William Po Thit, (1924) I.L.R. 2 Rang. 163 266, 268
Emperor *v.* Haji Shaik Mohomed Shustari, (1907) I.L.R. 32 Bom. 10. 672, 673
Emperor *v.* Nanhu, (1923) I.L.R. 45 All. 557 .. 662
Emperor *v.* Panchkowri Dutt, (1924) I.L.R. 52 Cal. 67 at 82. 1079, 1080
Emperor *v.* Satyendra Kumar, A.I.R. 1923 Cal. 463 790
Eroma Variar *v.* Emperor, (1903) I.L.R. 26 Mad. 656 (F.B.) .. 853
Estate and Trust Agencies, (1927) Limited *v.* Singapore Improvement Trust, (1937) A.C. 898 .. 179
Evans *v.* Nicholson, (1875) 32 L.T. (N.S.) 778. 484, 485, 486

F

Faez Rahman *v.* Ramsukh Bajpai, (1893) I.L.R. 21 Cal. 169 .. 949
Fakiraya *v.* Gadigaya, (1901) I.L.R. 26 Bom. 88 .. 526
Farley *v.* Turner, (1857) 26 L.J. Ch. 710 .. 911
Federated Amalgamated Government Railway anl Tramway Service Association *v.* The New South Wales Railway Traffic Employees' Association, (1906) 4 Com.L.R. 488 .. 17
Firm Laduram Sagarmal *v.* Jamuna Prasad Chaudhuri, (1938) I.L.R. 18 Pat. 114 .. 971
Firm of Syed Ibrahim Sahib *v.* Gurulinga Aiyar, (1937) 2 M.L.J. 717 .. 969
Fisher and Co. *v.* Apollinaris Co., (1875) 10 Ch. App. 297 .. 831
In re Fitzgeorge, (1905) 1 K.B.D. 462 .. 752
Fleetwood's Policy, *In re,* (1926) Ch. 48 at 53 .. 744
Foulsham *v.* Pickles, (1925) A.C.) 458 .. 206

G

Ganapathi Aiyar *v.* Sri Vedavyasa Alasinga Bhattar, (1906) 16 M.L.J. 435 =I.L.R. 29 Mad. 534 .. 39
Ganapati Asari *v.* Kuppuswami Asari, (1939) 1 M.L.J. 614=1939 M.W. N. 320 .. 620
Gane Kotappa *v.* Venkataramiah, (1900) 10 M.L.J. 398 .. 532
Ganesh *v.* Purshottam, (1908) I.L.R. 33 Bom. 311 .. 682
Gangaraju *v.* Ramayya, (1939) 1 M.L.J. 329=I.L.R. (1939) Mad. 520. 1068, 1069
Ghouse Khan *v.* Bala Subba Rowther, (1927) 53 M.L.J. 412=I.L.R. 51 Mad. 833 .. 970
Ghulamsa Rowther *v.* Visvanathan Chettiar, (1917) 5 L.W. 721 .. 819
In re Gilbert, *Ex parte* Gilbert, (1898) 1 Q.B. 282 .. 1031
Girdhari *v.* Sital Prasad, (1889) I.L.R. 11 All. 372 .. 122
Girdharee Lal *v.* Kantoo Lal, (1874) L.R. 1 I.A. 321 .. 334
Girdharilal Son and Co. *v.* Kuppini Gowder, (1938) 2 M.L.J. 44 .. 969
Girindra Nath Roy *v.* Kedar Nath Bidyanta, (1924) 29 C.W.N. 575 .. 922
Girikant Shivlal *v.* Vadilal Vrijlal, (1935) I.L.R. 60 Bom. 141 .. 838
Glegg *v.* Bromley, (1912) 3 K.B. 474 .. 634
Glynn *v.* Margetson and Co., (1893) A.C. 351 .. 284
Gnanambal *v.* Parvathi, (1892) 2 M.L.J. 212=I.L.R. 15 Mad. 477 at p. 480 .. 786
Gnanasambanda Pandarasannadhi *v.* Velu Pandaram, (1899) 10 M.L.J. 29= L.R. 27 I.A. 69=I.L.R. 25 Mad. 271 (P.C.) .. 468
Gobindo Nath Roy *v.* Ram Kanay Chowdhry, (1875) 24 W.R. 183 .. 139, 141
Gohur Bepari's case, (1927) 32 C.W.N. 387 .. 68

PAGE.

Golam Hossain Shah *v.* Altaf Hossain, (1933) I.L.R. 61 Cal. 80 .. 40
Gopalakrishna *v.* The Official Liquidators, T.N. and Q Bank, (1939) 1 M.L.J. 209 .. 911
Gopal Sahu Deo *v.* Joyran Tewary, (1881) I.L.R. 7 Cal. 620 .. 129
Gopikabai Mahadev *v.* Chapsi Purushottam, (1934) I.L.R. 59 Bom. 161 .. 364
Govada Balabharathi Co-operative Credit Society *v.* Venkatakrishnayya, (1940) 2 M.L.J. 388 .. 590
Gover's case, (1875) 1 Ch.D. 182 at 198 .. 28
Govinda Chetti *v.* Uttukottai Co-operative Society, (1940) 2 M.L.J. 241=I.L.R. (1940) Mad. 929 .. 75
Govindaraja Mudaliar *v.* Sabapathi Mudaliar, (1920) 13 L.W. 153 .. 40
Govindarajulu Naidu *v.* Chinnathambi Padayachi, A.I.R. 1928 Mad. 1270 625, 630
Govinddoss Krishnadoss *v.* Gokuldass Goverdhandoss, (1928) 55 M.L.J. 132 .. 305
Gregg *v.* Wells, (1839) 10 Ad. and E. 90=113 E.R. 35 .. 604
Griffin *v.* Weatherby, (1868) L.R. 3 Q.B. 753 .. 303
Groves *v.* Administrator-General of Madras, (1898) 8 M.L.J. 288=I.L.R. 22 Mad. 119 at p. 125 .. 1007
Gumm *v.* Tyre, (1864) 33 L.J.Q.B. 97 .. 284
Gunnam Dorayya *v.* Ayyama Charrulu, (1914) 27 M.L.J. 295 .. 997
Guruswami Naidu *v.* Narayana Naidu, 1932 M.W.N. 655 .. 502
Gur Narayan *v.* Sheolal Singh, (1918) 36 M.L.J. 68=L.R. 46 I.A. 1=I.L.R. 46 Cal. 566 (P.C.) .. 224
Gurudoss Pyne *v.* Ram Narain Sahu, (1884) L.R. 11 I.A. 59=I.L.R. 10 Cal. 860 (P.C.) .. 225, 226

H

Haddon *v.* Haddon, (1887) 18 Q.B.D. 778 265, 266, 267, 268
Hamed Gazi *v.* Sadat Ali Sikdar, (1940) 44 C.W.N. 443 .. 139, 140
Hanmant Subbayya *v.* Krishna Manjinath, (1925) I.L.R. 49 Bom. 604 139, 140, 141, 144
Hanooman Pershad's Case, (1856) 6 M.I.A. 393 .. 473
Hansraj Gupta *v.* Official Liquidators of Dehra Dun *etc.* Company, (1932) I.L.R. 54 All. 1067 .. 766
Hardi Narain Sahu *v.* Ruder Perkash Misser, (1883) L.R. 11 I.A. 26=I.L.R. 10 Cal. 626 (P.C.) .. 554
Hari Chand *v.* Secretary of State, (1939) 2 M.L.J. 722=L.R. 66 I.A. 258=I.L.R. (1939) Kar. 363 (P.C.) .. 715
Hari Ramayya *v.* Venkatachalapati, (1935) 70 M.L.J. 619 .. 807
Hari Rao *v.* Official Assignee of Madras, (1926) 50 M.L.J. 358=I.L.R. 49 Mad. 461 (F.B.) .. 701
Hari Vithal *v.* Jairam Vithal, (1890) I.L.R. 14 Bom. 597 .. 1052
Harrison *v.* Rutland, (1893) L.R. 1 Q.B. 142 .. 9
Hasan Shah *v.* Mohammad Amir Mirza, (1930) I.L.R. 6 Luck. 234 759, 760, 763, 765
Havali Shah *v.* Mt. Hussaina Jan, A.I.R. 1938 Lah. 217 .. 690
Hem Chandra Roy Chaudhury *v.* Krishna Chandra Saha Sardar, (1920) I.L.R. 47 Cal. 1079 .. 348
Herbert *v.* Sayer, (1844) 5 Q.B. 965=114 E.R. 1512 839, 840, 841
Hindu Women's Rights to Property Act, (1941) 2 M.L.J. 12 .. 864
Hodge *v.* The Queen, (1883) 9 A.C. 117 .. 132
Holland *v.* Bennett, (1902) 1 K.B. 867 .. 485, 486
Honk *v.* Miller, (1881) 50 L.J.Q.B. 529=L.R. 7 Q.B.D. 92 .. 286, 287
Hook *v.* Administrator-General of Bengal, (1921) 40 M.L.J. 423=L.R. 48 I.A. 187=I.L.R. 48 Cal. 499 (P.C.) .. 794
Hori Ram Singh *v.* King Emperor, (1940) 1 M.L.J. 706=L.R. 67 I.A. 122=I.L.R. (1940) Lah. 443=3 F.L.J. 12 (P.C.) .. 34
Howard *v.* Illinois *etc.* Co., (1907) 208 U.S. 463 .. 17
Humayun Raza Chowdhury *v.* Commissioner of Income-tax, Punjab, Lahore, 10 I.T.C. 7 .. 151
Husain Asghar Ali *v.* Ramditta Mal, (1932) I.L.R. 69 Cal. 662 (P.C.) .. 68

PAGE.

I

Ibrahim v. The King, (1914) A.C. 599. .. .. 1078, 1079, 1082, 1083
Ibrahim Ali v. Mohsin Ali, (1896) I.L.R. 18 All. 422 .. 396
Ibrahim Khan Sahib v. Rangaswami Naicken, (1905) I.L.R. 28 Mad. 420. 995
In re Illidge, Davidson v. Illidge, (1884) 27 Ch.D. 478 at 481 .. 1028
Imambandi v. Mutsadi, (1918) 35 M.L.J. 422=L.R. 45 I.A. 73=I.L.R. 45 Cal. 878 (P.C.) .. 550
Imbichi Beevi Umma v. Raman Nair, (1919) 37 M.L.J. 220=I.L.R. 42 Mad. 869 .. 289
Imperial Land Company of Marseilles (Harris' case), (1872) L.R. 7 Ch. App. 587 .. 484
Initiative and Referendum Act, In re, (1919) A.C. 935 .. 20
Inland Revenue Commissioner v. Blott: Inland Revenue Commissioners v. Greenwood, (1921) 2 A.C. 171 .. 902, 903
Irulappan Servai v. Veerappan, (1921) 42 M.L.J. 113 .. 86
Ishani Dasi v. Gopal Chandra Dey, (1914) 18 C.W.N. 1335 .. 742, 743
Ishwar Dadu v. Gajabai, (1925) I.L.R. 50 Bom. 468 .. 737
Iswarananda Bharathiswami v. The Commissioners, Hindu Religious Endowments Board, (1931) 61 M.L.J. 117=I.L.R. 54 Mad. 928 .. 51

J

Ex parte Jacobs, (1875) 10 Ch. App. C. 211 .. 752
Jagadamba Kumari v. Narain Singh, (1922) 44 M.L.J. 503=L.R. 50 I.A. 1=I.L.R. 2 Pat. 319 (P.C.) .. 978
Jagadish Narain Singh v. Mussamat Ramsakal Kuer, (1928) I.L.R. 8 Pat. 478 .. 838, 844
Jaganadha Sahu v. Rama Sahu (1914) 17 M.L.T. 80 .. 850
Jaganaick v. Ganesh, (1896) I.L.R. 18 All. 413 .. 786
Jagannatha Pillai v. Kathaperumal Pillai, (1927) 53 M.L.J. 688=I.L.R. 51 Mad. 76 .. 721
Jagannatha Rao v. Viswesam, (1924) 46 M.L.J. 590=I.L.R. 47 Mad. 621 .. 329
Jaggamoni Dasi v. Nilmoni Ghosal, (1882) I.L.R. 9 Cal. 75 .. 3, 8
Jai Kishen v. Ram Chand, A.I.R. 1935 Lah. 1 .. 1054
Jainul Abideen Marakayar v. Habibulla Sahib, (1927) 27 L.W. 483 .. 49, 50
Jakiruddin Badruddin v. Vithoba Jagannath Gaduli, A.I.R. 1939 Nag. 301. 971
Jamshedji v. Mangal Lal, (1925) 27 Bom.L.R. 514 .. 322
Janak Dulari v. Sri Gopal, I.L.R. (1939) All. 912 .. 22
Janardhana Rao v. Lakshminarasamma, (1933) 65 M.L.J. 873=I.L.R. 57 Mad. 177 (F.B.). .. 393, 394
In re, Jones, Lloyd and Co., Ltd.; (1889) 41 Ch.D. 159 .. 598
Jones v. Merionethshire Permanent Benefit Building Society, (1892) 1 Ch. 173 .. 830
Jones v. Merionethshire Permanent Benefit Building Society, (1892) 1 Ch. 587 .. 728
Jeypore Case, (1919) 37 M.L.J. 188=24 C.W.N. 226 .. 979
Jnanasundari Shaha v. Madhabchandra Mala, (1931) I.L.R. 59 Cal. 388 .. 502

K

Kachar Ala Chela v. Sha Oghadbhai Takarshi, (1892) I.L.R. 17 Bom. 35 .. 872
Kadir Mohideen Marakkayar v. Muthukrishna Aiyar, (1902) 12 M.L.J. 368 =I.L.R. 26 Mad. 230 .. 996
Kailasanatha Mudaliar v. Vadivanni, (1934) 69 M.L.J. 142=I.L.R. 58 Mad. 488 .. 771, 773
Kalachand Banerjee v. Jagannath Marwari, (1927) 52 M.L.J. 734=L.R. 54 I.A. 190=I.L.R. 54 Cal. 595 (P.C.) .. 836, 837, 838, 844, 845
Kalekhan v. Karim, (1934) 37 Bom.L.R. 207 .. 542
Kalliani Amma v. Govinda Menon, (1911) 22 M.L.J. 23=I.L.R. 35 Mad. 648 .. 291
Kallu Mal v. Barfo, I.L.R. (1938) All. 535 .. 267
Kamaraju v. The Secretary of State for India, (1888) I.L.R. 11 Mad. 309 (F.B.) .. 532

PAGE.

Kamaraja Pandiya Naicker *v.* The Secretary of State for India in Council, (1934) 69 M.L.J. 695 .. 51
Kamalathamal *v.* Harihara Aiyar, (1940) 2 M.L.J. 700 .. 539
Kaminikumar Basu *v.* Birendranath Basu, (1930) 59 M.L.J. 82=L.R. 57 I.A. 117=I.L.R. 57 Cal. 1302 (P.C.) .. 829, 832
Kamesam *v.* Butchamma, (1914) 1 L.W. 511 .. 799, 800
Kamisetti Subbiah *v.* Katha Venkataswamy, (1903) I.L.R. 27 Mad. 355 .. 483
Kanagammal *v.* Pandara Nadar, (1926) 52 M.L.J. 176=I.L.R. 50 Mad. 663 .. 267, 269
Kandasami Chetti *v.* Gokuldas Madanji and Co., (1941) 1 M.L.J. 837 .. 1021
Kandasami Goundar *v.* Chinnammal, (1933) 37 L.W. 729 .. 806, 808
Kanhyalal *v.* Radha Charan, (1867) 7 W.R. 338 at 344 .. 738
Kanhayalal *v.* The National Bank of India, Ltd., (1923) 45 M.L.J. 497=L.R. 50 I.A. 162=I.L.R. 4 Lah. 284 (P.C.) .. 929
Kannabhiran Pillai *v.* Govindaswami Pillai, (1940) 2 M.L.J. 473 .. 860, 1066
Kanwar Rajendra Bahadur Singh *v.* Rai Rajeswar Bali, A.I.R. 1937 P.C. 276 at 278 .. 875
Karri Seetaramayya *v.* Pappu Subramanyam, (1934) 68 M.L.J. 518=I.L.R. 58 Mad. 936 .. 959
Karuppa Goundan *v.* Emperor, 1935 M.W.N. (Crl.) 820 .. 536
Karuppanna Goundan *v.* Marutha Pillai, (1941) 1 M.L.J. 773 .. 705
Karuppanna Nadar *v.* Karuppa Nadar, (1939) 2 M.L.J. 226 .. 568, 967
Karuppiah Pillai *v.* Commissioner of Income-tax Madras, (1941) 1 M.L.J. 120=1941 I.T.R. 1=I.L.R. (1941) Mad. 220 (F.B.) .. 154
Kasim Ali Khan *v.* Sadiq Ali Khan and Jahan Begum *v.* Sadiq Ali Khan, (1938) 2 M.L.J. 210=L.R. 65 I.A. 219=I.L.R. 13 Luck. 494 (P.C.) .. 1026
Katamma Natchiar *v.* S.R.M. Vijaya Raghunadha B.G. Taver, (1863) 9 M.I.A. 539 .. 18
Katta Gundayya *v.* Katta Siddappa (1938) 1 M.L.J. 574=45 L.W. 749 .. 492
Kattiya Pillai *v.* Ramaswamia Pillai, (1929) 56 M.L.J. 394 .. 568
Kattuva Rowther *v.* Suppan Asari, (1926) 25 L.W. 86 .. 422
Kedar Nath Goenka *v.* Maharaja Chandra Mauleshwar Prashad Singh Bahadur, (1932) I.L.R. 11 Pat. 532 .. 860
Keir *v.* Leeman, (1844) 6 Q.B. 308=(1846) 9 Q.B. 371 .. 831
Kelu Achan *v.* Parasu Pattar, (1916) 5 L.W. 158 .. 630
Khalil Ur-Rahman *v.* Gokul Prasad, (1919) I.L.R. 41 All. 526 .. 683
Khatija *v.* Shekh Adam Husenally, (1915) I.L.R. 39 Bom. 545. 963, 964, 965
Khirode Chandra *v.* Saroda Prosad, (1910) 7 I.C. 436 .. 1096
Khub Lal Singh *v.* Ajoodhya Misser, (1915) I.L.R. 43 Cal. 574 .. 412
King Emperor *v.* Ayyan, (1901) I.L.R. 24 Mad. 675 .. 421, 422
The King *v.* Maung Thong Shwe, A.I.R. 1938 Rang. 161 .. 1039
Kissendoss *v.* Khatau Makanjee Spinning and Weaving Co., Ltd., (1916) 36 I.C. 389. 313, 315, 324
Kombi *v.* Aundi, (1889) I.L.R. 13 Mad. 75 .. 466, 467
Kondama Naidu *v.* Venkalakshmi, (1911) 10 I.C. 632 .. 795
Kotaghiri Venkata Subbamma Rao *v.* Vellanki Venkatarama Rao, (1899) 10 M.L.J. 221=L.R. 27 I.A. 197=I.L.R. 24 Mad. 1 at 10 (P.C.). 1070
Kotayya *v.* Venkata Punnayya, (1940) 2 M.L.J. 202. 297, 359, 859, 1066
Kothandarama Pillai *v.* The Municipal Council, Trichinopoly, (1933) 65 M.L.J. 678 .. 546
Krishan Kishore *v.* Commissioner of Income-tax, (1932) I.L.R. 14 Lah. 255 .. 974
Krishanlal Ramlal *v.* Abdul Ghafur Khan, (1935) I.L.R. 17 Lah. 275 .. 971
Krishna *v.* Chathappan, (1889) I.L.R. 13 Mad. 269 .. 874, 877
Krishna Chettiar *v.* Nagamani Ammal, (1915) I.L.R. 39 Mad. 915 .. 570
Krishnamachari *v.* Chengalraya Naidu, (1939) 2 M.L.J. 469 at 472 .. 1023
Krishna Iyer *v.* Krishnaswami Iyer, (1900) I.L.R. 23 Mad. 597 .. 321
Krishnan Naidu *v.* Soni Naidu, (1940) 1 M.L.J. 363=I.L.R. (1940) Mad. 815 .. 822
Krishnappa Chetti *v.* Abdul Khader Sahib, (1913) 26 M.L.J. 449=I.L.R. 38 Mad. 535 .. 761
Krishna Rao *v.* Appasami Aiyar, (1891) 1 Weir 585 .. 621

PAGE.

Krishnaswami Aiyar *v.* Nagalinga Mudaliar, (1940) 2 M.L.J. 174 .. 259, 262
Krishnaswami Thevan *v.* Pulukaruppa Thevan, (1924) 48 M.L.J. 354=I.L.R. 48 Mad. 465 .. 953
Sri Krishnayya Rao *v.* Suryarao Bahadur Garu, (1935) 69 M.L.J. 388 .. 806, 807
Krishtappa Chetty *v.* Lakshmi Ammal, (1923) 44 M.L.J. 431 .. 563
Kristnamachariar *v.* Mangammal, (1902) I.L.R. 26 Mad. 91 .. 1069
Kristnayya *v.* Lakshmipathi, (1920) 39 M.L.J. 70=L.R. 47 I.A. 99=I.L.R. 26 Mad. 681 .. 802
Kristo Kinkur Roy *v.* Rajah Burrodacaunt Roy, (1872) 14 M.I.A. 465.. 129
Kudhai *v.* Sheo Dayal, (1888) I.L.R. 10 All. 570 .. 1028
Kumaravel *v.* Shanmugha, (1940) 1 M.L.J. 719=I.L.R. (1940) Mad. 762 (F.B.) .. 391, 393
Kumara Goundan *v.* Thevaraya Reddi, (1924) 48 M.L.J. 616 .. 960
Kumaretta Servaigaran *v.* Sabapathy Chettiar, (1906) 16 M.L.J. 545=I.L.R. 30 Mad. 26 .. 629, 630
Kunhi Koya Haji *v.* Assam Bava Haji, (1918) 36 M.L.J. 188 .. 303
Kunj Behari Lal *v.* Kandh Prashad Narain Singh, (1907) 6 C.L.J. 362 at 368 .. 1052
Kunj Bihari *v.* Keshvlal Hiralal, (1904) I.L.R. 28 Bom. 567 .. 465, 466
Kukchand Nathmal Marwadi *v.* Rajeswar Shankar Deshpande, I. L. R. (1940) Nag. 512 at 516 .. 691, 693
Kuriyali *v.* Mayan, (1883) I.L.R. 7 Mad. 255.. 628, 629, 630

L

Lachmeshwar Prasad *v.* Keshwar Lal, (1941) 1 M.L.J. 49 (Supp)=57 L.W. 373 .. 518
Lachmi Narain Marwari *v.* Balmakund Marwari, (1924) 47 M.L.J. 441=L.R. 51 I.A. 321=I.L.R. 4 Pat. 61 (P.C.) .. 128
Lakshmadu *v.* Ramudu, I.L.R. (1940) Mad. 123 .. 625, 630
Lakshmana Aiyar *v.* Ayyaswami Chettiar, (1941) 1 M.L.J. 1=I.L.R. (1941) Mad. 356. 84, 85, 948
Lakshmana Chettiar *v.* Muthu Chellia Goundan, (1934) 68 M.L.J. 104. 824, 1052, 1057, 1058
Lakshmanan Chetty *v.* Mutta Ibraki Marakayar, (1889) 5 M.H.C.R. 90. 850, 851
Lakshmi Ammal *v.* Kadiresan Chettiar, (1921) 41 M.L.J. 198 .. 960
Lakshmi Ammal *v.* The Official Receiver, Tinnevelly, (1932) 67 M.L.J. 364. 934
Lakshmi Chand *v.* Ghatto Bai, (1886) I.L.R. 8 All. 319 .. 139, 140
Lakshmi Naidu *v.* Gunnamma, (1934) 68 M.L.J. 470=I.L.R. 58 Mad. 418. 889
Lakshminarasamma *v.* Nevugotla Pydanna, A.I.R. 1925 Mad. 265 .. 960
Lakshminarasimham *v.* Bharata Mahanty, (1910) 9 M.L.T. 216 .. 851
Lalta Prasad *v.* Gajadhar Shukul, (1932) I.L.R. 55 All. 283 .. 331
Lekha *v.* Bhauna, (1895) I.L.R. 18 All. 101 (F.B.) .. 502
Lewin *v.* Wilson, (1886) 11 A.C. 639 .. 916
Lickbarrow *v.* Mason, (1787) 2 T.R. 63=100 E.R. 35 .. 604
Lingama Naidu *v.* The Official Receiver, Madura, (1928) 110 I.C. 511. 961
Lingayya *v.* Venkatapathy, A.I.R. 1935 Mad. 694 .. 835
Linton *v.* Linton, (1885) 15 Q.B.D. 239 .. 266
Liverpool Corporation *v.* Chorley Assessment Committee, (1912) 1 K.B. 270 (C.A.) .. 201, 203
Liverpool Corporation *v.* Llanfyllin Assessment Committee, (1899) 2 Q.B. 14 .. 201, 202
Lloyds Bank, Ltd., Lahore *v.* Mt. Rehmat Bibi, A.I.R. 1939 Lah. 178. 625
Lokanadha *v.* Lokhono, A.I.R. 1930 Mad. 738 .. 888
London County Council *v.* Erith, (1893) A.C. 587.. 200, 202, 203
London Scottish Permanent Building Society, *In re*, (1893) 63 L.J. (Q.B.) 112 .. 180
Loorthi Odayar *v.* Gopalaswami Aiyar, (1923) 46 M.L.J. 125 .. 101
Lyons *v.* The Trustee, (1934) 152 L.T. 201 .. 815

M

Macha Koundan v. Kottora Koundan, (1935) 69 M.L.J. 750=I.L.R. 59 Mad. 202 (F.B.) .. 122
Macleod *v.* Attorney-General for New South Wales, (1891) A.C. 455 .. 26

PAGE.

Mada Nagaratnam *v.* Puvvada Seshayya, (1939) 1 M.L.J. 272=I.L.R. (1939) Mad. 151 (F.B.) .. 515
Madana Mohana Deo *v.* Purushothama Deo, (1918) 35 M.L.J. 138=L.R. 45 I.A. 156=I.L.R. 41 Mad. 855 (P.C.) .. 138, 140
Madura, etc Devasthanam *v.* Masanam Pillai, (1940) 1 M.L.J. 369 .. 163
Ma E Myaing *v.* The King, A.I.R. 1938 Rang. 247 .. 1039
Ma Fatima *v.* Momin Bibi, (1929) I.L.R. 7 Rang. 164 .. 965
Mahabala Bhatta *v.* Kunhanna Bhatta, (1898) 8 M.L.J. 139=I.L.R. 21 Mad. 373 .. 224
Maharaj Bahadur Singh *v.* Paresh Nath Singh, (1904) I.L.R. 31 Cal. 839 .. 2
Maharaja of Kolhapur *v.* Sundaram Ayyar, (1924) I.L.R. 48 Mad. 1 .. 213
Maharana Shri Ranmalsangji *v.* Bai Shri Kundankuwar, (1902) I.L.R. 26 Bom. 707 .. 267
Mahomed Ghasita *v.* Siraj-ud-din, (1921) I.L.R. 2 Lah. 376 .. 247
Mahomed Rowthan *v.* Mahomed Hussain Rowthan, (1899) 9 M.L.J. 135=I.L.R. 22 Mad. 337 .. 303
Maksud Mahi *v.* Secretary of State, (1911) 9 I.C. 532 .. 645
Mallayya *v.* Bapi Reddi, (1931) 62 M.L.J. 39 .. 413
Manavikrama *v.* Unniappan, (1891) 2 M.L.J. 23=I.L.R. 15 Mad. 170 .. 1068
Mandakinee Debee *v.* Basanta Kumaree Debee, (1933) I.L.R. 60 Cal. 1003 .. 107
Maneckji Pestonji *v.* Wadhilal Sarabhai & Co., (1926) 51 M.L.J. 1=L.R. 53 I.A. 92=I.L.R. 50 Bom. 360 .. 575
Manickam Pillai *v.* Audinarayana Pillai, (1910) 20 M.L.J. 407=I.L.R. 34 Mad. 47 .. 387, 388
Manmatha Nath Mullick *v.* Hedait Ali, (1931) 62 M.L.J. 287=L.R. 59 I.A. 41=I.L.R. 11 Pat. 266 (P.C.) .. 696
Manzur Hasan *v.* Muhammad Zaman, (1924) 48 M.L.J. 23=L.R. 52 I.A. 61=I.L.R. 47 All. 151 (P.C.) .. 106, 107, 108
Ma Phaw *v.* Maung Ba Thaw, (1926) I.L.R. 4 Rang. 125 .. 838
Maple Flock Co., Ltd. *v.* Universal Furniture Products (Wembly), Ltd. (1934) 1 K.B. 148 .. 286
Marukkolandai Ammal *v.* Secretary of State for India, (1932) 63 M.L.J. 249=I.L.R. 55 Mad. 876 at 881 .. 1003
Maruthamuthu Naicker *v.* Kadir Badsha Rowther, (1938) 1 M.L.J. 378=I.L.R. (1938) Mad. 568 (F.B.) 320, 321, 820, 822, 823, 824, 825, 826, 1057
Ma Thin On *v.* Ma Ngwe Hmon, (1934) I.L.R. 12 Rang. 512 .. 963, 965
In re, Maund, *Ex parte*, Maund, (1895) 1 Q.B. 194 .. 780
Maung Tha U *v.* Maung Hla, (1916) 38 I.C. 414 .. 672
Ma Yait *v.* The Official Assignee, (1929) 58 M.L.J. 83=L.R. 57 I.A. 10=I.L.R. 8 Rang. 8 (P.C.) .. 745
Meenakshi *v.* Muniandi Panikkan, (1914) 27 M.L.J. 353=I.L.R. 38 Mad. 1144 .. 446
Meenakshi *v.* Murugayya, (1940) 1 M.L.J. 288=I.L.R. (1940) Mad. 739 .. 446
Meenakshi Amma *v.* Subramania Aiyar, (1931) 22 Coch. L.R. 393 .. 71
Meenakshi Ammal *v.* Ramaswami Josier, (1937) 1 M.L.J. 28 .. 446
Meenakshi Mills Co., Ltd. *v.* Asst., Registrar of Joint Stock Companies, Madura, (1938) 1 M.L.J. 856=1938 M.W.N. (Cr.) 128 .. 489
Meenakshisundaram *v.* Swaminatha, (1938) 2 M.L.J. 404=I.L.R. (1938) Mad. 451 .. 346
Mersey Steal and Iron Co., Ltd., *v.* Naylor, Benzon and Co, (1884) 9 A.C. 434 .. 287
Midnapore Zamindari and Co., *v.* Muthapudayan, (1920) 40 M.L.J. 213=I.L.R. 44 Mad. 534 .. 84
Midnapore Zamindari *v.* The Secretary of State for India in Council, (1938) 43 C.W.N. 57 .. 89
Mohamed Adjim Nacoda *v.* E. M. Chettyar Firm, (1930) I.L.R. 9 Rang. 7 .. 688
Mohammad Ebrahim Molla *v.* Commissioner for the Port of Chittagong, (1926) I.L.R. 54 Cal. 189 .. 217
Mohamed Isa *v.* Nazim Hussain, I.L.R. (1940) All. 314 .. 622
Mohammad Rowther *v.* Tinnevelly Municipal Council, (1938) 47 L.W. 668 .. 217, 218
Mohanlal Kashinath *v.* Krishna Premji and Co., (1927) 30 Bom.L.R. 415 .. 285
Moithiyan Kutty *v.* Ayissa, (1928) 55 M.L.J. 208=I.L.R. 51 Mad. 574 .. 290, 291
Moniram Kolita *v.* Keri Kolitani, (1880) L.R. 7 I.A. 115=I.L.R. 5 Cal. 776 at 789 (P.C.) .. 865

PAGE.

Moses Kerakoosa v. Benjamin Brooks, (1860) 8 M.I.A. 339 pp. 355 and 356 .. 841, 842
Moti Lal v. Bhagwan Das, (1909) I.L.R. 31 All. 443 .. 756
Motilal Mansukram v. Maneklal Dayabhai, (1920) I.L.R. 45 Bom. 225 .. 217
Muhammad Gosukani v. Muhammad Sekka Maracayar, (1935) 70 M.L.J. 146=I.L.R. 59 Mad. 779 .. 89
Muhammad Sulaiman Khan v. Muhammad Yar Khan, (1888) I.L.R. 11 All. 267 (F.B.) .. 1068
Mummadi Venkatiah v. Boganatham Venkata Subbiah, (1921) 42 M.L.J. 51 .. 127
Municipal Committee, Delhi v. Mahammad Ibrahim, (1934) I.L.R. 16 Lah. 517 .. 107
Municipal Council, Dindigul v. Bombay Co., Ltd., Madras, (1928) 56 M.L.J. 525=I.L.R. 52 Mad. 207 .. 648
Muhisawmi v. Kutti, (1933) 65 M.L.J. 311=I.L.R. 56 Mad. 833. 315, 317, 318, 324, 325, 327, 328, 329, 330, 331, 333
Munusami v. Kuppusami, (1939) 1 M.L.J. 392=I.L.R. (1939) Madras 870 .. 106, 108
Murahari Brahma Sastri v. Sumitramma, (1933) 66 M.L.J. 577=I.L.R. 57 Mad. 411 .. 806, 808
Murari Rao v. Balavanth Dikshit, (1923) 45 M.L.J. 309=I.L.R. 46 Mad. 955 .. 392
Murugappa Mudiwallappa Kottanhalli v. Baswantrao Kaliappa Desai, (1913) I.L.R. 37 Bom. 559 .. 765
Musammat Bas Kuar v. The Gaya Municipality, (1938) I.L.R. 17 Pat. 588 .. 761
Mst. Binia v. Crown, I.L.R. (1937) Nag. 338 .. 622
Mt. Mehr Bano v. Sher Mahomed, A.I.R. 1936 Lah. 969 .. 66
Muthiah Chettiar v. Govinddoss Krishnadoss, (1921) 41 M.L.J. 316=I.L.R. 44 Mad. 919 .. 635, 636
Muthu Korakkai Chetty v. Madar Ammal, (1919) 38 M.L.J. 1=I.L.R. 43 Mad. 185 (F.B.) .. 908
Muthurama Reddi v. Motilal Daga, I.L.R. (1938) Mad. 326 .. 496
Muthuswami Aiyar v. Kalyani Ammal, (1916) I.L.R. 40 Mad. 818 at 822 .. 1069
Muthuvasu Chettiar v. Velu Muruga Nadar, (1939) 2 M.L.J. 362 .. 101, 102

N

Nagappa Chettiar v. Annapoorani Achi, (1941) 1 M.L.J. 164 .. 297
Nagaratnam v. Seshayya, (1939) 1 M.L.J. 272=I.L.R. (1939) Mad. 151 (F.B.) .. 810
C. R. Naidu v. Venkataswami Naidu, (1939) 2 M.L.J. 864 at 866 .. 1023
Nalupurappatti Mammad v. Narayana Pattar, (1940) 2 M.L.J. 934 .. 585
Nammaiya Chetty v. Thiruvengadathan Chetty, (1912) 24 M.L.J. 223 .. 445
Nanomi Babuasin v. Madan Mohan, (1885) L.R. 13 I.A. 1=I.L.R. 13 Cal. 21 (P.C.) .. 30, 1053
Nasrullah v. Wajid Ali, (1932) I.L.R. 54 All. 475 .. 542
Naraprath Kummali v. Paramboli Kondi, (1916) 34 I.C. 494 .. 882
Narasimhamurthy v. Official Receiver, West Godavari, (1935) I.L.R. 59 Mad. 438 .. 921
Narasimhamurthi v. Ramaswami, (1912) 24 M.L.J. 91 .. 343
Narasimha Pattamahadevi v. Annan Naidu, (1940) 1 M.L.J. 350 .. 920
Narayana Bhatta v. Mahabala Bhatta, S.A. No. 1469 of 1901 .. 224
Narayanan Chettiar v. Veerappa Chettiar, (1916) 31 M.L.J. 386=I.L.R. 40 Mad. 581 .. 886
Narayana Nair v. Bhargavi Ammal, (1926) 52 M.L.J. 118=25 L.W. 151 .. 789
Narayana Pattar v. Viraraghavan Pattar, (1899) I.L.R. 23 Mad. 184 .. 104
Narayanaswamy v. Venkataramana, (1915) 29 M.L.J. 607=I.L.R. 39 Mad. 239 (F.B.) .. 649
Natabar Ghose v. Adya Nath, A.I.R. 1923 Cal. 690 .. 790
National Insurance Co., Ltd., Calcutta v. Seethammal, (1935) 65 M.L.J. 455 .. 483, 743
Neelappa Reddiar v. Solaimuthu Udayan, (1940) 2 M.L.J. 517 .. 342
In re, Neil Makenzie: *Ex parte,* The Sheriff of Hertfordshire, (1899) 2 Q.B. 566 .. 114

PAGE.

Nelliyappa Pillai *v.* Thangama Nachiyar, (1897) 8 M.L.J. 119=I.L.R. 21 Mad. 406 .. 639
New Brunswick & Canada Railway Co., *v.* Conybeare, (1862) 9 H.L.C. 711 =11 E.R. 907 .. 158
In re, New Land Development Association and Gray, (1892) 2 Ch. 138 ... 841
Niamat Rai *v.* Din Dayal, (1927) 52 M.L.J. 729=L.R. 54 I.A. 211=I.L.R. 8 Lah. 597 (P.C.) .. 928
Nicol *v.* *Nicol,* (1886) 31 Ch.D. 524 .. 266
Nioz Ahmad *v.* Phul Kunwar, (1934) I.L.R. 54 All. 428 .. 691
Nur Mahomed Peerbhoy *v.* Dinshaw Hormasji Motiwalla, (1922) 45 M.L.J. 770 (P.C.) .. 724, 725
Nuton *v.* Chaplin, 19 L.J. (P.C.) 374 .. 158
Nutter *v.* Holland, (1894) 3 Ch.D. 408 .. 380, 382
Nyaunglebin Co-operative Bank *v.* Maung Ba U, (1928) I.L.R. 6 Rang. 417 .. 526, 528

O.

Official Assignee of Madras *v.* G. Smith, (1908) I.L.R. 32 Mad. 68 .. 912
Official Assignee of Madras *v.* Natesam Pillai, (1940) 1 M.L.J. 254 .. 911
Olpherts *v.* Mahabir Pershad Singh, (1882) I.L.R. 9 Cal. 656=L.R. 10 I.A. 25 (P.C.) .. 556
Opporti Padhi *v.* Pila Ujjulla, A.I.R. 1927 Mad. 998 .. 392
Owners of the S. S. Kalibia *v.* Alexander Wilson, (1910) 11 Com.L.R. 689 .. 19, 29

P

Palani Goundan *v.* Peria Goundan, (1940) 2 M.L.J. 887 .. 259
Panchanada Velan *v.* Vaithinatha Sastrial, (1905) 16 M.L.J. 63=I.L.R. 29 Mad. 333 (F.B.) .. 933, 934
Pangudaya *v.* Uthandiya, (1938) 2 M.L.J. 33=I.L.R. (1938) Mad. 968. .. 887, 888, 889
Papamma *v.* Venkayya, (1935) 69 M.L.J. 451=I.L.R. 58 Mad. 994 (F.B.) .. 346, 347
Paparaju Veeraraghavayya *v.* Kamaladevi, (1934) 68 M.L.J. 67 .. 723, 724
Parker *v.* Comptyz, 55 Sol. Journal 76 .. 562
Parr *v.* Parr, (1832) 2 L.J. Ch. 167 .. 16
Parthasarathi Iyengar *v.* Chinnakrishna Aiyangar, (1882) I.L.R. 5 Mad. 304 .. 106
Pattikadan Ummaru *v.* Emperor, (1902) 6 M.L.J. 14=I.L.R. 26 Mad. 243 .. 38
Paul Beier *v.* Chotalal Javardas, (1904) I.L.R. 30 Bom. 1 .. 285
Pavaji *v.* Palanivelu, (1940) 1 M.L.J. 766=I.L.R. (1940) Mad. 872 (F.B.) .. 337, 914
Pearey Lal *v.* Naraini, (1935) I.L.R. 58 All. 379 .. 269
Peda Venkanna *v.* Sreenivasa Dheekshatulu, (1917) 33 M.L.J. 519=I.L.R. 41 Mad. 136. 317, 318, 325, 328, 329, 332, 336
Peer Ammal *v.* Nalluswami Pillai, (1937) 2 M.L.J. 666 .. 990, 991
Peer Bathummal Beevi *v.* Nagur Meerammal Beevi, (1936) 71 M.L.J. 725 .. 625, 630
Periakaruppan Chettiar *v.* Appaji Naidu, (1940) 2 M.L.J. 786 .. 258, 342
Peria Muniswami Mudali *v.* Sena Narasappa Mudali, (1941) 2 M.L.J. 79 .. 948
Perianna Goundan *v.* Sellappa Goundan, I.L.R. (1939) Mad. 218 .. 859
Periasami Mudaliar *v.* Seetharama Chettiar, (1903) 14 M.L.J. 84=I.L.R. 27 Mad. 243 (F.B.). 326, 331, 337, 823, 886
Peruvian Guano Co. *v.* Dreyfus Bros. and Co., (1892) App. Cas. 166 .. 871
Pestonjee Bhicajee *v.* Anderson, (1938) 2 M.L.J. 906 .. 555
Peterswald *v.* Bartley, (1904) 1 Com.L.R. 497 .. 615
Phul Kali *v.* Harnan, (1888) 8 A.W.N. 210 .. 267
Phul Kumari *v.* Ghanshyam Misra, (1907) 17 M.L.J. 618=L.R. 35 I.A. 22=I.L.R. 35 Cal. 202 (P.C.) .. 74
Pichuvayyangar *v.* Seshayyangar, (1894) 5 M.L.J. 39=I.L.R. 18 Mad. 214 (F.B.) .. 1068
Pittapur case, (1918) 35 M.L.J. 392=L.R. 45 I.A. 148=I.L.R. 41 Mad. 778 (P.C.) .. 978, 979
Pitts *v.* La Fontaine, (1881) 6 A.C. 482 .. 113

PAGE.

Ponnambala Pillai v. Annamalai Chettiar, (1920) 38 M.L.J. 239=I.L.R. 43 Mad. 372 (F.B.) .. 526
Ponnuswami Pillai v. Quadir Mohideen Rowther, (1930) M.W.N. 1145 .. 103
Poonen *Ex parte*, (1876) I.L.R. 1 Mad. 174 .. 673
Poovanalingam Pillai v. Nagaratnam Pillai, (1940) 2 M.L.J. 575 .. 454
Prankishen Paul Chowdry v. Mothooramohan Paul Chowdry, (1865) 10 M.I.A. 403 .. 305
Pratt (Bombay), Ltd., M. T., Ltd., and Sasson and Co., v. Pratt (Bombay) Ltd., I.L.R. (1938) Bom. 421 (P.C.) .. 597
President Co-operative Credit Society, Kaikaran v. Sanam Narasimha Rao, (1940) 2 M.L.J. 402 .. 961
Presser v. Illinois, (1886) 116 U.S. 252 .. 29
Punjabhai v. Bhagwandas Kisandas, (1928) I.L.R. 53 Bom. 309 .. 217

Q

Queen v. Burah, (1878) 3 A.C. 889 .. 132
Queen v. Sir Charles Reed, (1880) 5 Q.B.D. 483 .. 218
Qumar-ud-din-Ahmad v. Jawahir Lal, (1905) 15 M.L.J. 258=L.R. 32 I.A. 102=I.L.R. 27 All. 334 (P.C.) .. 1023

R

R. v. Commonwealth Court of Conciliation and Arbitration, (1910) 11 Com. L.R. 1 .. 29
Radhacharan Saha v. Motilal Saha, (1937) 41 C.W.N. 534 .. 971
Raghunandun Pershad v. Bhugoo Lall, (1889) I.L.R. 17 Cal. 268 .. 760
Rai Jatindranath Chowdhuri v. Amritlal Bagchi, (1900) 5 C.W.N. 20 .. 139, 140
Rai Kiran Chandra Rai Bahadur v. Erfan Karikar, (1933) 38 C.W.N. 384. 822
Railway Assessment Authority v. Southern Railway Co., (1936) A.C. 266. 200, 202
Rai Radhakrishna v. Bisheshar Sahay, (1922) 44 M.L.J. 718=L.R. 49 I.A. 312=I.L.R. 1 Pat. 733 (P.C.) .. 944
Rajabhadar Mudaliar v. Thiruvengada Mudaliar, A.I.R. 1928 Mad. 20 .. 102
Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras, (1933) 66 M.L.J. 43=I.L.R. 57 Mad. 271 (F.B.) .. 533
Rajah of Arakal v. Churia Kunhi Kannan, (1915) 20 M.L.J. 632 .. 473
Rajah of Mandasa v. Jagannayakulu, (1931) 63 M.L.J. 450 (F.B.) .. 532
Rajah Ragunandan Prasad Singh v. Commissioner of Income-tax, Bihar and Orissa, (1933) 64 M.L.J. 544=L.R. 60 I.A. 133=I.L.R. 12 Pat. 305 (P.C.) .. 683
Rajah of Ramnad v. Subramaniam Chettiar, (1928) I.L.R. 52 Mad. 465 .. 762
Rajah of Ramnad v. Ramanatha, A.I.R. 1931 Mad. 609 and 743 .. 649
Rajah of Ramnad v. Venkataramier, (1922) 43 M.L.J. 264=I.L.R. 45 Mad. 890. 83, 86, 87, 88
Rajah of Vizianagaram v. Narasimharaju, (1916) 3 L.W. 517 .. 648
Raja Jogendra Bhupati Hurrichundun Mahapatra v. Nityanund Mansingh, (1890) 17 I.A. 128 .. 18
Rajaram v. Charanjilal, A.I.R. 1939 Lah. 98 .. 832
Raja Ram v. Raja Baksh Singh, (1938) 1 M.L.J. 41=I.L.R. 13 Luck. 61 (P.C.) .. 322
Raja Yerlagadda Mallikarjuna Prasada Naidu v. Raja Yerlagadda Durga Prasada Naidu, (1900) 10 M.L.J. 294=L.R. 27 I.A. 151=I.L.R. 24 Mad. 147 (P.C.) .. 980
Raju Goundan v. Kuppu Goundan, A.I.R. 1936 Mad. 402 .. 87
Ramachandra v. Pitchaikanni, (1884) I.L.R. 7 Mad. 434. 995, 996, 997
Ramachandra Aiyar v. Parvathi Ammal, (1940) M.W.N. 834 .. 921
Ramachandra Aiyar v. Sivarama Aiyar, (1936) 44 L.W. 502 .. 992
Ramachandra Bhagwan v. Mulji Nanabhai, (1896) I.L.R. 22 Bom. 558 .. 807
Ramachandra Prasad v. Emperor, A.I.R. 1937 Pat. 246 .. 789
Ramachandra v. Secretary of State for India in Council, (1888) I.L.R. 12 Mad. 105 .. 51
Ramadoss Reddiar v. Munuswami Reddiar, (1940) 2 M.L.J. 825 .. 656
Ramakrishna Chetty v. Venkatasubbiah Chetty, (1914) 17 M.L.T. 139 .. 850
Ramakrishna Nadar v. Ponnayya Thirumalai Vandaya Thevar, (1935) 69 M.L.J. 791 .. 452, 971
Ramakrishna Ranga Rao Bahadur Guru v. Vanguri Suryaprakasa Rao Garu, I.L.R. (1940) Mad. 149 .. 217, 218

PAGE.

Ramakrishna Reddi *v.* Kotta Kota Reddi, (1906) 16 M.L.J. 458=I.L.R. 30 Mad. 96 (F.B.) .. 776
Ramamurthi *v.* Sitaramayya, (1940) 2 M.L.J. 293=I.L.R. (1940) Mad. 947 .. 660
Ramamurti Pantulu *v.* Sri Lakshmi Narayana Harischandra Jagadev Raju, C.R.P. No. 2169|39 [(1941) 1 M.L.J. (N.R.C.) 51] .. 657
Raman *v.* Vairavan, (1883) I.L.R. 7 Mad. 392 .. 941
Ramanatha Aiyar *v.* Nagendra Aiyar, (1923) 45 M.L.J. 827 .. 838
Ramanathan Chettiar *v.* Subramania Chettiar, (1924) 47 M.L.J. 759=I.L.R. 48 Mad. 656 .. 920
Ramanathan Chettiar *v.* Subramania Sastrigal, (1902) 12 M.L.J. 276=I.L.R. 26 Mad. 179. 920, 921, 922
Ramanuja *v.* Devanayaka, (1885) I.L.R. 8 Mad. 361 .. 466
Ramaraja Tevan, *In re,* (1930) 59 M.L.J. 945=I.L.R. 53 Mad. 937 .. 536
Rama Rao *v.* Hanumantha Rao, (1929) 57 M.L.J. 720=I.L.R. 52 Mad. 856 .. 954
Rama Rao *v.* Kristnamma, (1929) 57 M.L.J. 793=I.L.R. 52 Mad. 936 .. 743
Ramasami Chetty *v.* Karuppan Chetty, (1915) 29 M.L.J. 551 .. 934
Ramasami Nadan *v.* Ulaganatha Goundan, (1898) 8 M.L.J. 312=I.L.R. 22 Mad. 49 (F.B.) .. 886
Rama Shah *v.* Lal Chand, (1940) 1 M.L.J. 895=L.R. 67 I.A. 160=I.L.R. (1940) Lah. 470 (P.C.) .. 849, 850
Ramasubbier *v.* Rama Aiyar, (1941) 1 M.L.J. 39 .. 705
Ramaswami Aiyan *v.* Venkatarama Ayyan, (1879) L.R. 6 I.A. 196=I.L.R. 2 Mad. 91 (P.C.). 138, 139, 140, 144
Ramaswami Aiyar *v.* Annasami Aiyar, (1898) 8 M.L.J. 124 .. 466, 467
Ramaswami Aiyar *v.* Rangaswami Aiyar, (1931) 61 M.L.J. 933=I.L.R. 55 Mad. 26 .. 966
Ramaswami Aiyar *v.* Vengidusami Aiyar, (1898) 8 M.L.J. 170=I.L.R. 22 Mad. 113 .. 414
Ramaswami Konar *v.* Nachiar Ammal, (1940) 2 M.L.J. 491=1940 M.W.N. 867 .. 620
Ramaswami Muthirian *v.* Arunachalam Chettiar, (1935) 69 M.L.J. 443 .. 539
Ramaswami Udayar *v.* Ramanathan Chettiar, (1941) 1 M.L.J. 6. 1066, 1067
Rama Vadhyar *v.* Manian Vadhyar, (1937) 45 L.W. 767 .. 888
Ramayya *v.* Lakshminarayana, (1934) 67 M.L.J. 1=L.R. 61 I.A. 177=I.L.R. 57 Mad. 443 (P.C.) .. 433
Ramesh Chandra Das *v.* Sarada Kirpa Lala, (1921) I.L.R. 49 Cal. 355 .. 503
Ramji *v.* Ghaman, (1879) I.L.R. 6 Bom. 498 (F.B.) .. 737, 738
Ramji Morarji *v.* Ellis, (1895) I.L.R. 20 Bom. 167 .. 120
Ram Kinkar Banerjee *v.* Satya Charan Srimani, (1939) 1 M.L.J. 544=L.R. 66 I.A. 50=I.L.R. (1939) 1 Cal. 283 (P.C.) .. 56
Ram Kirpal *v.* Rup Kuari, (1883) L.R. 11 I.A. 37=I.L.R. 6 All. 269 (P.C.) .. 794, 795
Ram Parkash Das *v.* Anand Das, (1916) 31 M.L.J. 1=L.R. 43 I.A. 73=I.L.R. 43 Cal. 707 (P.C.) .. 468
Ranganatham Chetti *v.* Ethirajulu Nayudu, (1940) 1 M.L.J. 24=L.R. 67 I.A. 25=I.L.R. (1940) Mad. 172 (P.C.) .. 119
Rangasayi *v.* Nagarathnamma, (1933) 65 M.L.J. 630=I.L.R. 57 Mad. 95 (F.B.) .. 954
Rangoon Botatoung Co., Ltd. *v.* The Collector of Rangoon, (1912) 25 M.L.J. 276=L.R. 39 I.A. 197=I.L.R. 40 Cal. 21 (P.C.) .. 533
Rathnasabapathi Pillai *v.* Ramaswami Aiyar, (1910) 20 M.L.J. 301=I.L.R. 33 Mad. 452. 464, 466, 467, 469
Ravi Veeraraghavulu *v.* Venkatanarasimha Naidu Bahadur, (1914) 27 M.L.J. 451=L.R. 41 I.A. 258=I.L.R. 37 Mad. 443 (P.C.) .. 532
Rebala Venkata Reddi *v.* Mangadu Yellappa Chetty, (1916) 5 L.W. 234 .. 724
Reg *v.* Frost, (1839) 9 Car. and P. 129 at 139=173 E.R. 771 .. 789
Rex. *v.* Commonwealth Court of Conciliation and Arbitration, (1910) 11 Com. L. R. 1 .. 17
Rex *v.* Dora Harris, (1927) 2 K.B. 587 .. 789
In re Rhoades: Rhoades *Ex parte,* (1890) 2 Q.B. 347 at 352 .. 1027
Robertson *v.* French, (1803) 102 E.R. 779=4 East 130 .. 284
Roopchand Merlacha *v.* Sha Motaji Mokanaji, (1940) 2 M.L.J. 283 .. 124

PAGE.

Roshan Lal *v.* Kanhaiya Lal, (1918) I.L.R. 41 All. 111 .. 916
Rowlandson *v.* Champion, (1893) I.L.R. 17 Mad. 21 .. 842, 843
Rukmabai *v.* Radhabai, (1869) 5 Bom.H.C. (A.C.) 181 .. 738
Russell *v.* Plaice, (1854) 52 E.R. 9 .. 928
Rustam Singh *v.* Moti Singh, (1896) I.L.R. 18 All. 474 .. 413

S

Sabapathi Chetti *v.* Rangappa Naickan, (1902) 13 M.L.J. 225=I.L.R. 26 Mad. 495 .. 906
Sadagopachariar *v.* Ragunatha Chariar, (1909) I.L.R. 33 Mad. 62 .. 221
Sadagopachariar *v.* Ramarao, (1902) I.L.R. 26 Mad. 376 .. 106
Sadasuk Janki Das *v.* Sir Kishen Pershad, (1918) 36 M.L.J. 429=L.R. 46 I.A. 33=I.L.R. 46 Cal. 663 (P.C.). 320, 820, 821
Sakharam *v.* Devji, (1898) I.L.R. 23 Bom. 372 .. 1052
Salt *v.* Power Plant Co., Ltd., (1936) 3 A.E.R. 322 .. 276
Sama Row *v.* Doraisami Chettiar, (1912) 24 M.L.J. 266 .. 102
Sambasiva Mudali, *In re*, (1930) 35 L.W. 98 .. 535
Sami Iyer *v.* Ramaswami Chetti, (1922) 44 M.L.J. 171 at p. 174. 1026, 1028
Sami Asari *v.* Anachi Ammal, (1925) 49 M.L.J. 554 .. 773
Sankaralingam *v.* Arumugham, (1938) 2 M.L.J. 156=I.L.R. (1939) Mad. 73. 1028, 1029
Sankaran Nambudripad *v.* Ramaswami Aiyar, (1918) 34 M.L.J. 446=I.L.R. 41 Mad. 691 .. 996, 997
San Paw *v.* Ma Yin, (1918) 55 I.C. 258 .. 963, 965
Santhappa *v.* Sowrappa Holiappa Bulla, (1941) 1 M.L.J. (N.R.C.) 57. 132
Sardar Singh *v.* Kunj Bihari Lal, (1922) 44 M.L.J. 766=L.R. 49 I.A. 383 =I.L.R. 44 All. 503 .. 412
Saroja Bala Dasi *v.* Jogemaya Dasi, (1917) I.L.R. 45 Cal. 634 .. 963, 964
Sartaj Kuari's case, (1888) L.R. 15 I.A. 51=I.L.R. 10 All. 272 (P.C.).. 978
Satish Chandra Chakravarthi *v.* Ram Dayal De, (1920) I.L.R. 48 Cal. 388 (S.B.) .. 622
Satish Chandra Giri *v.* Dharani Dhar Singha Roy, (1940) 1 M.L.J. 371=L.R. 67 I.A. 32=I.L.R. (1940) 1 Cal. 266 .. 468
Satku Valad Kadir Sausare *v.* Ibrahim Aga Valad Mirza Aga, (1877) I.L.R. 2 Bom. 457 .. 106
Sat Narain *v.* Sri Kishen Das, (1936) 71 M.L.J. 812=L.R. 63 I.A. 384=I.L.R. 17 Lah. 644 (P.C.) .. 324, 330
Satyanandam *v.* Nammayya, (1937) 47 L.W. 51 .. 122
Satyanarayana *v.* Mallayya, (1934) 68 M.L.J. 540=I.L.R. 58 Mad. 735 .. 570
Satyanarayana *v.* Purnayya, (1930) 61 M.L.J. 805 .. 453
Satyanarayana *v.* Viswanathan, (1940) 2 M.L.J. (N.R.C.) 27 .. 1087
Scott *v.* Brown, Doering, McNab & Co., (1892) 2 Q.B. 724 .. 170
Secretary of State for India *v.* Debendralal Khan, (1933) 66 M.L.J. 134=L.R. 61 I.A. 78=I.L.R. 61 Cal. 262 (P.C.) .. 256
Secretary of State *v.* Jagannadham, (1941) 2 M.L.J. 47=54 L.W. 7 (F.B.) .. 580
Secretary of State for India in Council *v.* Jagat Mohini Dassi, (1901) I.L.R. 28 Cal. 540 .. 512, 513
Secretary of State for India in Council *v.* Kasturi Reddi, (1902) 12 M.L.J. 453=I.L.R. 26 Mad. 268 .. 566
Secretary of State for India *v.* Mask & Co., (1940) 2 M.L.J. 140=L.R. 67 I.A. 222=I.L.R. (1940) Mad. 599 (P.C.) .. 51
Secretary of State *v.* Maurice, A.I.R. 1937 Rang. 81 .. 188
Secretary of State for India in Council *v.* Pisipati Sunkarayya, (1910) 20 M.L.J. 794=I.L.R. 34 Mad. 493. 997, 1006
Secretary of State for India *v.* Sivasankaram Pillai, (1935) 70 M.L.J. 404=I.L.R. 59 Mad. 876 .. 405
Secretary of State for India in Council *v.* Raja of Venkatagiri, (1921) 41 M.L.J. 624=L.R. 48 I.A. 415=I.L.R. 44 Mad. 864 (P.C.) .. 162
Seshadri Ayyangar *v.* Nataraja Ayyar, (1898) I.L.R. 21 Mad. 179 .. 38
Seth Bansiram Jeshamal *v.* Gunnia Naga Aiyar, (1930) 59 M.L.J. 928 .. 990, 991
Setti Rangayya *v.* Somappa, (1924) 20 L.W. 919 .. 422
Shah Abu Ilyas *v.* Ulfat Bibi, (1896) I.L.R. 19 All. 50 .. 267
Shankar Viswanath *v.* Umabai, (1913) I.L.R. 37 Bom. 471 .. 742, 743
Shanmugha Pillai *v.* Minor Govindasami, (1907) 17 M.L.J. 452=I.L.R. 30

PAGE.

Mad. 459 .. 224
Shunmugasundaram Pillai *v.* Manicka Mudaliar, (1939) 1 M.L.J. 412=1939 M.W.N. 192 .. 619
Sharp *v.* Jackson, (1899) A.C. 419 .. 814
Shashi Bhushan Bose *v.* Manindra Chandra Nandy, (1916) I.L.R. 44 Cal. 890. 963, 964, 965
Sheetalachandra Datta *v.* Lakshimanee Dasee, (1935) I.L.R. 63 Cal. 15 .. 31
In re Sheppard's Corn Malting Company: *Ex parte* Lowenfield, 70 L.T. 3 .. 96
Shia Youngmen's Association, Punjab *v.* Fateh Ali Shah, I.L.R. (1941) Lah. 395 (F.B.) .. 543
Shiba Prasad Singh, In the case of, (1932) 63 M.L.J. 196=L.R. 59 I.A. 331=I.L.R. 59 Cal. 1399 (P.C.) .. 976
Shirin Begam *v.* Agha Ali Khan, (1895) I.L.R. 18 All. 141 .. 65
Shivaganga Case, (1863) 9 M.I.A. 539 (611) .. 982
Shivaji Yesji Chawan *v.* The Collector of Ratnagiri, (1886) I.L.R. 11 Bom. 429 .. 65
Shivaprasad Singh *v.* Pryakumari Debee, (1933) I.L.R. 61 Cal. 711 at 724. 963, 965
Shujaatmand Khan *v.* Govind Behari, A.I.R. 1934 All. 100 .. 453
Shyamkant Lal *v.* Rambhajan Singh, (1939) F.C.R. 193 at 213 .. 19
Siddeswara *v.* Krishna, (1890) 1 M.L.J. 321=I.L.R. 14 Mad. 177 .. 108
Sikandar Rowther *v.* Ghouse Mohidin Marakayar, (1916) 32 M.L.J. 213=I.L.R. 40 Mad. 355 .. 575
Singani Mupan *v.* Krishna Char, (1910) 9 M.L.T. 117 .. 502
Siraj-ud-Din *v.* Guranditta Mal, A.I.R. 1934 Lah. 962 .. 652
Sital Singh *v.* Dalganjan Singh, (1913) 12 All. L. J. 15 .. 789, 790
Sitharama Chetty *v.* Sir S. Subramania Aiyar, (1915) 30 M.L.J. 29=I.L.R. 39 Mad. 700 .. 40
Sivaswami Palankondan *v.* Perumal Palaiyondan, 1931 M.W.N. (Crl.) 1194 .. 853
Sobhanadri *v.* Nagayya, (1938) 1 M.L.J. 413=I.L.R. (1938) Mad. 578 (F.B.) .. 836, 845
Sona Alaga Kudunban *v.* Sivarama Aiyar, (1915) 29 I.C. 31 .. 1092
Somasundaram Chettiar *v.* Karuppan Chettiar, (1940) 51 L.W. 606 .. 856, 857, 858, 860, 861
Sonachala *v.* Manika, (1885) I.L.R. 8 Mad. 516 .. 466, 467
Soundararajan *v.* Arunachalam Chetti, (1915) 29 M.L.J. 793 and 816=I.L.R. 39 Mad. 159 (F.B.) .. 953
Spickernell *v.* Hotham, (1854) 69 E.R. 285 .. 562
M. K. Srinivasa Aiyangar *v.* Balasubramania Pirandar, C.R.P. No. 1667 of 1939 .. 1067
Srinivasa Aiyangar *v.* Srinivasa Swami, (1892) 2 M.L.J. 139=I.L.R. 16 Mad. 31 .. 466, 467
Srinivasa Swami *v.* Ramanujachariar, (1898) 8 M.L.J. 190=I.L.R. 22 Mad. 117 .. 466, 467
Srinivasam Pillai *v.* Rukmani Ammal, (1927) 55 M.L.J. 330 .. 503
Srirama Rao *v.* Bapayya, (1922) 18 L.W. 453 .. 170
Sriramulu Naidu *v.* Andalammal, (1906) 17 M.L.J. 14=I.L.R. 30 Mad. 145 .. 843, 844
Sriramulu *v.* Kristamma, (1902) 12 M.L.J. 197=I.L.R. 26 Mad. 143 .. 136, 137
Sri Ranga Thathachariar *v.* Srinivasa Thathachariar, (1927) 53 M.L.J. 189=I.L.R. 50 Mad. 866 .. 954
Ex parte Stapleton: *In re* Nathan, (1875) 10 Ch.D. 586 .. 114
St. Mary Newington *v.* Jacobs, (1871) L.R. 7 Q.B. 47 .. 9
Subbalakshmi Ammal *v.* Ramanujam Chetty, (1918) 35 M.L.J. 552=I.L.R. 42 Mad. 52 .. 127
Subbamma *v.* Subramaniam, (1915) 30 M.L.J. 260=I.L.R. 39 Mad. 1035. 137, 138, 139
Subbanna Bhatta *v.* Kunhanna Bhatta, (1907) 17 M.L.J. 224=I.L.R. 30 Mad. 298 .. 224
Subbarama Aiyar *v.* Nagammal, (1901) 11 M.L.J. 432=I.L.R. 24 Mad. 683 .. 795
Subba Rao *v.* Mahalakshmamma, (1930) 59 M.L.J. 558=I.L.R. 54 Mad. 27 at 53 .. 710
Subbaraya *v.* The Sub-Collector of Chingleput, (1883) I.L.R. 6 Mad. 303 .. 1005
Subbarayadu *v.* Pedda Subbarazu, (1892) I.L.R. 16 Mad. 476 .. 65

PAGE.

Subbaraya Goundan *v.* Ranganadha Mudaliar, (1915) 30 M.L.J. 387=I.L.R. 40 Mad. 93 at p. 96 .. 1005
Subbayya *v.* Thippa Reddi, (1939) 2 M.L.J. 604=50 L.W. 364 .. 51, 75
In re Subbiah Pandaram, 1937 M.W.N. 672=A.I.R. 1937 Mad. 840 .. 775, 777
N. A. Subramania Aiyar *v.* King-Emperor, (1901) 11 M.L.J. 233=L.R. 28 I.A. 257=I.L.R. 25 Mad. 61 (P.C.) .. 535, 536
Subramania Aiyar *v.* Rajarajeswara Dorai, (1916) I.L.R. 40 Mad. 1016 .. 795
Subramania Aiyar *v.* Sabapathy Aiyar, (1927) 54 M.L.J. 726=I.L.R. 51 Mad. 361 (F.B.) .. 317, 318, 324, 325, 328, 329, 330, 332, 333
Subramania Reddi *v.* Emperor, 1936 M.W.N. (Crl.) 839 .. 536
Subrahmanyam Chettiar *v.* Commissioner of Income-tax, Madras, (1935) 69 M.L.J. 844=I.L.R. 59 Mad. 171 (S.B.) .. 174
Subramaniam *v.* Muthuswami, (1940) 2 M.L.J. 170=I.L.R. (1941) Mad. 43 .. 518
Subramanyam Chettiar *v.* Muthuswami Goundan, (1941) 1 M.L.J. 1 (Supp.) =(1940) F.C.R. 189=3 F.L.J. 157. 33, 134, 519, 810
Subramanian Chettiar *v.* Somasundaram Chettiar, (1937) 1 M.L.J. 60= I.L.R. 59 Mad. 1064 .. 142, 144
Subramania Mudaliar *v.* The East Asiatic Co., Ltd., (1936) 71 M.L.J. 663 .. 969
Subramania Pattar *v.* Velu Nair, (1925) 49 M.L.J. 717 .. 570, 571
Subroya Chetty *v.* Ragammall, (1904) 14 M.L.J. 482=I.L.R. 28 Mad. 161 .. 651
Sukkamoni Chowdhrani *v.* Ishan Chunder Roy, (1898) L.R. 25 I.A. 95= I.L.R. 25 Cal. 844 (P.C.) .. 941
Sundararama Sastri *v.* Ananthakrishna Naidu, (1916) 5 L.W. 672 .. 39
Sundarasiva Rao *v.* Viyamma, (1925) 49 M.L.J. 266=I.L.R. 48 Mad. 933 .. 138
Sundaram *v.* Mausa Mavuthar, (1921) 40 M.L.J. 497=I.L.R. 44 Mad. 554 (F.B.) .. 300
Sundaresa Gurukkal *v.* Subramania Mudali, (1920) 13 L.W. 212 .. 39
Sundaresan Chettiar *v.* Viswanada Pandara Sannadhi, (1922) 43 M.L.J. 147=I.L.R. 45 Mad. 703 .. 570, 571
Sundar Koer *v.* Rai Sham Krishen, (1906) 17 M.L.J. 43=L.R. 34 I.A. 9=I.L.R. 34 Cal. 150 (P.C.) .. 250, 252
Sundar Lal *v.* Benarsi Das, I.L.R. (1939) All. 492 .. 691
Sunitbala Debi *v.* Dhara Sundari Debi Chowdhurani, (1919) 37 M.L.J. 483=L.R. 46 I.A. 272=I.L.R. 47 Cal. 175 (P.C.). 989, 990, 991, 992
Suraj Bunsi Koer *v.* Sheo Proshad, (1879) L.R. 6 I.A. 88 .. 334
Suryanarayana *v.* Ramadoss, (1917) 34 M.L.J. 87=I.L.R. 41 Mad. 604 .. 141
Suryanarayana *v.* Venkataramana, (1903) 13 M.L.J. 318=I.L.R. 26 Mad. 681. 799, 800, 801, 802
Suthersanam Maistri *v.* Narasimhulu Maistri, (1901) 11 M.L.J. 353 .. 305
Swaminatha Aiyar *v.* Official Receiver, South Malabar, (1933) 65 M.L.J. 402=I.L.R. 57 Mad. 330 .. 922
Swaminatha Aiyar *v.* Ramier, (1924) 47 M.L.J. 671. 464, 465, 467, 469
Swaminatha Aiyar *v.* Srinivasa Aiyar, (1916) 32 M.L.J. 259. 569, 570, 571
Swaminatha Odayar *v.* Subbarama Ayyar, (1926) 51 M.L.J. 856=I.L.R. 50 Mad. 548 .. 942
Syama Rao *v.* Hanumantha Rao, (1940) 2 M.L.J. 476 .. 660
Syed Saib *v.* Meeram Bee, (1909) 20 M.L.J. 12 .. 266
Syud Tuffuzzool Hossein Khan *v.* Raghoonath Pershad, (1871) 14 M.I.A. 40 .. 555

T

Tamiz Bano *v.* Nand Kishore, (1927) I.L.R. 49 All. 645 .. 1031
Tatayya *v.* Ramakrishnamma, (1910) 20 M.L.J. 798=I.L.R. 34 Mad. 288 .. 412
Tayarali *v.* Garabad Sadu, A.I.R. 1939 Bom. 252 .. 851
Thadi Subbi Reddi *v.* Emperor, (1930) 59 M.L.J. 229 .. 590
Thathu Naick *v.* Kondu Reddi, (1908) I.L.R. 32 Mad. 242 (F.B.) .. 946
Thiruvengadathaiangar *v.* Ponnappaiengar, (1914) 28 M.L.J. 209=I.L.R. 38 Mad. 1176 .. 40
Thoppai Vedaviasa Aiyar *v.* Madura Hindu Labha Nidhi Co., Ltd., (1923) 45 M.L.J. 478 .. 794

PAGE.

Tiluck Chand v. Soudamini Dasi, (1878) I.L.R. 4 Cal. 566. 869, 870, 872
Tiruvengada Mudali v. Tripurasundari Ammal, (1926) 51 M.L.J. 112=I.L.R. 49 Mad. 728 (F.B.) .. 620
Toronto Corpn. v. York Corpn. (1938) A.C. 415 .. 20
Transval Lands Co. v. New Belgium (Transvaal) Land and Development Co., (1914) 2 Ch.D. 488 .. 597
Trustees of Tribune Press, Lahore v. The Commissioner of Income-tax, Punjab, Lahore, (1939) 2 M.L.J. 444=L.R. 66 I.A. 241=I.L.R. (1939) Lah. 475 (P.C.) .. 150 151

U

Udho Ram v. The Crown, (1928) I.L.R. 10 Lah. 790 .. 790
Umar Baksh v. Commissioner of Income-tax, Punjab, (1931) I.L.R. 12 Lah. 725=5 I.T.C. 402 (F.B.) .. 151
C. K. Ummar v. C. K. Ali Ummar, (1931) I.L.R. 9 Rang. 165 (F.B.) .. 965
U Po Shein v. Ma Sein Mya, (1930) I.L.R. 8 Rang. 460 .. 266

V

Vacuum Oil Co., Ltd., v. The State of Queensland, (1934) 51 Com.L.R. 677 .. 19, 29
Vadlamannati Venkatanarayana Rao v. Gottumukkula Venkata Somaraju, (1937) 2 M.L.J. 251=I.L.R. (1937) Mad. 880 (F.B.). 1054, 1058
Vaidhianadasami Aiyar v. Somasundaram Pillai, (1905) 15 M.L.J. 126=I.L.R. 28 Mad. 473 (F.B.) .. 250, 252
Vaidyanatha Sastri v. Savithri Ammal, (1917) 33 M.L.J. 387=I.L.R. 41 Mad. 75 (F.B.) .. 137, 138
Vairavan Chettiar v. Srinivasachariar, (1921) I.L.R. 44 Mad. 499 .. 32
Vaman v. Tikaram, (1927) 29 Bom.L.R. 471 .. 882
Varada Pillai v. Jeevarathnammal, (1919) 38 M.L.J. 313=L.R. 46 I.A. 285=I.L.R. 43 Mad. 244 (P.C.) .. 408, 410
Varadarajam v. Krishnamurthi, (1940) 2 M.L.J. 664=I.L.R. (1941) Mad. 248 .. 704, 706
Varadarajulu Naidu and Kuppuswami Naidu and Co., v. Raja Manicka Mudaliar, (1937) 2 M.L.J. 273 .. 900, 969
Vasireddi Veeramma v. Butchayya, (1926) 52 M.L.J. 381=I.L.R. 50 Mad. 646 .. 568
Vasudeva Kamath v. Lakshminarayana Rao, (1918) 36 M.L.J. 453=I.L.R. 42 Mad. 684. 685, 686, 687, 688, 689, 690
Vecht v. Taylor, (1917) 116 L.T. 446 .. 70
Veerabasavaraju v. Balasurya Prosada Rao, 1914 M.W.N. 502 .. 799, 800
Veera Basavaraju v. Balasurya Prasada Rao, (1918) 36 M.L.J. 40=L.R. 45 I.A. 265=I.L.R. 41 Mad. 998 (P.C.) .. 801
Veerappa v. Emperor, 1935 M.W.N. 179 .. 402, 403
Veerappa Thevar v. Venkatarama Aiyar, (1935) 69 M.L.J. 678=I.L.R. 59 Mad. 1 .. 724, 757
Veerasokkaraju v. Papiah, (1902) 13 M.L.J. 258=I.L.R. 26 Mad. 792 .. 1033
Veerayya v. Sobhanadri, (1936) I.L.R. (1937) Mad. 471 .. 832
Velayuda Mudali v. Co-operative Rural Credit Society, (1933) 66 M.L.J. 90 .. 590
Venkatabalagurumurthi Chettiar v. Balakrishna Odayar, (1930) 60 M.L.J. 90 .. 570, 571
Venkatachala Pillai v. The Taluq Board, Saidapet, (1911) I.L.R. 34 Mad. 375=21 M.L.J. 305 .. 39, 639
Venkatachariar v. South Indian Bank, (1937) 1 M.L.J. 575 .. 786
Venkata Hanumantharao v. Gangayya, (1928) 55 M.L.J. 168=I.L.R. 51 Mad. 594 .. 779, 780
Venkatakrishna Rao v. Venkatarama Lakshmi, (1876) L.R. 4 I.A. 1=I.L.R. 1 Mad. 174 (P.C.) .. 805
Venkatakrishniah v. Subbarayudu, (1916) I.L.R. 40 Mad. 698 .. 851
Venkatakrishnayya v. Venkatanarayana Rao, A.I.R. 1936 Mad. 733 .. 625
Venkatammal v. Ramaswami Aiyar, (1940) 2 M.L.J. 685 .. 661
Venkatanarayana v. Subbaraju, (1937) 2 M.L.J. 251=I.L.R. (1937) Mad. 880 (F.B.) .. 823, 824
Venkataramanjulu Chetti v. Kanniah Chetti, (1933) M.W.N. 1263 .. 620, 621

PAGE.

Venkataratnam *v.* Ranganayakamma, (1918) 35 M.L.J. 335=I.L.R. 41 Mad. 985 (F.B.). .. 958, 960, 961, 962
Venkatarayudu *v.* Rangayya Appa Rau, (1897) I.L.R. 21 Mad. 152 .. 503
Venkatarayulu *v.* Rattamma, (1939) 1 M.L.J. 120=A.I.R. 1939 Mad. 293 .. 392
Venkata Reddi *v.* Kuppa Reddi, (1918) M.W.N. 680 .. 880
Venkatareddi *v.* Nataraja Setti, (1924) 46 M.L.J. 571 .. 482, 483
Venkatasubba Rao *v.* Ananda Rao, (1934) 67 M.L.J. 204=I.L.R. 57 Mad. 772 .. 413
Venkateswara Pattar *v.* Mankayammal, (1934) 69 M.L.J. 410 .. 18
Venkatramier *v.* Vythilinga Thambiran, (1913) 1 L.W. 89=I.L.R. 38 Mad. 655 .. 532
Vidyapurna Thirthaswami *v.* Vidyanidhi Thirthaswami, (1903) 14 M.L.J. 105=I.L.R. 27 Mad. 435 .. 38
Vidya Varuthi Thirtha *v.* Baluswami Ayyar, (1921) 41 M.L.J. 346=L.R. 48 I.A. 302=I.L.R. 44 Mad. 831 (P.C.) .. 2
Virabadrayya *v.* Sonti Venkanna, (1913) 24 M.L.J. 659 .. 161
Viraraghavamma *v.* Samudrala, (1885) I.L.R. 8 Mad. 208 .. 1058
Virayya *v.* Pardhasarathi Appa Rao, (1933) 65 M.L.J. 417=I.L.R. 57 Mad. 190 .. 331
Viswanatha Aiyar *v.* Narayanaswami Aiyar, (1939) 2 M.L.J. 398=50 L.W. 201 .. 581
Visvanatha Reddi *v.* Venkata Reddi, A.I.R. 1927 Mad. 278 .. 102
Visvanatha Santhasingrao *v.* Ramachandra Mardraju Deo, (1914) 17 M.L.T. 78 .. 850
In re, Vudigalapudi Gadu, (1924) 20 L.W. 916 .. 402
Vythilinga Pandarasannadhi *v.* Somasundara Mudaliar, (1893) I.L.R. 17 Mad. 199 .. 639

W

Wakefield Rolling Stock Co., *In re,* (1892) Ch.D. 165 .. 97
Warwick Tyre Company, Ltd., *v.* New Motor and General Rubber Co., Ltd., (1910) 1 Ch.D. 248 .. 438
Wigg *v.* Attorney-General for Irish Free State, (1927) A.C. 674 .. 206
Sir William Henry Peat *v.* Gresham Trust, Ltd., (1934) A.C. 252 .. 813
Williams *v.* Bosanquet, (1819) 1 Broad and B. 238 at 263 .. 57
Williams *v.* Williams, (1904) Prob. 145 .. 265, 266
Windhill Local Board of Health *v.* Vint, (1890) 45 Ch.D. 351 .. 831
Wolverhampton New Waterworks Co., *v.* Hawkesford, (1859) 6 C.B. (N.S.) 337=141 E.R. 486 .. 52
Woodward *v.* Darcy, (1558) 1 Plow 184=75 E.R. 282. 1030, 1031, 1032

Y

Yadao *v.* Namdeo, (1921) 42 M.L.J. 219=L.R. 48 I.A. 513=I.L.R. 49 Cal. 1 (P.C.) .. 737, 738

Z

Zamindar of Kalikote *v.* Mongolopur, (1926) 51 M.L.J. 500 (F.B.) .. 967
Zamindar of Karvetnagar *v.* Trustee of Tirumalai Tirupati, etc., Devasthanam, (1909) 19 M.L.J. 401=I.L.R. 32 Mad. 429 .. 629, 630
Zamindar of Tuni *v.* Bennayya, (1898) 8 M.L.J. 304=I.L.R. 22 Mad. 155 .. 503, 504
Zamorin of Calicut *v.* Sitarama, (1884) I.L.R. 7 Mad. 405 at p. 406 .. 1005

THE

Madras Law Journal Reports

II] JULY [1941

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad].

PRESENT:—LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN.

Maharani Hemanta Kumari Debi and others .. *Appellants**

v.

Gauri Shankar Tewari and others .. *Respondents.*

P.C.

Hemanta Kumari *v.* Gauri Shankar.

Hindu Law—Religious endowment—Dedication—Bathing ghat on the banks of the Ganges—Absence of formal express dedication—Inference from history of institution and conduct of founder—Partial dedication—Right of founder's heirs to possession of the property.

The practice of bathing in the Ganges is not in general so directly connected with the worship of any particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication. In the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs.

Where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes, for example, bathing there is a partial dedication and the founder and his heirs are entitled to obtain possession as owner from squatters and restrain such squatters from collecting *dan dakshina* from the bathers.

Appeal against the decision of the Full Bench of the High Court of Allahabad dated 3rd January, 1936. 1936 A.W.R. 266 (F.B.).

C. S. Rewcastle, K.C. and *C. Sidney Smith* for Appellants.—The ghat came to the plaintiff's estate by purchase. She and her predecessors in title have always treated the ghat as being part of

* P.C. Appeal. No. 64 of 1939. 4th December, 1940.

P.C.

Hemanta Kumari v. Gauri Shankar.

their own property, and have spent considerable sums in repairs accordingly.

The presence of *ghatias* is in no way essential to the carrying out of holy bathing rites, and they did not exist before 1821. Evidence was before the High Court with regard to the position in other ghats which ought to have made it impossible to hold that the defendants had the rights which the Court has accorded them. *Ghatias* in other ghats were proved only to be sitting there by leave and licence of the owners and the evidence clearly showed that those *ghatias* were not protected by any custom, or by any right by grant or prescription to any specific part of any ghat. The Court ought to have made similar findings with regard to the defendants here. It is submitted that if the defendants have no right or duty to minister to members of the public visiting the ghat in order to bathe, they cannot lay claim to specific sites on the ghat. The two claims are inseparable; the first is clearly not maintainable, thereby, the second, it is submitted, necessarily fails.

Next, there cannot be any valid ground for holding that the plaintiff is a mere mutawalli of the ghat; what dedication of the ghat for use by the public for bathing has taken place is not such as to have deprived the plaintiff's predecessors of their full ownership. The law relating to dedication of highways is applicable. Ghat land in India is the same as in England: *Maharaj Bahadur Singh* v. *Paresh Nath Singh*[1].

J. M. Parikh and *P. V. Subba Row* for Respondents.—The respondents *ghatias* claim nothing but a right to sit on the ghat, and of that right they ought not to be deprived by ejectment. They are prepared to refrain from causing any obstruction because they are only concerned to perform the ceremonies for which they frequent the ghat. What is given to these Brahman *ghatias* by the bathers is not alms; it is a pious gift. The services which the *ghatias* render to bathers are essential to the proper use of the ghat for bathing purposes. The *ghatias* have the right to be present at the ghat both as members of the public and because of their function of ministering to the needs of the pilgrim bathers. It is no part of the respondents' case that they are entitled to occupy any specific part of the ghat, or that they have any proprietary right in its soil. (Counsel referred to *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[2]).

Next, it is submitted that the ghat is the subject of a dedication at Hindu law. Such a dedication is complete, and left the

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1. (1904) I.L.R. 31 Cal. 839.
2. (1921) 41 M.L.J. 346: I.L.R. 44 Mad. 831: L.R. 48 I.A. 302 (P.C.).

P.C.

Heranta Kumari v. Gauri Shankar.

plaintiff's predecessors, as it now leaves her a mere mutawalli of the ghat. The Mitakshara recognises no such limited dedication as that for which the plaintiff contends. The dedication has clothed the ghat with the character of a public trust; it is trust property in which the plaintiff can have no rights of ownership. The suggestion that the ghat is subject only to a limited dedication for the purpose of granting the public a right of passage to and from the river is untenable. This is a full dedication, the donee being the ghat itself, in the absence of any temple. From the fact of the dedication it follows that the public should be afforded all facilities in and about the performance of religious duties at the ghat. The principle laid down in *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar*[1] is applicable. These *ghatias* it is submitted, are clearly persons whose rights by virtue of long established practice, should be protected. There is even evidence that succession is operative among them.

(*Lord Thankerton.* The plaintiff here sues as owner. She can only be debarred from suing in that capacity if as you contend a dedication has taken place which has deprived her predecessors of their ownership.)

This is a very ancient dedication. A dedication is analogous to a gift: Counsel referred to Mulla's Hindu Law (8th edn.) S. 406 and to Macnaghten's Hindu Law, (1829) p. 213-217. The Mitakshara nowhere suggests that the kind of right which flows from dedication can be conferred apart from the property itself. There is no power under the Mitakshara to make a gift of incorporeal property. See Mulla Ss. 406, 407.

Subba Row following referred to *United Provinces District Gazetteer* at p. 242, *Havel's Benares "The Second City"* and to *Monier Williams' "Non Christian Religious Systems* at p. 171 and submitted that the ghat was public property of which the plaintiff or her predecessors had assumed ownership.

Rewcastle, K. C. in reply: There is no authority for the proposition that a dedication can only be complete in the sense of passing the proprietary rights in the property dedicated. (Counsel referred to *Jaggamoni Dasi* v. *Nilmoni Ghosal*[2].

4th December, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The sanctity which Hindu thought and feeling attribute to the Ganges and the special veneration

1. (1899) L.R. 26 I.A. 199. 2. (1882) I.L.R. 9 Cal. 75.

P.C.
Hemanta Kumari *v.* Gauri Shankar.
Sir George Rankin.

which its stream commands as it flows past the holy city of Benares (Kashi) are manifested by the temples and bathing ghats upon the banks. The efficacy of its waters to wash away every form of sin and pollution, is widely accepted doctrine among the orthodox and brings the Hindu pilgrim in large numbers seeking to acquire religious merit and advantage. According to evidence given in the present case:

> ". . . . Mankarnika, Dasaswamedh, Panch Ganga, Assi and Barna are the panch tirthas of Kashi; one who comes to Kashi on pilgrimage has to visit all these five places."

In this appeal their Lordships are concerned with a bathing ghat which is known as the Prayag or Puthiya ghat and which is covered by the name Dasaswamedh—the name of a mohalla of the city. The suit was brought on the 15th February, 1929, in the Court of the Additional Subordinate Judge of Benares. The plaintiff was Maharani Hemanta Kumari Debi, widow of the last male owner of the Puthiya Raj estate. She claimed to be owner of the ghat. She will be referred to as "the plaintiff" notwithstanding that pending this appeal she has by relinquishment accelerated the interest of her husband's reversioners who have been joined with her as appellants to His Majesty in Council. She impleaded six sets of defendants, 14 persons in all, alleging that they belonged to a class of Brahmins known as *ghatias* and that they and their predecessors, had been allowed by the owners of the ghat to sit on different portions of it in order to gain a livelihood by receiving alms and gifts from pilgrim bathers. She complained that the defendants were abusing the permission granted to them, by altering the condition of the steps, putting down platforms of earth and wood, erecting canopies and blocking up the free space to the detriment of the utility, cleanliness and beauty of the ghat. She alleged that the defendants were mere squatters; that she had been willing to allow them to continue to sit on the ghat if they would execute written agreements for the proper conduct of the ghat; but that they had failed or refused so to do. She asked for relief in different forms—a declaration that she was the owner of the ghat and that the defendants had no right to sit on any portion of it; an order of ejectment of the defendants; an order for removal of the various obstructions put up by the defendants; and an injunction restraining the defendants

> ". . . . from using any portion of the said Prayag ghat as *ghatias* in

any season of the year and from sitting and squatting over the same for the purposes of collecting *dan dakshina* from the bathers."

A number of written statements were filed. The defendants numbered 2, 8 and 11 pleaded that they were mere servants of other defendants. The main defence as pleaded on behalf of the rest denied the plaintiff's proprietary right and set up that the *ghatias* were a community whose business and duty it was to assist bathers; that a ghat necessarily involved a right on the part of some members of this community to occupy portions of it by the use of seats or platforms of the kind known as *chaukis* or *takhts*; that this right was a form of property heritable and transferable by the Hindu law; that the defendants and their ancestors had been in occupation of definite sites on the ghat for hundreds of years; and that they had been guilty of no impropriety. They maintained that a right to occupy sites on the ghat by laying out *chaukis* and *takhts* had become vested in them by lost grant, prescription or custom.

The learned trial Judge heard more than 20 witnesses and by his judgment (25th June, 1930,) came to the conclusion that the plaintiff's ownership of the ghat was proved and that she had a right to sue as owner notwithstanding that the ghat was dedicated to the use of the public for purposes of bathing. He found that the *ghatias* do not belong to any particular class or community but are called *ghatias* because they sit on the ghats. He thought that there was nothing in any *Shastra* to show that their presence at the ghat is indispensable for the performance of religious ceremonies or that a bath in the Ganges would not yield any spiritual benefit unless accompanied by gifts to them. He found that in the case of plaintiff's ghat and neighbouring ghats the *ghatias* had sat by leave and licence of the owners. He negatived the existence of any customary right in the defendants and found that at no time had any grant of any interest in the ghat been made to them. He further held that they could have no claim by prescription to an exclusive right to occupy any specific portion of a bathing ghat dedicated to the use of the public. In the result, he found for the plaintiff, but following a practice which is not to be commended he contented himself with ordering "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which he

P.C.

Hemanta Kumari *v.* Gauri Shankar.

Sir George Rankin.

was granting, save by this reference to prayers in the plaint which might well have been improved by revision. An appeal to the High Court was taken by a number of the defendants. On the 27th March, 1935 it came before a Division Bench who in referring it to a Full Bench recorded an order mentioning that before them it was not in dispute that the plaintiff was owner of the ghat or that the defendants or their predecessors had sat on different portions of the ghat for generations; also that the defendants did not claim any right by virtue of adverse possession but that they did claim a right of property in the ghat in respect of their long use of it for the purpose of assisting the bathers. A single judgment was given by the Full Bench (Sulaiman, C.J., Bajpai and Ganga Nath, JJ.,) on 3rd January, 1936. The learned Judges maintained the decree of the trial Judge in so far as it directed removal of railings, planks, canopies and other articles of obstruction but discharged the trial Judge's order of ejectment and the injunction granted by him to restrain the defendants from using the ghat as *ghatias* or sitting or squatting over the same. They discharged also the declaration made by the trial Judge that the plaintiff was owner of the ghat. The plaintiff upon this appeal complains of these variations and asks that the decree of the trial Judge be restored.

In the view of the learned Judges of the Full Bench the right claimed by the defendants may be divided into two parts: (1) a right to exclusive possession over specific plots of land and to place platforms and canopies over them; (2) the right to minister to the needs of the bathing public and to receive alms and gifts for their services. As regards the first, the Full Bench found some difficulty in appreciating the nature of the right claimed but they found that *ghatias* as members of a class have no customary right and that the individul defendants could have no right by custom to exclusive possession of any parts of the ghat. The claim to such a right by prescription or lost grant was also held to be bad. The Full Bench considered it to be proved that the *takhts* and canopies had been obstructions leaving little space for passage, injurious to the pavement and dangerous to the public using the ghat. In their Lordships' view, the reasons given by the learned Judges in their judgment fully justify their order for removal of the obstructions, and their rejection of the defendants' claim to have acquired

any rights in this ghat whether by custom, prescription or grant. The defendants have not appealed from the High Court's decree.

P.C.

Hemanta Kumari *v.* Gauri Shankar.

Sir George Rankin.

But the Full Bench set aside the trial Judge's decree of ejectment and the injunction granted by him on the ground that such relief would interfere with the right of "the bathing public" to take to the ghat persons who may help in the proper performance of "spiritual ablutions" and ceremonies. It would be inconvenient, in a suit not constituted for the purpose, that an attempt should be made to define with exactness the extent of the user which the public have as of right in this ghat. But if it be assumed that any bather may bring with him his own priest or his own friend to assist in ceremonial ablutions, this is not in their Lordships' view a valid reason for refusing to the plaintiff an order in ejectment together with a properly framed injunction. The defendants have been sitting on the ghat for the purpose of carrying on their occupation there and have claimed to be entitled to exclusive possession of parts of the ghat as a right of property. If the plaintiff's ownership and possession entitle her to relief, then, upon it appearing that the defendants have no such rights as they claim, she is as well entitled to an order that the defendants should remove themselves as to an order for removal of their canopies. They are not persons who come with bathers to the ghat but persons who cumber the ghat in order to intercept the bathers and who do so continuously, habitually and as an occupation or profession. A right to stand, sit or squat on the ghat for the purposes of exercising the profession of *ghatias* may be acquired by consent of the plaintiff but as matters stand it is not the right of any of the defendants. As the rights claimed by the defendants have not been established, it is not clear that they have anything to gain by disputing whether the plaintiff is owner of the ghat or is merely the hereditary superintendent of a religious endowment. In either case, she would be entitled to maintain a suit in respect of the grievances complained of, and to obtain the same or similar relief. But as the plaintiff sued as owner and as the Full Bench appear to have held that she was a mere manager or mutawalli it is right to consider whether the trial Judge's declaration of the plaintiff's ownership was well founded.

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu

P.C. — Hemanta Kumari v. Gauri Shankar. — Sir George Rankin.

law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a *dharamsala* or a *math*, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also, as Mr. Mayne in his well-known work was careful to notice:

> " . . . . where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes." (Hindu Law and Usage, 6th Ed., 1900, S. 438, p. 567).

In *Jaggamoni Dasi* v. *Nilmoni Ghosal*[1], the plaintiff's ancestor had built a temple and bathing ghat, as well as a room and another ghat for use by persons at the point of death. The defendant having used the ghat for the landing of goods, Field J., observed:

> "There is here no deed of endowment, and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father, in building these temples, this *antorjoli* room, and this ghat, intended to give to the Hindu community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this ghat and this *antorjoli* room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, etc."

The judgment of the Full Bench in the present case is open to criticism in respect that it does not take due account of this distinction. Speaking of the tolls collected from shopkeepers

1. (1882) I.L.R. 9 Cal. 75.

P.C.

Hemanta Kumari *v.* Gauri Shankar.

Sir George Rankin.

on the ghat at festivals, the learned Judges, though noticing that no trustee or manager had ever been appointed and that the plaintiff and her predecessors had bought the land, built the masonry steps and had always looked after and repaired the ghat, say:

"The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realized the income of the ghat and made repairs as a manager or mutawalli and not as absolute proprietor. . . . . The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such."

Another passage deals with the right of the defendants as follows:

" The ghat having been dedicated to the public the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the right of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a high road."

Now there is the very broadest distinction between saying that the plaintiff's ownership is not absolute because it is qualified by the public's right of user for purposes of bathing and saying that the plaintiff is not the owner at all, but a mere mutawalli in whom nothing vests because her predecessor had dedicated the ghat in the full sense of divesting himself completely of all interest therein. When in English law the owner of land is said to have dedicated it for a highway it is not intended or implied that his right of ownership has been divested. On the contrary, if any member of the public exceeds the permitted user a right of action in trespass arises to the dedicator or his successor in title by virtue of his ownership and possession. *St. Mary Newington* v. *Jacobs*[1] and *Harrison* v. *Rutland*[2]. Dedication in the full sense known to the Hindu law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu law and is very different from anything that could ordinarily

1. (1871) L.R. 7 Q.B. 47.

2. (1893) L.R. 1 Q.B. 142,

P.C.
Hemanta Kumari v. Gauri Shankar.
Sir George Rankin.

be inferred from the public user of a highway. From the standpoint of the Hindu law

"It is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated." *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitra*[1] (per Mookerjee, J. p. 348).

When the dedication is only partial, the property in some parts of India might none the less in common parlance be described as *debottar*; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; "the only difference being," as Mr. Mayne observes in the passage already referred to in this judgment "that it passes with the charge upon it." (Hindu Law and Usage, 6th, Ed. 1900, S. 438, p. 567).

The conclusion of the Full Bench that the plaintiff had only the right of reversion if ever the ghat ceases to be used as such appears to have been drawn from the mere fact that the ghat was "dedicated to the public". But a review of the history of the ghat and the conduct of the plaintiff and her predecessors is required to determine whether the river bank at this spot was dedicated in such sense as to make an end of private ownership therein. The written statements of the defendants set up that:

" . . . . the land on the bank of the holy river Ganges between the two confluents of Baruna and Assi rivulets in the city of Benares is waqf property from time immemorial the same having been dedicated to the Hindu community at large."

The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. Whether the question be limited to the ghat in suit or be enlarged by consideration of the evidence about neighbouring ghats, it seems to their Lordships that there is no substantial ground for holding that the plaintiff's predecessors or any of them had divested themselves of all property in this ghat and had accepted the position of having a mere right of management. No express dedication has been proved by production of a deed of endowment or otherwise. No manager has ever been appointed. Not one instance has been shown in which the plaintiff or any predecessor has purported

1. (1906) I.L.R. 33 Cal. 1290.

P.C.

Hemanta Kumari
v.
Gauri Shankar.

Sir George Rankin.

to act as superintendent, shebait or mutawalli. On the contrary, they have been treated as owners whenever by disrepair the ghat has attracted the attention of public authority. They have repaired and substantially improved the ghat at their own expense. They have closed it to bathers on proper occasions and have levied tolls on the keepers of shops at festivals. That their expenditure upon the ghat has exceeded their receipts and that they would not wish to make a profit from the tolls is probable enough but in no way tends to prove that they have parted with all right as owners of the soil. The evidence as to agreements taken from *ghatias* upon nearby ghats is strong to show that in them the proprietors have retained their rights of ownership notwithstanding that the ghats are public bathing places. The learned trial Judge very reasonably thought that the evidence was overwhelming to show the plaintiff's proprietary right and their Lordships though bearing well in mind that there was a bathing ghat at this spot before the purchase of the plaintiff's predecessor in 1814, think that there is little to support a contrary view. The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu: but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication: rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing ghats, though it might be common enough in the case of tanks dedicated to the public for bathing purposes; even then the ownership of the banks would be another matter.

Their Lordships are of opinion that the declaration made by the trial Judge as to the plaintiff's ownership as well as his order of ejectment against the defendants was correct. They think that the terms of the permanent injunction to be granted to the plaintiff should restrain the defendants from frequenting the Prayag ghat, without the consent of the plaintiff or her suc-

P.C.
Hemanta Kumari v. Gauri Shankar.
Sir George Rankin.

cessor in title, for the purpose of acting as *ghatias* thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of *ghatias*. They will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dated 3rd January, 1936, be set aside and that the decree of the Additional Subordinate Judge of Benares dated the 25th June, 1930, be restored, with the variation mentioned as to the terms of the permanent injunction. The respondents will pay the costs of the plaintiff in the High Court and of the appellants in this appeal. The appellants must, however, pay to the respondents the costs of the application to restore the appeal, which had been dismissed for non-prosecution, as directed by the Order in Council of the 25th July, 1939, and there must be a set-off as regards these costs.

Solicitors for Appellants: *Douglas Grant & Dold.*

Solicitors for Respondents: *Harold Shephard.*

K.S. *Appeal allowed.*

FEDERAL COURT.

PRESENT:—SIR MAURICE GWYER, C. J., VARADACHARIAR AND BEAUMONT, JJ.

In the matter of The Hindu Women's Rights to Property Act, 1937, and The Hindu Women's Rights to Property (Amendment) Act, 1938.

In the matter of The Hindu Women's R. P. Act.

Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937) *as amended by Central Act XI of* 1938, *if affects succession to agricultural land and devolution by survivorship of non-agricultural land—Property, meaning of—Succession and devolution whether cover survivorship—Government of India Act, 1935, entry* 7 *of List III and entry* 21 *of List II—Crucial date to determine validity of enactment—Construction of terms of wide import in Act of Legislature with limited powers.*

The Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937) and the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938)

(*a*) do not operate to regulate succession to agricultural land in the Governors' Provinces, and

(*b*) do operate to regulate devolution by survivorship of property other than agricultural land.

The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List, of the Government of India Act, 1935, and falls within the scope of the term "succession."

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* Case No. 1 of 1941. 22nd April, 1941.

In the matter of The Hindu Women's R. P. Act.

The question whether an Act is or is not within the competency of the Legislature enacting it must be determined only with reference to the date when it became law and to none other, and it is immaterial that the powers of the Legislature had changed during the passage of the Bill from one House of the Legislature to the other.

Where a Legislature with limited powers uses a term of wide and general import, such term must be construed in the light of its powers at the time of enactment, and if on being so construed the statute still remains "an Act which is complete, intelligible and valid, and which can be executed by itself," it must be upheld.

The word 'property' as used in the Hindu Women's Rights to Property Act and its amendment, refers only to property other than agricultural land.

The term "succession" in entry No. 7 of List III and the word "devolution" in entry No. 21 of List II of the Government of India Act, 1935 do both cover the cases of change in the extent of a person's interest in the property of a joint Hindu family governed by the Mitakshara law by operation of the principle of survivorship.

In the matter of the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937) and the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938) and *In the matter of* a Special Reference under S. 213 of the Government of India Act, 1935.

The questions referred were:

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on 4th February, 1937 and by the Council of State on 6th April, 1937, and which received the Governor-General's assent on 14th April, 1937,

or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after 1st April, 1937,

operate to regulate

(*a*) succession to agricultural land?

(*b*) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935?

Statement of the case for the Governor-General in Council.

1. On the 6th April, 1937 when the Council of State passed the Bill, the Legislative powers of the Indian Legislature were defined by the 7th Schedule to the Government of India Act. List III, entry 7, expressly excludes agricultural land. The Act of 1938

In the matter of The Hindu Women's R. P. Act.

was passed in all its stages after the 1st April, 1937. Therefore, the answer to Question 1 (*a*) is in the negative.

2. The answer to Question 1 (*b*) depends on the content of the word "succession" in entry 7 of List III. In the collocation, coming after the words "Wills" and "Intestacy", it refers to some destination, in due order, of the owner's property or interest after his death. Assuming that such destination can only be regulated by rules of inheritance or of survivorship, is there any reason why survivorship should be excluded? Although, in strict legal conception, survivorship implies the extinguishment of a joint owner's interest at death, yet, in Indian Legislative practice, all devolutions of property after death have been expressed by the phrase "Inheritance and succession", from the year 1781 onwards. *See* Ilbert's Government of India, Chapter IV. The same phrase was used in the Government of India Act, 1919, S. 112. Therefore, the word "succession" in entry 7, includes devolution by survivorship.

3. From what is stated above, the answer to Question 2 is that devolution by survivorship of property other than agricultural land is included in List III, entry 7.

Statement of the case for the Advocate-General of Madras, Intervener.

On the general question raised as to the subject of devolution of property other than agricultural land, the view, the Advocate-General of Madras contends for is that the expression 'succession' in the Concurrent Legislative List is used in a comprehensive sense so as to include devolution by survivorship, and that no distinction is intended between the use of the expression 'devolution' in item 21, List II and 'succession' in item 7 of List III and that it is not a correct view to take that survivorship to joint family property other than agricultural land is unprovided for in the Legislative Lists. In support of this contention he would submit the following points for the consideration of the Court:—

1. It has been repeatedly laid down by the Judicial Committee that both survivorship and inheritance are two different modes or rules of 'succession' depending upon the nature of the property—*vide* for instance the following passage in 2 Indian Appeals at p. 271: "whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession".

2. That inheritance and survivorship both come under the category of 'succession' is specially brought out in the case of succession to impartible property wherein the nature of the property

determines the course of descent or devolution though for all purposes the incidents of the property in the hands of the holder for the time being are the same whether the property is self-acquired or separate, or undivided and ancestral.

3. Even in regard to the import of the expression survivorship it is important to note that according to the strict theory of the Hindu law a son and a grandson succeeding even to separate or self-acquired property get it by survivorship. In the light of this the antithesis between survivorship and succession cannot be maintained especially where the expressions occur in a Legislative List. It is important to note that the expression 'succession' occurs not merely in the Concurrent List but also in the entries in regard to succession duties in item 56 of List I and item 43 of List II—an expression which has been used in a most comprehensive sense in the "Succession Duties Acts" of Parliament and all over the Empire.

4. The Hindu Women's Rights to Property Act cannot be attacked on the ground that the subject of devolution by survivorship of property other than agricultural land is not included in the entry 'succession' in item 7 of List III.

5. That the expression 'devolution' in item 21, List II, is used to signify both inheritance and survivorship is a position conceded by the Advocate-General of Madras.

6. A point has been raised in Madras as to the validity of the entire enactment XVIII of 1937 on the ground that the assent given by the Governor-General after the coming into force of Part III of the Government of India Act, 1935, in regard to a measure which was introduced into a Legislative Chamber functioning under the Government of India Act, 1919, is inefficacious but as that point is not raised in the Reference, the Advocate-General of Madras is not addressing himself to that question.

7. The Advocate-General of Madras does not dispute the answer given by the Advocate-General of India to question No. (1) (*a*). But in regard to question (1) (*b*), he submits that the Act would be operative subject, however, to the point indicated above regarding the validity of the assent on which he does not dwell since the latter is not within the terms of the Reference.

Sir Brojendra Mitter, Advocate-General of India (*Asadullah Khan with him*) instructed by *K. Y. Bhandarkar, Agent,* for the Government of India.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras, (*N. Rajagopala Aiyangar with him*) instructed by *Ganpat Rai, Agent.*

In the matter of The Hindu Women's R. P. Act.

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces, (Sri Narain Sahai with him), instructed by *Gurudayal Sahay, Agent, amici curiae.*

Sir B. L Mitter, Advocate-General of India after referring to the dates on which the Act of 1937 passed through the various stages in the two houses of the legislature, said that the enactment was validly passed. The fact that during the passage of the measure through the upper house, the Government of India Act of 1935 came into force does not render it invalid. The old legislature is continued by the Act of 1935, though its powers are curtailed. See Schedule IX. S. 65 of the old Act which defined the powers of the Indian Legislature has been repealed and replaced by the provisions of S. 100 and Schedule VII, but that does not interrupt the continuity of the same institution. S. 317 preserves that continuity. S. 63 (d) in Schedule IX refers to the duration of the Legislative Assembly as five years "from its first meeting". The first meeting referred to, can only be the meeting during the period when the Act of 1919 was in force. This is an unmistakable indication that the old Legislature continues. The powers of the Legislature have been curtailed and the Indian Legislature has the powers of the Federal Legislature by reason of S. 316.

The result is that when the Bill came to the Council of State the powers of the Indian Legislature had been cut down to those set out in Schedule VII, List 1.

In so far therefore as the enactment purports to deal with the devolution of agricultural land in the Governors' Provinces, it cannot be operative, because the subject is one within exclusive provincial competence.

The next question is whether the expression "succession" in entry 7 of Schedule VII, List 3 includes survivorship. The argument that it cannot include, is put this way. The use of the different expressions succession and devolution in the entries shows that different things are meant. Devolution is wider than succession. Sir D. F. Mulla in his Hindu Law speaks of "Succession" and "Survivorship" as different modes of devolution. (Page 18). See Sarkar's Hindu Law, (Page 377). In a joint Hindu family on the death of a member there is no passing of property from one to another. There is merely an acceleration of the estate. "Succession" therefore is inapt to designate the acceleration by survivorship. (Cf. 27 Hals. p. 660). For the meaning of the expression devolution, see *Parr* v. *Parr*[1] and *Cope* v. *Earl De La Warr*[2].

1. (1832) 2 L.J. Ch. 167.
2. (1873) 8 Ch. A. 982.

In the matter of The Hindu Women's R. P. Act.

But in the legislative usage of the last 150 years the expression "succession" has been used in a most comprehensive sense as inclusive of survivorship. See Ilbert, Government of India. So it must be taken, having regard to that legislative history that the expression "succession" has been used to include survivorship.

The Provinces and the Government of India are all agreed that the Act cannot affect succession to agricultural land in the provinces though it can operate to regulate succession to that also in centrally administered areas. (Cf. S. 100 (4) and S. 94). Question 1 (*a*) must be so answered. The answer to question 1 (*b*) is 'yes'.

The enactment being invalid as to agricultural land which forms the bulk of the property in India is invalid *in toto*, as the valid portions cannot be severed from the invalid. The test of separability is "Would the legislature have passed this legislation if the valid portions were not there? (Cf. *Howard* v. *Illinois* etc. *Co*[1].) The same test has been applied in Australia (Cf. *The Federated Amalgamated Government Railway and Tramway Service Assn.* v. *The New South Wales Railway Traffic Employees' Assn.*[2], *Attorney-General for N.S.W.* v. *Brewery Employees' Union of N.S.W.*,[3] *Rex* v. *Commonwealth Court of Conciliation and Arbitration*[4], *The Committee of Direction of Fruit Marketing* v. *Collins*[5]. See also the decision of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada*[6]. Applying that test the whole enactment is invalid.

Dr. Narayan Prasad Asthana. Advocate-General of the United Provinces:

The enactment in so far as it seeks to regulate succession to agricultural land in the provinces is inoperative. The expression "succession" in entry 7 of the Concurrent List is wide enough to include survivorship.

The whole enactment is bad on two grounds. 1. It was not validly passed because it did not pass through the two houses of the legislature constituted under the present Government of India Act. It is not an existing Indian Law within the definition of that term in S. 311. The Bill must be deemed to have lapsed when the Council of State purported to pass it. 2. The enactment being admittedly invalid as to a portion, is bad *in toto* because the valid and the invalid portions cannot be separated.

1. (1907) 208 U.S. 463.
2. (1906) 4 Com.L.R. 488.
3. (1908) 6 Com. L.R. 469 at p. 518.
4. (1910) 11 Com. L.R. 1.
5. (1925) 36 Com. L.R. 410.
6. (1925) A.C. 561 at 562.

Sir Alladi Krishnaswamy Aiyar, Advocate-General of Madras: My attitude in regard to the three questions propounded in the reference is as follows:

I came here to fight for the position that the expression 'succession' includes survivorship; fortunately that task is lightened on account of the attitude taken up by the Advocate-General of India. In regard to the other question, namely, the validity of the Hindu Women's Rights to Property Act, I shall first take up the meaning of the words 'devolution' and 'succession'. The word 'succession' which is used in the Government of India Act, 1935, is one which finds a place in the previous Government of India Act, S. 112. It could not have been the intention of Parliament to give a restricted meaning to the expression 'succession' occurring in S.112. In that section and in the earlier Government of India Acts the expression is used in a most comprehensive sense. Therefore there cannot be any doubt that succession includes survivorship. The expression succession occurring close upon the word inheritance in the entries leads certainly to the inference that it includes survivorship. There is high authority for the position that survivorship is one mode of succession recognised in the Hindu law. *Katamma Natchiar* v. *S. R. M. Vijaya Ragunadha B. G. Taver*[1]. The Privy Council recognises two rules of succession in the Hindu law. *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*[2], *Raja Jogendra Bhupati Hurrichundun Mahapatra* v. *Nityanund Mansingh*[3]. The decision in *Baijnath Prashad Singh* v. *Tej Bali Singh*[4], also refers to two modes of 'devolution'. In the cases decided under the Succession Certificate Acts the High Courts have no doubt held that succession does not include survivorship, but these cases are of no assistance in determining the import of the expression succession in the Concurrent Legislative List. Under the Hindu law even in regard to self-acquired property the son takes it as an unobstructed heritage. He really takes it by survivorship, though during the lifetime of the father he has no alienable interest. *Venkateswara Pattar* v. *Mankayammal*[5]. Mayne's Hindu Law 10th Edn. pp. 348 to 351. In the result my contention is that both devolution and succession are used in a comprehensive sense, and no distinction is intended between the use of the two expressions.

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1. (1863) 9 M.I.A. 539.
2. (1875) 2 I.A. 263.
3. (1890) 17 I.A. 128.
4. (1921) 40 M.L.J. 387: I.L.R. 43 All. 228: L.R. 48 I.A. 195.
5. (1934) 69 M L.J. 410.

In the matter of The Hindu Women's R. P. Act.

In dealing with the question of severability I am proceeding on the assumption that the Legislature would have power to legislate in regard to property other than agricultural land and that the Legislature is incompetent to legislate in regard to agricultural land. That is the hypothesis with which we start. In approaching this question the learned Advocate-General of India referred to the American and the Australian modes of approach. While I do not object to the result achieved, I hold a different view in regard to the mode of approach. My submission would be that the American mode of approach cannot be accepted. To embark upon the theory of what the Legislature would have done is not a correct mode of approach. If as a matter of analysis of the Act the conclusion is reached that it is a single scheme, that the texture is so interwoven that you cannot separate one from the other, then the whole legislation would be bad. But I submit that it would not be a correct test to adopt in a case like this, to go into the question as to what the Legislature would have done with regard to agricultural land. I would prefer the method that has been followed in the Australian cases. It might be interesting to note that the Privy Council never countenanced the American method as distinguished from the Canadian or the Australian method.

Again the distinction has to be kept in view between the principles to be adopted in regard to the territorial operation of an enactment and the collision arising from the spheres of legislative activity in a Federal Constitution—*Vide* Wynes p. 46. The rule as to the sphere of legislative jurisdiction in a federal constitution stands on a footing different from the extra-territorial operation of a legislative enactment in pursuance of a written constitution.

There is one other point to consider in dealing with the subject under the scheme of the Government of India Act. Though inheritance is a single scheme the Legislature seems to proceed on the footing that it is possible to treat it in two parts, that is, succession in regard to agricultural land and succession in regard to non-agricultural properties. The whole law of succession under the Hindu law is single and entire in its character. The only safe test is to examine the particular provisions of the Act. Is it a single scheme, is it possible to give effect to it?

The Owners of the S. S. Kalibia v. *Alexander Wilson*[1], *Vacuum Oil Co., Proprietary Ltd.* v. *The State of Queensland*[2], *Shyamkant Lal* v. *Rambhajan Singh*[3], *Attorney-General for Manitoba* v. *Attorney-General for Canada*[4], *The Initiative and Referen-*

1. (1910) 11 Com.L.R. 689
2. (1935) 51 Com.L.R. 677.
3. (1939) F.C.R. 193 at 213.
4. (1925) A.C. 561.

In the matter of The Hindu Women's R. P. Act.

dum Act, In re[1], *Toronto Corpn.* v. *York Corpn.*[2] Applying that test the entire enactment must be declared invalid as the two parts are inseparably connected.

The next point for consideration is whether the Act is invalid or inoperative for the reason that the Bill was passed by the Assembly prior to Part III coming into force and was passed by the Council of State and assented to by the Governor-General after Part III came into force. Of course in any event it cannot affect agricultural lands as the power of the Legislature had by that time been curtailed.

The Court delivered the following

Gwyer, C.J.

OPINION. *Gwyer, C. J.*—This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under S. 213 of the Constitution Act. The questions referred are:—

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on 4th February, 1937, and by the Council of State on 6th April, 1937, and which received the Governor-General's assent on 14th April, 1937,

Or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after 1st April, 1937,

operate to regulate

(*a*) succession to agricultural land?

(*b*) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935?

There being no 'opposite party' properly so called to this Reference, it was not considered necessary or useful to serve any parties with notice of the Reference. But, as the Court desired to hear the various possible view points presented and argued, it suggested to the Advocate-General of India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that each of them

1. (1919) A.C. 935.

2. (1938) A.C. 415.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

wished to present and arguments in support thereof. The Advocate-General of India has filed a statement on behalf of the Government of India and he has also placed on the file statements from the Advocates-General of seven of the Provinces. As the Court further intimated that besides hearing the Advocate-General of India it would be prepared to hear two more counsel, the Advocates-General of Madras and the United Provinces appeared and took part in the argument. The Court is indebted to all the learned counsel for the assistance which they have afforded it.

The doubts which have led to the Reference arise from the fact that the Bill which became the Hindu Women's Rights to Property Act, 1937 (Act No. XVIII of 1937), which for convenience is hereafter referred to as Act No. XVIII, was passed by the Legislative Assembly of the Indian Legislature on the 4th of February, 1937, that is, before Part III of the Constitution Act came into operation and at a time when the powers of the Legislature were plenary, but was passed by the Council of State only on the 6th of April, 1937, that is, after Part III had come into operation, and received the Governor-General's assent only on the 14th of April, 1937. After the 1st April, 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of the Seventh Schedule to the Constitution Act, so far as the Governors' Provinces were concerned. Laws with respect to the 'devolution of agricultural land' could be enacted only by the Provincial Legislatures (entry No. 21 of List II), and 'wills, intestacy and succession, save as regards agricultural land' appeared as entry No. 7 of List III, the Concurrent List. Act No. XVIII, read with the amending Act of 1938, endeavoured to improve the position of Hindu widows in two classes of case: (*a*) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other co-parceners; and (*b*) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in cases where her husband had predeceased the last male owner (S. 3 (1), first proviso). The Act purports to deal in

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

quite general terms with the 'property' or 'separate property' of a Hindu dying intestate, or his 'interest in joint family property'; it does not distinguish between agricultural land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred have already been discussed in one or two cases (see, for instance, *Janak Dulari* v. *Sri Gopal*[1], on the assumption that the Bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present Reference it will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Act No. XI of 1938) call for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous year.

Of the questions referred, Question (2) will in effect be answered by the views to be expressed in the course of the discussion of Question (1); and it is therefore not separately considered. In the statements filed before the hearing and in the course of the arguments, the following contentions were raised with respect to Question (1):

(*i*) That Act No. XVIII was never properly passed at all, in view of the stage at which it was taken up and dealt with by the Council of State and the Governor-General.

(*ii*) That the Act was in any view *ultra vires* the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces.

(*iii*) That if the Act should be held to be only in part *ultra vires*, it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces.

(*iv*) That even if it were permissible to uphold the Act to a limited extent, the provision in S. 3 (2) relating to the interest of the deceased in Hindu joint family property would be *ultra vires* the Indian Legislature, on the ground that the mention of 'succession' in entry No. 7 of List III of the Seventh Schedule does not include or authorize legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship.

In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confer on the widow a right by survivorship, though it gives her the same interest in the joint property as

1. (1939) I.L.R. All. 912.

her deceased husband had. This does not seem to be tenable. It is true that S. 3 of the Act does not use the word 'survivorship', and it may be that the widow taking a share under the Act does not become a co-parcener with the other sharers; but there can be no doubt that in the cases in which it gives to the widow of a deceased co-parcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining co-parceners. The Reference must therefore be dealt with on the footing that so far as its effect goes, the Act does legislate 'with respect to' the law of survivorship. It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from another the benefit of survivorship.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force. Part XIII of the Constitution Act contains certain provisions entitled 'Transitional Provisions', which are to apply 'with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation'. It is then enacted by S. 317 that the provisions of the Government of India Act, 1919, set out (with certain amendments consequential on the provisions of the Constitution Act) in the Ninth Schedule, are to continue to have effect, that is, during the transitional period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been.

One of the provisions included in the ninth Schedule is that a Bill shall 'not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act [Ninth Schedule, para 68 (2)]. Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor-General's assent. But it does not appear to the Court that the form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its Speaker and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a Bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the Bill after it has become an Act.

In the opinion of this Court therefore it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April, 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

It is convenient to consider the second and third contentions together, namely, that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governor's Provinces; and that, if it were held to be in part beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if

In the matter of The Hindu Women's R. P. Act.

Gwyer, C. J.

the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word 'property' in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly, the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word 'property' as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts, namely, the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word 'property' as used in it, no part of the Act was beyond the Legislature's powers.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction: *Maxwell on the Interpretation of Statutes* (8th Edn.) 126; and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it.

"It seems to me" said Lord Esher M.R., in *Colquhoun* v. *Heddon*[1], "that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it

1. (1890) 25 Q.B.D. 129 at 134.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

uses general words, is only dealing with persons or things over which it has properly jurisdiction."

Where the expression 'personal estate' occurred in a Victorian statute imposing duties on the estates of deceased persons, it was held by the Judicial Committee that it must be construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the personal representatives to administer, whatever the domicile of the testator might be, that is to say, personal estate situate within the Colony, in respect of which alone the Supreme Court of Victoria had power to grant probate:

> "Their Lordships thought that in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they held that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under S. 7 (2) of the Act should be confined to that property which the probate enables him to administer": *Blackwood* v. *The Queen*[1].

In the well-known case of *Macleod* v. *Attorney-General for New South Wales*[2], the Legislature of New South Wales had enacted a law providing that:

> ". . . . whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years."

The appellant, who had during the lifetime of his wife married another woman in the United States of America and had, in a New South Wales Court, been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be *ultra vires*. Lord Halsbury, delivering the Judgment of the Judicial Committee, observed that if their Lordships construed the statute as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be

1. (1882) 8 A.C. 82 at 98. 2. (1891) A.C. 455.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

caught in that Colony:

"That seems to their Lordships", he continued, "to be an impossible construction of the statutes; the colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony and indeed inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'whosoever being married' mean, 'whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales'."

And again in a later passage:

"It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever, and that therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction and within the limits of the Colony."

The principle is the same for all law-making bodies with limited powers:

"Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law:" *Collman* v. *Mills.*[1]

In *D'Emden* v. *Pedder*[2], the High Court of Australia held that they would not be justified in assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth:

"It is in our opinion a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate legislatures such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative . . . . It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or more restricted sense according to the general scope and object of the enactment" (at pages 119, 120).

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1. (1897) 1 Q.B. 396 at 399.
2. (1904) 1 Com.L.R. 91.

In the matter of The Hindu Women's R. P. Act.

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Gwyer, C.J.

There is this also to be said. The underlying purpose of Act No. XVIII is plainly stated in its preamble:

"Whereas it is expedient to amend the Hindu Law to give better rights to women in respect of property."

It is therefore a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation:

"If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit:" *Gover's case.*[1]

It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that the 'better rights' which it sought to give to Hindu women should extend to agricultural land as well as to other property; but it cannot be supposed that when, after restriction of its powers, it passed an Act with the above preamble, it did not intend to make the enactment as effective as it was within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India were by no means conclusive, and it should not be assumed that the Court accepts the contention; but even if it were true that an Act intended to be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.

The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that the construction which has commended itself to the Court leaves no room for the application of the principle of non-severability of subject-matter. It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad.

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1. (1875) 1 Ch. D. 182 at 198.

In the matter of The Hindu Women's R. P. Act.
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Gwyer, C. J.

If the restriction of the general words to purposes within the power of the Legislature, would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of S. S. Kalibia* v. *Wilson*[1], *Vacuum Oil Company Ltd.* v. *State of Queensland*[2], *R.* v. *Commonwealth Court of Conciliation and Arbitration*[3], *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation.*[4] If the Act is to be upheld it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself:" *Wynes*: *Legislative and Executive Powers in Australia*, p. 51 citing *Presser* v. *Illinois.*[5] These words appear to the Court apt to describe Act No. XVIII, if construed as the Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

It remains to deal with the fourth contention, that is, with regard to the import of the term "succession" in entry No. 7 of List III and of the word "devolution" in entry No. 21 of List II. The question raised is whether these words which *prima facie* imply the passing of an interest from one person to another can include the change which takes place under the Mitakshara law in the extent of the interest possessed by the male members of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English law, this change has been described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh*[6], as to the use of the terms "coparcenery" and "coparceners" in relation to a Mitakshara joint family is equally applicable to the use of the terms "joint-tenancy" and "survivorship"; for the incidents associated with joint ownership under the Mitakshara law are not identical with those known to the English law of

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1. (1910) 11 Com.L.R. 689.
2. (1934) 51 Com.L.R. 677.
3. (1910) 11 Com.L.R. 1.
4. (1925) 35 Com.L.R. 422.
5. (1886) 116 U. S. 252.
6. (1921) I.L.R. 43 All. 228.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

joint-tenancy. There is however this degree of resemblance between the *jus accrescendi* and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors—whose pre-existing interest extended over the whole property—are increased only because of the diminution in the number of sharers. The argument therefore is that words like "devolution" and "succession" cannot be held to include cases where the deceased person's interest does not pass to another but is merely extinguished or lapses. There are at least two answers to this argument.

Whatever may be the position under the English law, the theory of extinction does not exactly describe the position which arises on the death of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a member of a joint family and during the latter's lifetime attaches his undivided interest in the family property, the creditor will be entitled to proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by reason of the death of the judgment-debtor. In some of the Provinces there have also been decisions recognising a right of voluntary alienation in each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have been held not to be defeated by the death of the alienor, though no suit for partition be instituted during his lifetime. Results of this kind are wholly inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was recognised as early as *Nanomi Babuasin* v. *Modhun Mohun*[1], that the application of the theory of the son's

1. (1886) I.L.R 13 Cal. 21.

"pious obligation" to pay the father's debts has practically resulted in the *pro tanto* extinction of the son's independent rights in the family property; and S. 53 of the Civil Procedure Code provided that to the extent to which joint family property remained liable for the father's personal debts even after his death, it "shall be deemed to be property which has come to the hands of the son as his legal representative."

It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words 'inheritance' and 'succession' in juxtaposition, justifying the inference that succession is either another category from, or a wider category than, 'inheritance': (see some of these enactments referred to in *Ilbert's Government of India,* Chapter IV, and in *Mulla's Hindu Law,* p. 4). If in these enactments 'succession' should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view, the continued administration of that part of the Hindu law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists II and III Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well.

A line of cases in the High Courts dispensing with the production of a succession certificate when title to a 'debt' is claimed by survivorship may seem to support the restricted interpretation of the word 'succession': *cf. Sheetalchandra Datta* v. *Lakshimanee Dasee.*[1] But taking this class of

1. (1935) I.L.R. 63 Cal. 15.

In the matter of The Hindu Women's R. P. Act.

Gwyer, C.J.

decisions as a whole they must be understood to rest not so much on the connotation of the word 'succession' as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" *prima facie* due to a deceased person: (see *Vairavan Chettiar* v. *Srinivasachariar.*[1]) In any event, the two enactments not being *in pari materia*, such observations as may be found in these cases in support of the limited interpretation of the word 'succession' cannot be held to be sufficient to override the cumulative effect of the considerations referred to above.

In one or two instances, eminent writers have employed language suggesting that 'devolution' may comprehend cases of survivorship but not the word 'succession' (*see* Mayne's Hindu Law para. 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a 'death' (see O. 22, r. 10, Civil Procedure Code), but that is immaterial for the present purpose; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship.

The Court is therefore of opinion that the answers to the questions comprised in the Special Reference are as follows:

(1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938:—

(*a*) do not operate to regulate succession to agricultural land in the Governors' Provinces; and

(*b*) do operate to regulate devolution by survivorship of property other than agricultural land.

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List.

The Court will report to His Excellency accordingly.

K. S. *Reference answered accordingly.*

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1. (1921) I.L.R. 44 Mad. 499.

FEDERAL COURT.

PRESENT:—SIR MAURICE GWYER, C.J., VARADACHARIAR AND BEAUMONT, JJ.

A. L. S. P. P. L. Subrahmanyan Chettiar .. *Appellant*.*

v.

Muttuswami Goundan .. *Respondent.*

Subrahmanyan Chettiar *v.* Muttuswami Goundan.

Practice—Federal Court—Leave to appeal to Privy Council — When granted.

The Federal Court will not formulate in advance any code of rules in regard to the granting or withholding of leave to appeal to the Judicial Committee and will deal with each case on its merits as it comes before it.

It will not be disposed to grant leave to appeal save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved.

Application for leave to appeal to His Majesty in Council under S. 208 (*b*) of the Government of India Act, 1935, from the Judgment of the Federal Court in *Subramaniam Chettiar* v. *Muttuswami Goundan.*[1]

Mohammad Taqi, Senior Advocate, Federal Court, (Raghbir Singh with him) instructed by *B. Banerji, Agent,* for the Applicant.

The Opposite Party was not represented.

The judgment of the Court was delivered by

Gwyer, C.J.

Gwyer, C.J.—This is an application for leave to appeal under S. 208 (*b*) of the Constitution Act. The case was one in which the appellant had sued the respondent for a sum due under a promissory note and had obtained a decree. After the decree had been obtained, the Madras Agriculturists' Relief Act became law. That Act gave agriculturist debtors the right to have their debts drastically scaled down, and S. 19 empowered the courts to apply its provisions to a decree for the payment of a debt obtained against an agriculturist before the commencement of the Act. This Court, when the case came before it, heard arguments on a variety of questions, including the question whether the Act conflicted with the Negotiable Instruments Act, which is an Act within the exclusive competence of the Central Legislature; but a majority of the Court were of opinion that questions relating to the Negotiable Instruments Act were irrelevant for the purposes of the case, and held that

*Case No. 2 of 1941. 17th April, 1941.

1. (1941) 1 M.L.J. Suppl. 1: 3 F.L.J 157.

Subrahmanyan Chettiar v. Muttuswami Goundan.

Gwyer, C.J.

the original debt had merged in the decree and that the scaling down was of a liability evidenced by a decree and not by a negotiable instrument at all.

Counsel for the appellant has cited to us a number of decisions in which the Judicial Committee itself has indicated the principles on which it will act when advising His Majesty to grant or withhold special leave to appeal to His Majesty in Council. This Court will not attempt to formulate in advance any code of rules which it will take for its guidance in granting or withholding leave to appeal to the Judicial Committee, and will deal with each case on its merits as it comes before it. But it will not be disposed to grant leave to appeal, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved.

In the present case the decision of the Court dealt only with the scaling down of decrees obtained before the Madras Act came into force. The number of such decrees must necessarily be limited, and there can be no addition to their number. In a case which was before us in May, 1939, and in which we had refused leave, the applicant afterwards petitioned the Judicial Committee for special leave to appeal. The Judicial Committee, in refusing special leave, emphasized the fact that the decision of this Court was concerned with the construction of a section which would have no application in the future: *Hori Ram Singh* v *King Emperor*[1]. It appears to the Court that this is a sufficient reason for refusing leave in the present case. It should be added that the amount in dispute in the case appears on the figures which were given to us not to have exceeded Rs. 3,000 or Rs. 4,000 at the outside.

The majority of the Court declined to enter into any of the other questions which were raised at the Bar and reserved their opinion upon all of them. There is therefore nothing to prevent these matters being raised and determined at any future time in an appropriate case.

K. S. *Application dismissed.*

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1. (1940) 1 M.L.J. 706: L.R. 67 I.A. 122: I.L.R. 1940 Lah. 443: 3 F.L.J. 12 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

C. Thiruvengada Mudaliar .. *Appellant* (Plaintiff)*

v.

M. Rajabathar Mudaliar .. *Respondent (Defendant).*

F.B.

Thiruvengada Mudaliar *v.* Rajabathar Mudaliar.

Hindu Religious Endowments Act (XX of 1863)—Devasthanam Committee created under—Appointment of trustee by—If can be for a term of years or must be for life—Trustee whether servant of the Committee.

The Devasthanam Committee of Madras appointed under the Hindu Religious Endowments Act has an unfettered discretion, subject to the special conditions of particular endowments, to appoint a trustee for a term of years only, and not for life if it considers that it should be so in the interests of any particular trust.

So far as Madras is concerned, it is settled by authorities that a trustee is not a servant of the Devasthanam Committee.

Case-law discussed. Judgment of King, J., in (1940) 2 M.L.J. 5, affirmed.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice King dated the 2nd April, 1940 and passed in C. C. C. A. No. 54 of 1938 [(1940) 2 M.L.J. 5] preferred to the High Court against the decree of the City Civil Court, Madras, in O.S. No. 1095 of 1935.

N. Sivaramakrishna Aiyar and *A. Venkatasubbu Mudaliar* for Appellant.

N. Srinivasa Aiyangar Amicus Curiae.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises the question whether the Madras Hindu Devasthanam Committee, created under the Religious Endowments Act, 1863, is bound, in appointing a trustee to make the appointment for life or whether it can make the appointment for a term of years. On the 8th March, 1929, the Committee appointed the appellant a trustee for life of the Sri Thiruvatteswarar temple in Madras. On the 18th November, 1935, the Committee appointed the respondent a trustee of the same temple, but limited his appointment to a period of three years. The appellant objected to the respondent entering upon the duties of his office. The reason given was that the appointment to be valid must be for life. On the 5th December, 1935, the appellant filed in the City Civil

* L.P. A. No. 18 of 1940. 8th April, 1941.

F.B.

Thiru-vengada Mudaliar v. Rajabathar Mudaliar.

Leach, C.J.

Court the suit out of which this appeal arises for a declaration that the respondent's appointment is invalid and for an injunction restraining him from interfering with the appellant's management. The principal City Civil Judge who tried the case held that the Committee had power to appoint the respondent a trustee for a period of three years and dismissed the suit. The appellant appealed to this Court, but without success. The appeal was heard by King, J., and the present appeal is from his judgment, under Cl. 15 of the Letters Patent.

For the purpose of appreciating the provisions of the Religious Endowments Act, 1863, it will be useful to refer first to the Madras Endowments and Escheats Regulation, 1817, which governed religious endowments in the Presidency until the passing of the Act of 1863 by the Government of India. Cl. 2 of the Regulation vested in the Board of Revenue the general superintendence of all endowments in land or money granted for the support of mosques, Hindu temples or colleges, or for other pious and beneficial purposes. Cl. 3 declared it to be the duty of the Board to take such measures as might be necessary to ensure that all endowments made for the maintenance of such establishments were duly appropriated to the purpose for which they were destined by the Government or the individuals by whom the endowments were made. To enable the Board the better to carry into effect the duties entrusted to it by the Regulation, power was given in Cl. 7 to appoint local agents in each zilla. Cl. 12 provided that in those cases in which the nomination had usually rested with the Government, or with the public officer, or in which no private person might be competent and entitled to make sufficient provision for the succession to the trust and management, it was the duty of the local agents to propose for the approval and confirmation of the Board, a person or persons for the charge of trustee, manager or superintendent. On the receipt of the report and information required by Cl. 12, the Board was required by Cl. 13 either to appoint the person or persons nominated for their approval, or to make such other provision for the trust, management or superintendence as might seem 'right and fit' to them, with reference to the nature and conditions of the endowment. Therefore, by virtue of this clause, the Board had full power to make such arrangements as they considered to be necessary for the proper management of the trust.

F.B.

Thiru-vengada Mudaliar v. Rajabathar Mudaliar.

Leach, C.J.

The Religious Endowments Act, 1863, took away from the Board of Revenue the management of religious endowments, and the provincial Government was directed to appoint one or more Committees in every division or district to take the place and to exercise the powers of the Board and the local agents under the Regulation of 1817. The provincial Government duly appointed a Committee to function in the City of Madras. Committees were also appointed to function in the mofussil, but only the Madras Committee now exists. So far as the mofussil is concerned, Hindu religious endowments are now governed by the provisions of the Madras Hindu Religious Endowments Act, 1926. S. 9 of the Act of 1863 provides that every member of a Committee appointed under the Act shall hold his office for life unless removed for misconduct or unfitness, but there is no corresponding provision in respect of appointments made by the Committee to fill vacant trusteeships. The important section so far as this case is concerned is S. 12 which reads as follows:

"Immediately on the appointment of a committee as above provided for the superintendence of any such mosque, temple or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence, or in the possession of the said Board or local agents, and belonging to the said religious establishment, except as is hereinafter provided for,

and thereupon the powers and responsibilities of the Board and the local agents, in respect to such mosque, temple or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section may from the date of such transfer be exercised by such committee to whom such transfer is made."

The Committee has the same powers as the Board of Revenue had. As we have already indicated, there was nothing in the Regulation of 1817 which restricted the power of the Board of Revenue in respect of the appointment of trustees. On the contrary, it was left to do what it considered right and fit. This can only mean that the Board had full power to appoint a trustee for a term of years unless the conditions of the endowment prohibited it or there was some special reason which demanded an appointment for life. The Act of 1863 must be read in conjunction with what went before, the Regu-

F.B.

Thiru-vengada Mudaliar v. Rajabathar Mudaliar.

Leach, C.J.

lation of 1817, and if this is done it will be seen that there is no warrant for the assertion that the Devasthanam Committee of Madras can only appoint trustees for life. The learned advocate for the appellant has, however suggested that the decisions of this Court have interpreted the Act differently and therefore it is necessary to examine these decisions

The first judgment bearing on the question was delivered by Collins, C.J., and Parker, J., in 1895. This case has not been reported, but an extract from the judgment is given in a foot-note to the report of *Pattikadan Ummaru* v. *Emperor*.[1] It was said that the trustee or manager was not in the position of a clerk or servant, removable at the pleasure of the Devasthanam Committee and that he held office permanently, though subject to removal for misconduct. Neither in this case nor in any of the subsequent cases was the question now before the Court discussed. It would appear that until recent times, it was usual to appoint a trustee without limiting the term of his office, which, of course, meant that he held the office for life. There is no reason to suppose that this was not the position in the case before Collins, C.J., and Parker, J. In *Seshadri Ayyangar* v. *Nataraja Ayyar*,[2] Shepherd, J., emphasised that a trustee was not a servant of the Devasthanam Committee. He had what may be called a 'freehold' in the office, and except for good cause shown, he could not be removed from it. This case was concerned with whether the Devasthanam Committee had acted rightly in dismissing a trustee of a Hindu temple. There was no limitation of the term of his appointment, and in such circumstances the word 'freehold' would not perhaps be out of place.

The appellant has laid emphasis on the following passage from the judgment of Bashyam Ayyangar, J., in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[3]:

"The religious foundations known as *debuther*, devasthanams or temples are the most numerous in India and have the largest endowments, especially in the shape of lands, assignment of public revenue and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof. The management of these institutions is vested in one or more persons variously known in this Presidency as dharmakartas, panchayats, urlans, etc., but referred to in the Religious Endowments Act (XX of 1863) and in judicial

1. (1902) 6 M.L.J. 14: I.L.R 26 Mad. 243.
2. (1898) I.L.R. 21 Mad. 179.
3. (1903) 14 M.L.J. 105: I.L.R. 27 Mad. 435.

decisions as trustees, managers or superintendents. Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income."

Bashyam Ayyangar, J., is here merely giving a general description of religious endowments as he found them, and incidentally refers to the fact that they were under the management of trustees who held their office hereditarily or for life. This statement is true of the conditions then extant, but is not quite an accurate description of things as they now are. The Court was concerned with maths and not temples in that case and was really not called upon to decide, and did not in fact decide, whether the Temple Committee has the power to make a term appointment.

Another judgment relied upon by the appellant is the one delivered in *Ganapathi Aiyar* v. *Sri Vedavyasa Alasinga Bhattar*[1]. There, the question was whether the Temple Committee, Trichinopoly taluk, had power to appoint two additional trustees to take part 'temporarily' in the management of the temple. It was held that it had not. The Division Bench which decided this appeal considered that to lay down that the Committee had an unqualified power of making temporary appointments would give it a power liable to grave abuse. Such temporary managers would, it was considered, be merely servants removable at the will of the Committee, and would serve to give the Committee a control over the management inconsistent with the policy of 1863, namely, that the actual administration of affairs should be in the hands of the trustees, subject only to the supervision of the Committee. The finding that the Committee could not appoint additional trustees is not in accord with subsequent decisions to which reference will be made presently.

In *Venkatachala Pillai* v. *The Taluk Board, Saidapet*[2], *Sundararama Sastri* v. *Ananthakrishna Naidu*[3], and in *Sundaresa Gurukkal* v. *Subramania Mudali*[4], the office of trustee was again spoken of as being 'freehold', but these decisions cannot be taken as going beyond any of the earlier decisions.

While none of the cases already referred to render real support for the appellant's case, there are certain decisions of

1. (1906) 16 M.L.J. 435: I.L.R. 29 Mad. 534.
2. (1911) 21 M.L.J. 305: I.L.R. 34 Mad. 375.
3. (1916) 5 L.W. 672.
4. (1920) 13 L.W. 212.

F.B.

Thiru-vengada Mudaliar *v.* Rajabathar Mudaliar.

Leach, C.J.

this Court which are distinctly against him. In *Thiruvengadathaiangar* v. *Ponnappaiengar*[1], a Division Bench of this Court (Sadasiva Aiyar and Napier, JJ.), held that for the better management of a Hindu temple, a temple committee had power to appoint additional trustees by virtue of the general power of superintendence over temples committed to the committee's care as successors to the Board of Revenue, but this power must be exercised reasonably and in good faith in the interests of the temple. This decision was approved of in *Sitharama Chetty* v. *Sir S. Subramania Aiyar*[2]. In *Govindaraja Mudaliar* v. *Sabapathi Mudaliar*[3], Wallis, C.J., and Sadasiva Aiyar, J., expressly recognised the power of the Committee to appoint a trustee temporarily, although Sadasiva Aiyar, J., considered that the appointment should only be made in an emergency. The fact that the Court had recognised the power to make a temporary appointment even although to meet an emergency meant the recognition of a full power in the Committee to make suitable arrangements for the management of a religious trust.

Consideration of the authorities reveals no restriction in the power of this Court to interpret the Act of 1863 in accordance with what it considers to be the true intent of that measure, and we hold that the Devasthanam Committee of Madras has an unfettered discretion, subject to the special conditions of a particular endowment. If it considers that it is better in the interests of a particular trust that an appointment for life should not be made, the Committee has, in the absence of some overriding factor, the right of making the appointment for a term of years. And this is in effect the interpretation which the Calcutta High Court gave in *Golam Hossain Shah* v. *Altaf Hossain*[4]. The Calcutta High Court, however, was of the opinion that a trustee was a servant of the Committee and he could not have a freehold in the office. It has always been the view of the Madras High Court that a trustee is not a servant of the Committee and that must now be accepted so far as Madras is concerned.

It has been urged that to recognise a right in the Devasthanam Committee of Madras to appoint a trustee for a

1. (1914) 28 M.L.J. 209: I.L.R. 38 Mad. 1176.
2. (1915) 30 M.L.J. 29: I.L.R. 39 Mad. 700.
3. (1920) 13 L.W. 153.
4. (1933) I.L.R. 61 Cal. 80.

limited term will result in the Committee obtaining actual control over the management of trusts. It must be assumed that the Committee will do its duty and if it does there is nothing to be feared. If it does not, the arm of the law is long enough to reach the Committee and compel it to do its duty. It may here be pointed out that the Madras Hindu Religious Endowments Act, 1926 recognizes that it is expedient to make limited appointments. Some day perhaps the desirability of having one Act instead of two, governing religious trusts in the Presidency may also be recognised.

For these reasons we consider that the case was rightly decided by King, J., and the appeal will be dismissed.

We thank Mr. N. Srinivasa Aiyangar for having acted as *amicus curiae.* The Court has received great assistance from him and from Mr. N. Sivaramakrishna Aiyar who appeared on behalf of the appellant.

K. S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Adilakshmi Ammal and others .. *Petitioners* (Accused).*

Madras Prohibition Act (X of 1937), S. 4 (1) (a) —Government of India Act, 1935, S. 107—Provincial law with respect to matter in Concurrent Legislative List—Repugnancy of, to existing Indian law—Non-reservation, effect —Act of Local Legislature prohibiting possession of dangerous drugs—Validity of—Conviction under Prohibition Act—Alteration of, to one under Abkari Act—Permissibility.

Dangerous drugs being in the Concurrent Legislative List appended to the Government of India Act of 1935 and there being an existing Indian Law (Madras Abkari Acts) permitting *ganja* to be possessed, the Madras Legislature could not, by reason of the provisions of S. 107 of the Government of India Act legislate to prohibit entirely the possession of ganja without reserving the measure for the consideration of the Governor-General, or for the signification of His Majesty's pleasure. The Prohibition Act which by S. 2 provides for the repeal of the Madras Abkari Acts in certain areas, and for the repeal of Sch. II, Dangerous Drugs Act, 1930, so far as it relates to the Abkari Act, was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and this being the case, the Madras Legislature had no power to interfere with the Madras Abkari Acts

* Crl.R.C. Nos. 1052 to 1054 of 1940
(Cr. R. P. Nos. 1001 to 1003 of 1940.) 17th March, 1941.

F.B.

Adilakshmi Ammal, *In re.*

so far as the possession of dangerous drugs is concerned. S. 4 (1) (*a*) as it stands being entirely repugnant to an existing Indian law, is completely *ultra vires*, so far as the possession of ganja or any other dangerous drug is concerned.

Where the circumstances disclosed an offence under the Abkari Act, 1886 by reason of a person being in possession of ganja exceeding the maximum that could be lawfully held by him without a license, but the person had been convicted under S. 4 (1) (*a*) of the Prohibition Act,

Held, the conviction under the Prohibition Act could be altered to a conviction under S. 55 of the Madras Abkari Act.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the Sub-Divisional Magistrate of Vellore in Criminal Appeals Nos. 55, 56 and 57 of 1940 preferred against the judgments of the Court of the Second Class Magistrate of Vellore in C. C. Nos. 739, 740 and 741 of 1940 respectively.

M. Natesan and *A. N. Veeraraghavan* for Petitioners.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *A. S. Sivakaminathan* for *Public Prosecutor* for the Crown.

The Order of the Court was delivered by

Leach. C.J.

The Chief Justice.—These three petitions all raise the question whether S. 4 (1) (*a*) of the Madras Prohibition Act, 1937 is *ultra vires* the Provincial Legislature in so far as it relates to dangerous drugs. S. 4 (1) (*a*) states that whoever imports, exports, transports or possesses liquor or any intoxicating drug shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. To the sub-section there is a proviso which says that nothing contained in the sub-section shall apply to any act done under, and in accordance with, the provisions of the Act or the terms of any rule, notification, order, licence or permit issued thereunder, but so far as dangerous drugs are concerned, the total prohibition imposed by the sub-section has been left unaffected.

The petitioners reside in the North Arcot district of the Madras Presidency and have been convicted on charges framed under this sub-section of being in unlawful possession of ganja. The petitioner in Criminal Revision Case No. 1052 of 1940 was sentenced in the Court of the Second Class Magistrate of Vellore to four months' rigorous imprisonment for being in possession of ten tolas of ganja. The petitioner appealed to the

F.B.

Adilakshmi Ammal, *In re.*

Leach, C. J.

Sub Divisional Magistrate of Vellore, who confirmed the conviction and sentence. The Second Class Magistrate of Vellore convicted the petitioner in Criminal Revision Case No. 1053 of 1940 of being in possession of one tola of ganja, and the petitioner in Criminal Revision Case No. 1054 of 1940 of being in possession of two grains of the drug, and sentenced them to four months' and six weeks' rigorous imprisonment respectively. These convictions and sentences were also upheld by the Sub Divisional Magistrate.

Ganja, which is a form of Indian hemp, is not only an intoxicating drug, but is regarded as a dangerous drug both in England and India. The English Act, is the Dangerous Drugs Act, 1925. S. 1 (2) of that Act defines Indian hemp as meaning dried flowering or fruiting tops of the pistillate plant known as *cannabis satival*, from which the resin has not been extracted, by whatever name such tops are called. The Indian Act is the Dangerous Drugs Act, 1930. Hemp is defined by S. 2 (c) of that Act as meaning:

"(*i*) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*cannabis satival*), including all forms known as *bhang*, *siddhi* or *ganja*;

(*ii*) *Charas*, that is the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport, and

(*iii*) any mixture, with or without neutral materials, of any of the above forms of hemp or any drink prepared therefrom."

R. 2 of the Hemp Drugs Rules which were framed and notified under the Madras Abkari Act, 1886, as subsequently amended, defines ganja as meaning the dried flowering tops of cultivated female hemp plants which have been coated with resin in consequence of having been unable to seed freely and by R. 3; 'hemp drugs' are given the same definition as 'hemp' in the Indian Drugs Act, 1930.

The Madras Prohibition Act applies to the Salem, North Arcot, Cuddapah and Chittoor districts of the Madras Presidency. It came into force in the North Arcot district on the 1st October, 1939. S. 2 provides for the total repeal of the Madras Abkari Acts of 1886, 1905, 1913, 1915 and 1929 in respect of areas to which the Prohibition Act is applied and for the repeal of so much of Schedule II of the Dangerous Drugs Act, 1930 as relates to the Madras Abkari Act, 1886. With the exception of the Dangerous Drugs Act, 1930, which

F.B.

Adilakshmi Ammal, *In re.*

Leach, C.J.

is an Act of the Central Legislature, all these Acts are local Acts, being either the Acts of the Governor of Fort St. George in Council or of the Madras Legislature.

The Madras Abkari Acts did not prohibit the possession of ganja altogether. S. 13 of the Act of 1886, as amended by subsequent Acts, states that no person, not being a licenced manufacturer or vendor of liquor or intoxicating drugs shall have in his possession any quantity of liquor or intoxicating drugs in excess of such quantities as the Governor in Council may from time to time prescribe by notification, unless under a licence granted by the Collector in that behalf. The Hemp Drugs Rules framed under statutory authority were notified on the 1st February, 1936. By R. 23, a person may have in his possession in the Agency Tracts of Ganjam, Vizagapatam and East Godavari any quantity of ganja not exceeding six tolas, in the Madras District any quantity not exceeding two tolas, and elsewhere in the Presidency, any quantity not exceeding three tolas. Therefore, before the application of the Prohibition Act to the North Arcot district, a person there could lawfully possess three tolas of ganja.

The petitioners say that in passing the Prohibition Act the Madras Legislature had no power to repeal the Abkari Acts so far as the possession of dangerous drugs is concerned or to prohibit the possession of such drugs, and they rely on the provisions of S. 107 of the Government of India Act, 1935. Eliminating the words of sub-section (1) of that section which have no application here, the sub-section says that if any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of the section, the existing Indian law shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void. Sub-S. 2 provides that where a Provincial law with respect to one of the matters enumerated in the Concurrent Legi lative List contains a provision repugnant to the provisions of an existing Indian law with respect to the matter, then, if the Provincial law having been reserved for the consideration of the Governor-General, or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, subject to a right given to the Federal Legislature to enact

F.B.

Adilakshmi Ammal, *In re.*

Leach, C.J.

further legislation with respect to the same matter after obtaining the previous sanction of the Governor-General in his discretion.

S. 311 (2) defines 'existing Indian law' as meaning:

"any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

Part III of the Government of India Act, 1935 came into force on the 1st April, 1937, and the learned Advocate-General naturally concedes that the rules framed under the Madras Abkari Act, 1886, as amended, constitute an existing Indian law within the meaning of S. 107 of the Government of India Act, 1935.

A Provincial Legislature has power, subject to restrictions, to legislate with regard to intoxicating liquors and narcotic drugs. The power and the restrictions are both embodied in Cl. 31 of the Provincial Legislative List. This Clause reads as follows:

"Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession transport,purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and as respects poisons and dangerous drugs, to the provisions of List III."

List III is the Concurrent Legislative List and by reason of the terms of Cl. 31 of the Provincial Legislative List a Provincial Legislature in legislating with regard to intoxicating liquors and narcotic drugs can only do so subject to the provisions of the Act relating to the Concurrent Legislative List and Cl. 19 of the Concurrent Legislative List places dangerous drugs in that list.

Dangerous drugs being in the Concurrent Legislative List and there being an existing Indian law permitting ganja to be possessed, the Madras Legislature could not by reason of the provisions of S. 107 legislate to prohibit entirely the possession of ganja without reserving the measure for the consideration of the Governor-General, or for the signification of His Majesty's pleasure. The Prohibition Act was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and this being the case the Madras Legislature had no power to interfere with the Madras

F.B.

Adilakshmi Ammal, *In re.*

Leach, C.J.

Abkari Acts so far as the possession of dangerous drugs was concerned.

The learned Advocate-General has very properly said that he cannot resist this argument, but he has asked the Court not to declare S. 4 (1) (a) of the Prohibition Act to be *ultra vires* the Provincial Legislature altogether so far as dangerous drugs are concerned. Pointing to the words 'to the extent of the repugnancy' in S. 107 of the Government of India Act, 1935, the learned Advocate-General suggests that the Court should re-write Sub-S. 4 (1) (a) of the Prohibition Act to make it read that no person shall be in possession of ganja in excess of the quantities allowed by R. 23 of the Hemp Drugs Rules. The Court has no power to re-write the sub-section. The effect of S. 107 of the Government of India Act, 1935 is that where the offending statute offends to a limited extent it shall be void only so far as it is repugnant to the dominant measure. As S. 4 (1) (a) now stands, it is entirely repugnant to the Hemp Drugs Rules because it prohibits a person possessing any ganja whatsoever. Therefore it must be declared to be completely *ultra vires* so far as the possession of ganja or any other dangerous drug is concerned. The learned Advocate-General has been unable to point to a single case, Canadian or Australian, which supports the contention that the Court is entitled to say that S. 4 (1) (a) is only *ultra vires* the Provincial Legislature in part so far as dangerous drugs are concerned. If the Prohibition Act had permitted of the possession of ganja in quantities different from those permitted by the Hemp Drugs Rules, the position would have been different, but here the Prohibition Act imposes a total prohibition and therefore there is no room for even a partial reconciliation of the two Acts.

It follows from what has been said that the Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, which means that the petitioners in Criminal Revision Cases Nos. 1053 of 1940 and 1054 of 1940 have been wrongly convicted, because they were not in possession of more ganja than the law allowed. Consequently, their convictions and sentences will be set aside.

F.B.
Adilakshmi Ammal, *In re.*
Leach. C. J.

The conviction of the petitioner in Criminal Revision Case No. 1052 of 1940 stands on a different basis. While the Court was wrong in convicting her under S. 4 (1) (a) of the Prohibition Act, she did commit an offence under the Abkari Act, 1886, as amended. She was found to be in possession of ten tolas of ganja whereas the maximum she could have lawfully held without a licence granted by the Collector was three tolas and she possessed no licence to hold a larger quantity than three tolas. The conviction under the Prohibition Act will be altered to a conviction under S. 55 of the Madras Abkari Act, but the sentence will be reduced to one of rigorous imprisonment for twenty days, the period during which she was in prison before being liberated on bail.

A certificate will be issued under S. 205 of the Government of India Act, 1935 to the effect that the cases involve a substantial question of law as to the interpretation of the Act.

K. C. *Convictions set aside in two cases and altered in the third case.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE SOMAYYA.

The Right Honourable the Secretary of State for India in Council, represented by the Collector of Vizagapatam. *Appellant** (*Defendant Appellant*)

v.

Allu Jagannadham .. *Respondent* (*Plaintiff Respondent*).

F.B.
Secretary of State for India *v.* Jagannadham.

Madras Local Boards Act (XIV of 1920)—Order of surcharge by Examiner of Local Fund Accounts—Amount paid by President of Union Board—Suit for recovery after unsuccessful appeal to the Government—Jurisdiction of Civil Courts—Civil Procedure Code (V of 1908), S. 105—Order of remand by first appellate Court—Party not aggrieved by remand order—Absence of appeal by—How far a bar to objection to jurisdiction of trial Court.

Where the appellant was not aggrieved by and therefore had not appealed against an order of remand by the lower appellate Court it will be monstrously unjust to hold that the appellant is precluded from raising later on when the matter comes up in second appeal, after remand, the question of the jurisdiction of the trial Court.

Jainul Abideen Marakayar v. *Habibulla Sahib*, (1927) 27 L.W. 483, approved.

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* S. A. No. 308 of 1938. 2nd April, 1941.

F.B.

Secretary of State for India v. Jagannadham.

A person aggrieved by a surcharge order has one of two remedies open to him. He might either appeal to the Government against the order or he might apply to the principal Civil Court of Original Jurisdiction against the order.

Where the President of a Local Board sued for recovery of monies paid by him under an order of surcharge by the Examiner of Local Fund Accounts, after his appeal to the Government against the order had been dismissed,

Held, that the plaintiff having elected one remedy could not again resort to the civil Court for relief.

Held further, that R. 6 framed under the Madras Local Boards Act S. 199, sub-S. (2) providing a remedy for persons aggrieved by a surcharge order was *intra vires* the Local Government.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam dated 28th September, 1937 and passed in A. S. No. 257 of 1936 (District Court's File No. 345 of 1935) preferred against the decree of the Court of the District Munsif of Chodavaram dated 30th September, 1935, and passed in O. S. No. 5 of 1930.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. Jagannadha Das for Respondent.

Leach, C. J.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The respondent filed a suit in the Court of the District Munsif of Chodavaram to recover with interest a sum of Rs. 389-8-0 which he alleged the Government had unlawfully made him pay. The respondent was the President of the Union Board of Dharmavaram, Vizagapatam district, from 1921 to the month of April, 1928. On the 30th March, 1928, the Examiner of Local Fund Accounts passed an order of surcharge against the respondent in respect of a sum of Rs. 455-8-0 on the ground that he had failed to collect arrears of house tax to this amount during the years 1921-22, 1922-23 and 1923-24, and consequently the claims had become barred by the law of limitation.

R. 6 of the rules relating to the powers of auditors to surcharge, framed under S. 199 (2) (*o*) of the Madras Local Boards Act, provides that any person aggrieved by a disallowance, surcharge or charge made against him, may apply to the principal Civil Court of original jurisdiction to set the order aside. The rule also provides that in lieu of applying to Court the aggrieved person may appeal to the Local Government. The respondent chose the alternative course, and asked the Local Government to cancel the order of surcharge. His

F.B.

Secretary of State for India v. Jagannadham.

Leach, C.J.

petition was rejected, but on an application for review, the Local Government reduced the amount of the surcharge to Rs. 389-8-0, which the respondent paid under protest on the 15th October, 1928. On the 14th December, 1929, he filed this suit against the appellant, the Secretary of State for India in Council, for a decree for Rs. 426, being the Rs. 389-8-0 with interest. The respondent averred that it would have been unlawful for him to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The appellant contended that the Court had no jurisdiction to try the suit. This contention was rejected by the District Munsif, who accepted the respondent's plea that the notification was invalid. The appellant appealed to the Court of the Subordinate Judge of Vizagapatam. The appeal was heard by the Additional Subordinate Judge, who concurred in the findings of the District Munsif, but at the request of the respondent remanded the case to the District Munsif to decide whether the tax could be deemed to be lawfully levied under an earlier notification. The Additional Subordinate Judge did not content himself with merely calling for a finding on this further issue, but set aside the decree which the District Munsif had passed. On remand the District Munsif held that the earlier notification was also invalid and accordingly passed a fresh decree. This resulted in the appellant again appealing to the Court of the Subordinate Judge. The Additional Subordinate Judge held that the District Munsif was also right in declaring the earlier notification to be invalid. The appellant then appealed to this Court and the appeal has been placed before a Full Bench as the Court is asked to reconsider the judgment in *Jainul Abideen Marakayar* v. *Habibulla Sahib*[1], which was decided by a Division Bench.

In *Jainul Abideen Marakayar* v. *Habibulla Sahib*[1], Wallace and Thiruvenkatachariar, JJ., held that S. 105 (2) of the Code of Civil Procedure confines an appeal against an order of remand to the question of the correctness of the order of remand. It is open to the appellant to impeach the order of remand on the ground that it was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the first appellate Court is erroneous. The learned Judges considered that no other questions could be

1. (1927) 27 L.W. 483.

F.B.

Secretary of State for India v. Jagannadham.

Leach, C. J.

raised in an appeal against an order of remand whatever bearing they might have upon the merits of the appellant's case. S. 105 (2) states that notwithstanding anything contained in sub-S. (1), where a party aggrieved by an order of remand made from which an appeal lies does not appeal, he shall thereafter be precluded from disputing its correctness. O. 41, r. 23 says that where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case and may further direct what issue or issues should be tried on the case remanded. This rule has been amended by this Court under the powers conferred upon it by the Code. The power of remand is not now confined to the case where there has been disposal of the suit upon a preliminary point.

The respondent contends that as there was no appeal against the order of remand passed by the Additional Subordinate Judge the appellant is precluded from raising the question whether the District Munsif had jurisdiction to entertain the suit. He says that the appellant should have raised the question of the validity of the finding with regard to jurisdiction and the legality of the later notification on an appeal from the order of remand. This contention runs counter to the judgment in *Jainul Abideen Marakayar* v. *Habibulla Sahib*[1], which I consider was rightly decided. In remanding the suit, the Additional Subordinate Judge set aside the decree of the District Munsif and therefore there was no decree from which the appellant could appeal. The appellant was not aggrieved by the order of remand and therefore there was no ground here for an appeal. It would be monstrously unjust in these circumstances to hold that the appellant is precluded from raising the question of jurisdiction. He could not bring the question before this Court until the Additional Subordinate Judge had dismissed the appeal from the finding made by the District Munsif on the point left undecided by him at the first hearing. The decree of the Additional Subordinate Judge on the appellant's second appeal must be taken to embody the previous findings of the Additional Subordinate Judge that the District Munsif's Court had jurisdiction and that the later notification was invalid. I

1. (1927) 27 L.W. 483.

F.B.

Secretary of State for India v. Jagannadham.

Leach, C. J.

hold that the appellant has a right in this appeal to question all the decisions made by the Additional Subordinate Judge except the decision to order a remand.

The learned Government Pleader does not ask the Court to inquire into the validity of the notifications which have been referred to. He says that the appellant confines his case to the contention that a Civil Court had no jurisdiction to entertain the suit. In this connection he relies on the decisions of this Court in *Ramachandra* v. *Secretary of State for India in Council*[1], *Iswarananda Bharathiswami* v. *The Commissioners, Hindu Religious Endowments Board*[2], *Subbayya* v. *Thippa Reddi*[3] and the judgment of the Privy Council in *Secretary of State for India* v. *Mask & Co*[4]. In *Ramachandra* v. *Secretary of State for India in Council*[1], Kernan and Muthusami Aiyar, JJ., following English authorities, held that where by an act of the Legislature powers are given to a person for a public purpose from which an individual may receive injury, if the method of redressing the injury is indicated by the statute, the ordinary jurisdiction of Civil Courts is ousted and a suit does not lie. This maxim was applied by Curgenven and Cornish, JJ., in *Iswarananda Bharatiswami* v. *Commissioners, Hindu Religious Endowments Board*[2] and Wadsworth, J., in *Subbayya* v. *Thippa Reddi*[3]. In *Kamaraja Pandiya Naicker* v. *The Secretary of State for India in Council*[5], Varadachariar, J., pointed out, however, that where a person's liberty or property is interfered with, under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain unless a bar to such entertainment has been enacted by express legislation or by necessary implication. The correctness of this statement is to be gathered from the judgment of the Privy Council in the *Secretary of State for India* v. *Mask & Co.*[4] There Lord Thankerton in delivering the judgment of the Board said that it is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be really inferred. The exclusion must either be explicitly expressed or clearly implied. And approval was expressed of the dictum of Willes, J., in *The*

1. (1888) I.L.R. 12 Mad. 105.
2. (1931) 61 M.L.J. 117: I.L.R. 54 Mad. 928.
3. (1939) 2 M.L.J. 604: 50 L.W. 364.
4. (1940) 2 M.L.J. 140: L.R. 67 I.A. 222: I.L.R. 1940 Mad. 599 (P.C.).
5. (1934) 69 M.L.J. 695.

F.B.

Secretary of State for India v. Jagannatham.

Leach, C.J.

Wolverhampton New Waterworks Co. v. *Hawkesford*[1], that, where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it the party must adopt the form of remedy given by the statute.

Therefore, we have here two principles clearly established. The first is that to exclude the jurisdiction of the Civil Courts the exclusion must be explicitly expressed or clearly implied. The second is that where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute. I cannot imagine a clearer case of implied exclusion of the right to file a suit than we have here. The person aggrieved by an order of surcharge is given the right of applying—that is of making an application—to the principal Civil Court of original jurisdiction for an order remedying his grievance. If he does not want to petition the Court he may apply to Government to redress the wrong complained of. Outside Madras the principal Court of original jurisdiction is the District Court. If the respondent's contention were to be accepted, it would mean that he could apply to the District Judge to cancel the order of surcharge and direct a refund of the money which has been paid, and if the District Judge decided against him, he could then file a suit in the District Munsif's Court and ask the District Munsif to decree what the District Judge had refused. This is absurd on the face of it. The second principle also applies here. The power to surcharge does not arise under the common law but under statutory rules, and the rules provide the remedy in case of an improper surcharge.

In an attempt to escape from this situation, the learned advocate for the respondent has suggested that rule 6 is *ultra vires* the Local Government. But this suggestion must also be rejected. Sub-S. (1) of the Madras Local Boards Act says that the Government may make rules to carry out all or any of the purposes of the Act not inconsistent therewith. Sub-S. (2) says that in particular, and without prejudice to the generality of the foregoing power, the Local Government shall have power to make rules with regard to specified matters, and clause (*o*) gives them power to make rules "as to the powers of auditors to disallow and surcharge items, and as to the recovery of sums

1. (1859) 6 C.B. (N.S,) 337: 141 E.R. 486,

disallowed or surcharged." There is here full authority to make rules governing the powers of auditors to surcharge, and therefore authority to provide a remedy for the unlawful exercise of the auditors' powers. What better way could there be of controlling unlawful exercise of power by an auditor than by allowing the aggrieved person to apply to Court or to appeal to Government against the decision? I consider there is no substance in the contention that the rule is *ultra vires*. It may be mentioned that the contention was only put forward at the last moment in this court and was never raised below.

F.B.
Secretary of State for India *v.* Jagannadham.
Leach, C.J.

For the reasons indicated I hold that the Court below erred in entertaining the suit and I would allow the appeal with costs throughout.

Wadsworth, J.—I agree with my Lord and have nothing to add.

Wadsworth J.

Somayya, J—I also agree with my Lord The Chief Justice.

Somayya, J.

K. S.　*Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON AND SIR GEORGE RANKIN.

The Jagadamba Loan Company Limited .. *Appellants**

v.

Raja Shiba Prasad Singh and others .. *Respondents.*

P.C.
Jagadamba Loan Co, *v.* Prasad Singh.

Mortgage—Lessee's mortgage of interest in property for lesser term—Mortgagee's entry into possession—Lessee's failure to make payments under lease—Sale—Claim by lessor to recover balance from mortgagee—No privity of estate or contract between mortgagee and lessee.

Where a lessee mortgages his interest in the leasehold property but retains an interest in the land neither privity of estate nor privity of contract arises between the mortgagee and the lessor. He cannot be liable for the whole of the rents or under the covenants, of the lease. This is so even if the mortgagee enters into possession of the property under the mortgage. Neither can he, without apportionment, be liable for any part of those rents, whether or not he enters into possession of the property, for the transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee.

Ram Kinkar Banerjee v. *Satya Charan Srimani*, (1939) 1 M.L.J. 544: L. R. 66 I.A. 50: I.L.R. (1939) 1 Cal. 283 (P.C.), followed and applied.

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* P. C. Appeal No. 72 of 1939.
Appeal No. 21 of 1938.　2nd December, 1940.

P.C.

Jagadamba Loan Co., *v.* Prasad Singh.

Appeal from a decision of the High Court, Patna dated 18th February, 1938, (Terrell, C. J., and Fazl Ali, J.), reversing a decision of the Subordinate Judge of Dhanbad, Manbhum District.

The plaintiff (the first respondent) was the lessor of certain land which the lessee had mortgaged to the appellant company. The mortgagees in due course entered into possession under the mortgage and collected rents and profits. The plaintiff having instituted proceedings for the recovery of arrears of payments, a balance was left outstanding after the sale of sub-lessee's other interests in the land, which balance the plaintiff applied under O. 34, r. 6, Civil Procedure Code, to recover from the mortgagees. The Subordinate Judge dismissed the application. The High Court reversed that decision and the mortgagees then appealed.

The facts are fully stated in the judgment.

J. M. Pringle for Appellants.

C. S. Rewcastle and *R. K. Handoo* for Respondents.

2nd December, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The controversy in this case has reference to 650 bighas of coal land in Mouza Jinagara in the district of Manbhum in Bihar. In these, the appellants, the Jagadamba Loan Company, Limited, are mortgagees of certain leasehold interests which were granted by the Jharia Raj as zemindar to one Charles Smith upon the terms of two kabulyats dated 24th April, 1907. By one of these instruments Charles Smith took settlement of the surface rights for 999 years at an annual rent of Rs. 650: by the other the sub-soil rights were settled with him for the same period upon certain terms as to payment of royalty which need not here be set out. The rent for the surface rights was secured by a provision that "the leasehold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge." As regards the sub-soil rights the provision was "that for the amount of royalty the leasehold land and the machineries remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land."

P.C.

Jagadamba Loan Co., v. Prasad Singh.

Sir George Rankin.

The appellants' mortgage is dated 4th February, 1920. It was executed by the lessee Charles Smith. It recited that several sub-leases had in the meantime been granted by him one being in favour of the Jinagara Coal Company, Limited. It provided that the appellants should from time to time make advances upon a cash credit loan account and that Charles Smith the mortgagor should repay the same with certain interest on the 4th February, 1923. Subject to a proviso for redemption it conveyed to the appellants all the estate and interest of the mortgagor including his right to rent and royalties from sub-leases. The mortgagor covenanted that during the subsistence of the security he would pay all rents, royalties, taxes, etc., and observe the covenants of the head leases. In case of the mortgagor's default in payment of the principal and interest when due the appellants were to be entitled to enter into possession of the mortgaged premises and receive the rents, issues and profits thereof, and in case of the mortgagor's default in payment of the rents, royalties or taxes due in respect of the lands the appellants were to be at liberty to enter into possession without being accountable as a mortgagee in possession.

It is agreed that the appellants eventually collected certain rents and profits from sub-lessees of Charles Smith and in this sense entered into possession; but the dates and other particulars of the appellants' action do not appear from the record submitted to the Board. It is not suggested that the appellants at any time paid rent to the Jharia Raj in respect of the leasehold interests in mortgage to them.

The suit out of which this appeal arises was brought in the Court of the Subordinate Judge at Dhanbad on the 20th April, 1928. It was brought on behalf of the Raj as lessor against Charles Smith (the first defendant) as lessee and certain other parties as sub-lessees. The appellants were not originally impleaded: they were added as parties on 4th January, 1929, but took no steps to contest the suit until after it had resulted in a sale as hereafter mentioned. The plaint claimed large sums as due to the Raj for rent and royalty in arrear in respect of the 650 bighas, prayed that an account of the raisings of coal should be had to ascertain the sums due for royalty, claimed that the arrears were a first charge on the leasehold properties, and asked for enforcement of the charge by sale. Certain accounts having been taken as directed by the trial Judge on

P.C.
Jagadamba Loan Co., v. Prasad Singh.
Sir George Rankin.

14th June, 1929, a preliminary decree for sale was made on 9th December, 1929, and a final decree on 30th August, 1930. The sale took place on 25th June, 1931. After setting off the sale proceeds against the amount due to the Raj, a large sum remained due and unpaid, and on the 23rd June, 1934, application was made on behalf of the Raj under O. 34, r. 6, of the Civil Procedure Code for a personal decree for the deficiency against the estate of Charles Smith the lessee (who had died pending suit), against one of his sub-lessees, and against the appellants. The deficiency was said to amount to a lac of rupees.

This claim was resisted by the appellants who lodged an objection dated 28th July, 1934, maintaining that between themselves and the Raj as lessors there was neither privity of contract nor of estate.

The learned Subordinate Judge on 6th December, 1934, upheld the objection and refused to make a personal decree against the appellants, but on appeal the High Court at Patna (Terrell, C.J., and Fazl Ali, J.), reversed his decision and passed a decree on 18th February, 1938, against the appellants for the sums due to the Raj for rent and royalties in respect of the six years before suit.

From this decree an appeal has now been brought to His Majesty in Council. The appellants as a new ground of objection in addition to those previously insisted on, have relied upon the fact that the plaintiffs agreed to exclude from the sale the interest of certain sub-lessees, and say that in any case the property which was included in the decree for sale was neither "the mortgaged property nor a sufficient part thereof" within the meaning of r. 5 (3) of O. 34. Whether upon this new ground the appellants could resist a personal decree for the deficiency under r. 6 of that Order, is however a question which their Lordships do not find it necessary to discuss or decide.

Since the decision of the High Court in this case, the position of a mortgagee of leaseholds has been considered by the Board in *Ram Kinkar Banerjee* v. *Satya Charan Srimani*[1]. It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor: hence the interest taken by the mortgagee is not an absolute interest and

1. (1939) 1 M.L.J. 544: L.R. 66 I.A. 50: I.L.R. (1939) 1 Cal 283 (P.C.).

P.C.

Jagadamba Loan. Co. *v.* Prasad Singh.

Sir George Rankin.

is not such as to render him liable for the burdens of the lease by reason of privity of estate. In that case however the mortgagees had not entered into possession of the properties mortgaged.

In the present case no question arises of novation by reason of the appellants having paid rent to the Raj or otherwise. Their Lordships have however to consider whether the appellants have become liable for the rents and royalties by reason of their entry into possession of the mortgaged property. They are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term.

The High Court were of opinion that the appellants were liable by reason of privity of contract and in support of this view cited Dallas, C.J., in *Williams* v. *Bosanquet*[1]:

"..... and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: it is therefore a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants."

Before relying upon this *dictum* it would be necessary to enquire whether the principle which it expresses has been accepted in the law of England and how it consists with the doctrine, generally accepted, that the assignee's liability to the lessor can be brought to an end by his assigning the premises over to another. But in their Lordships' view the principle of the decision in *Ram Kinkar Banerjee's* case (*supra*) is inconsistent with there being privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. It would be somewhat remarkable if the lease in *Ram Kinkar's* case was not thought to be one in which "the contract is with the lessee and his assigns"; yet no suggestion is to be discovered to the effect that the mortgagees were liable by

1. (1819) 1 Brod. & B. 238, at 263.

P.C.

Jagadamba Loan Co. v. Prasad Singh.

Sir George Rankin.

privity of contract. Their Lordships are of opinion that the principle of that decision is equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the present.

They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court dated 18th February, 1938, set aside and that of the Subordinate Judge dated 6th December, 1934, restored. The first respondent will pay the appellant's costs in the High Court and of this appeal.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Douglas Grant & Dold.*

R.C.C. *Appeal allowed.*

K. S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

Merla Ramanna .. *Appellant**

v.

Chelikani Jagannadha Rao and others .. *Respondents.*

P.C.

Ramanna v. Jagannadha Rao.

Hindu Law—Joint family—Sham deed between two brothers—Parties named in deed as holders of specified shares in properties—Insufficient to constitute a severance in status.

Co-parceners who intend to remain joint and undivided do not become divided contrary to their intention because, for purposes of pretence, they refer to their interests as represented by a fractional share.

Two brothers governed by the Mitakshara entered into a sham deed whereby the younger purported to sell to the elder his one-tenth share in certain family properties. The elder brother having died indebted to the plaintiff, the latter sought to recover possession from the defendants the sons of the younger brother who was also dead, of assets of the elder brother come into their hands, and attached the properties which were the subject of the sham sale deed between the two brothers.

Held, (the evidence establishing that the transaction between the brothers had been a sham one) that the brothers had not become divided in respect of the properties in question merely because the deed referred to their one-tenth shares in those properties. While it might be different where a third party had been induced to act on the footing of such a document as the sham deed, no change of status was effected by the fact that a party to it spoke of his "one-tenth" share as part of the pretence of sale.

Decision of the High Court, Madras (1937) 2 M.L.J. 386, affirmed

* P.C. Appeal No. 11 of 1939. 18th March, 1941.

P.C.

Ramanna *v.* Jagannadha Rao.

Appeal from a decree of the High Court, Madras, (Mockett and Lakshmana Rao, JJ.) [(1937) 2 M.L.J. 386] dated 16th November, 1936, reversing a decree dated 10th September, 1934, of the Subordinate Judge at Cocanada.

The facts are stated in the judgment.

J. M. Parikh and *R. Parikh* for Appellant.

Sir Herbert Cunliffe K. C., and *P. V. Subba Row* for Respondents.

18th March, 1941. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—Dharma Rao and Kasibabu were brothers, the former being older than the latter by about 19 years. The appellant Merla Ramanna was a creditor of Dharma Rao in respect of a promissory note executed in 1928 for Rs. 10,000 with certain interest. The first and second respondents (herein called the respondents) are the sons of Kasibabu who died in 1910. The family is governed by the Mitakshara. The third and fourth respondents do not appear and need not be mentioned.

After Dharma Rao's death in 1929, the appellant sued the respondents in the Court of the Subordinate Judge at Cocanada as being persons in possession of Dharma Rao's estate and on 27th January, 1931, recovered judgment in the usual form limited to assets of Dharma Rao which had come to their hands. Certain immoveables, in which Dharma Rao had had an interest were attached before judgment and on 22nd April, 1932, the respondents applied to the Subordinate Judge to raise the attachment, contending that the properties attached were not liable to be taken in execution under the decree. Their case is that they were co-parceners with their uncle in a joint Hindu family governed by the Mitakshara and that on Dharma Rao's death they became entitled by survivorship to the whole interest in the joint family property, the appellant, though a creditor of Dharma Rao, not having taken any steps in his debtor's lifetime to recover his debt.

The appellant, on the contrary, contends that Dharma Rao and Kasibabu had ceased so far as regards the attached properties to be undivided and had become separate in estate by reason of a deed of sale (Exhibit B) dated 22nd March, 1900, whereby Kasibabu purported to sell his one-tenth interest there-

P.C.
Ramanna
v.
Jagannadha
Rao.
Sir George
Rankin.

in to his brother Dharma Rao. To this the first answer of the respondents is that the deed was a sham deed not intended to have any effect upon the rights of the parties and not the expression of any agreement between them. Further and in the alternative the respondents contend that even if the deed of sale was intended to be operative and was entered into *animo contrahendi* it did not have the effect of dividing the brothers' interest in the attached properties or of bringing to an end the right of the survivor to succeed to the whole interest. This contention is based upon the circumstance that in 1900 other branches of the family were joint with the branch represented by Dharma Rao and Kasibabu and it is said that the members of these other branches are not shown to have had notice of the deed of sale. As their Lordships do not find it necessary to examine this contention it need not be stated more particularly. The respondents also contend that if Dharma Rao had acquired Kasibabu's one-tenth interest in addition to his own he had brought the income into the common stock so as to make the properties joint. This contention was raised by the respondents in their petition and though it does not seem to have been urged at the hearing before the Subordinate Judge, it was maintained before the High Court with success.

Apart from Exhibit B, their Lordships are satisfied that there is no ground for maintaining that Dharma Rao and Kasibabu's sons had become divided in respect of the properties now in question. The learned Subordinate Judge found that the respondents had "failed to prove that Exhibit B is a sham or a nominal document" but the High Court on appeal thought that "the conclusion is irresistible that Exhibit B the sale deed was a nominal conveyance." The learned Subordinate Judge found in favour of the appellant that Exhibit B operated to divide the interests of the two brothers and by his order of 10th September, 1934, he maintained the attachment. The High Court having found that Exhibit B was not intended to be acted on held that it did not operate a division of status as between the brothers. They also held that this would not have resulted from the deed even if it had been a real and not a sham transaction; and that if a division of interest had taken place by virtue of the deed the manner in which the income had been treated by Dharma Rao restored the properties comprised therein to the condition of joint family property. The High Court

P.C.

Ramanna *v.* Jagannadha Rao.

Sir George Rankin.

by order dated 16th November, 1936, accordingly held that the appellant was not entitled to have recourse to the attached properties in execution of his decree, and this is the decision now complained of.

There is a good deal of evidence upon the question whether the deed of sale (Exhibit B) was intended by the parties thereto as an agreement between them or was executed merely to bring into existence a document which might, contrary to the truth, appear to have taken away from Kasibabu his interest in the properties comprised therein. Upon a full consideration of this evidence their Lordships are of opinion that the view taken by Mockett and Lakshmana Rao, JJ., in the High Court has the greater reason and should prevail. In 1900 Kasibabu had just attained the age of eighteen years and Dharma Rao was thirty seven. Of a total alleged consideration of Rs. 12,500 only Rs. 650 is said to have been paid in cash to Kasibabu at the time the rest being accounted for in the deed by recitals about debts of the joint family, of the parties' own branch of the family and of Kasibabu personally, and by a statement that Rs. 1,000 had been paid as earnest money. Though accounts kept by Dharma Rao over many years are in evidence there is no satisfactory proof of the existence of the alleged debts of their father and none at all that these were in 1900 pressing or that payments were made by Dharma Rao in discharge of them. It is reasonably clear from these accounts that they draw no distinction between properties sold to Dharma Rao by Exhibit B and other properties in which Kasibabu retained his original interest as a co-parcener. He and his family are shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches became divided in status, and thereafter out of the income of the branch. It is not easy to account for such a transaction as the deed discloses save upon the ground that Kasibabu was thought to be foolish and extravagant and given to bad habits likely to lead to his dissipating his property. There is direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there is evidence of statements made by Dharma Rao disclaiming that by the deed he had become entitled to his brother's share. In 1912 at the making of the record of rights no such effect appears to have been given to the deed. There was another deed in 1910

P.C.

Ramanna *v.* Jagannadha Rao.

Sir George Rankin.

whereby Kasibabu purported to divest himself of other properties in favour of a nominee for Dharma Rao, and there is also to be considered the fact that Dharma Rao in 1927 made an ineffective because unwitnessed will purporting to leave all his properties to the respondents. In the present case the oral evidence as to which the courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. Their Lordships think it sufficient to say that the careful and detailed examination of the evidence given by Lakshmana Rao, J., in his judgment appears to them to be convincing and that they agree with the High Court in regarding the deed of sale as being merely "nominal" in the sense that it was not intended to have effect upon the right of the parties *inter se*.

Even so, and upon the footing that Exhibit B is only a sham, and not a real transaction, the appellant has contended before the Board that it would in law divide the interest of the parties thereto so as to put an end to the *jus accrescendi* or right of survivorship between co-parceners. The learned judges of the High Court do not appear to have contemplated that a document which was not the expression of an agreement at all and not intended to have effect upon the rights of the parties could have the important effect of changing their undivided status. The repeated references in Exhibit B to the one-tenth share of each of the two brothers have been emphasised in argument for the appellant but, while they do not seek in any way to qualify what was said in *Appovier's* case[1], their Lordships are unable to hold that co-parceners who intend to remain joint and undivided become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share. Where a third party has been induced to act upon the footing of such a document as Exhibit B, very different questions may arise by reason of estoppel or otherwise, but the question in the present case is limited to the parties themselves and to the immediate effect of the deed. Even a member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be

1. (1866) 11 M.I.A. 75.

P.C.

Ramanna v. Jagannadha Rao.

Sir George Rankin.

one third." But in the present case the reference to the shares as "one-tenth" shares is part of the pretence of sale. When once the conclusion is reached that Exhibit B is not the expression of any intention or agreement to transfer Kasibabu's interest to Dharma Rao propriety or impropriety of language matters little since the deed does not warrant any inference of a previous or independent agreement to hold in divided shares.

Their Lordships are of opinion that it is not shown as regards the properties now in question that Dharma Rao had before his death ceased to be joint with Kasibabu's sons. They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs to the first and second respondents.

Solicitors for Appellants: *Lambert & White.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R.C.C.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Koothoor Cherappan and another .. *Petitioners* (Petitioners 1 and 6)*

v.

T. K. S. S. Sankara Aiyar and Subbayya Aiyar by partner Subbayya Aiyar and others. *Respondents (Respondents and Petitioners 3 to 5 and 2).*

Cherappan v. Sankara Aiyar.

Civil Procedure Code (V of 1908), *O.* 21, *r.* 90—*Sale of undivided share in the properties of judgment-debtor—Application to set aside by co-sharers—Application not sustainable.*

Where a sale of properties of the judgment-debtor was made but what was sold was only an undivided share in certain items of property and the petitioners applied under O. 21, r. 90 C. P. Code to set aside the sale in regard to such items as had fallen exclusively to their shares under an arbitration award previous to the sale itself, on the question whether the application was sustainable,

Held, that the petition was unsustainable. The petitioners as claimants by a paramount title were not affected in any way by the sale. What was sold was only an undivided share in certain items and if the purchaser wanted to realise the fruits of his purchase, he would have to file a suit for partition and separate possession of the share purchased and then it would be open to the petitioners to resist his claim.

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* C.R.P. No. 455 of 1939. 5th March, 1941.

Cherappan v. Sankara Aiyar.

Mt. Mehr Bano v. *Sher Mahomed*, A.I.R. 1936 Lah. 969, dissented from. *Shirin Begam* v. *Agha Ali Khan*, (1895) I.L.R. 18 All. 141 and *Subbarayadu* v. *Pedda Subbarazu*, (1892) I.L.R. 16 Mad. 476, referred to.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of South Malabar dated 13th September, 1938 and made in C. M. A. No. 39 of 1937 preferred against the order of the Court of the District Munsif of Chowghat dated 26th May, 1937 and made in E. A. No. 22 of 1937 in R. E. P. No. 2022 of 1934 in O. S. No. 34 of 1934.

K. P. Ramakrishna Aiyar for Petitioners.

K. Rajah Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The main question for decision in this Civil Revision Petition is whether the application of the petitioners under O. 21, r. 90, Civil Procedure Code out of which this petition arises is sustainable. The relevant facts are few and are these. In execution of a decree obtained by the first respondent against the second respondent, one-fourth share in certain items of immoveable property were attached, and sold. The second respondent and the petitioners were co-owners entitled each to a third share in all the properties that were attached. But subsequent to the attachment there was an agreement to refer the matter to arbitration and there was an award in and by which the properties were divided into three equal shares and some of the items which formed the subject-matter of the attachment exclusively fell to the share of the petitioners. The sale in court-auction in execution of the decree of the first respondent took place subsequent to this division. This application is by the petitioners to set aside the sale in regard to the properties which fell exclusively to their shares. The learned District Munsif allowed the application of the petitioners but the learned District Judge reversed it, but the ground on which he did so is not supported by the learned counsel for the first respondent. But he contended that the application under O. 21, r. 90 is not sustainable. His contention is that the petitioners claim by title adverse to and paramount to that of a judgment-debtor and they are not therefore persons whose interests were affected by the sale. It seems to me that this contention is well founded. The corresponding section in the old Civil Procedure Code was S. 311 where the

Cherappan v. Sankara Aiyar.

corresponding expression was "any person whose immoveable property has been sold." A Full Bench of the Calcutta High Court has interpreted this to mean a person whose interest is affected by the sale. It is this interpretation that was adopted in the Code of 1908 by enacting O. 21, r. 90. In *Asmutunnissa Begum* v. *Ashruff Ali*[1], the person who made the application is the person who claimed under the sale from the judgment-debtor prior to the attachment. Sir Petheram, the learned Chief Justice, observed in the course of the judgment thus:

"... a person claiming by title paramount to the judgment-debtor is not within the meaning of the words "any person" in the section, inasmuch as his title to the property is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale."

This interpretation was also accepted by our High Court. Vide *Subbarayadu* v. *Pedda Subbarazu*[2]. On the language of the section it seems to me, if I may say so with respect, that this is the correct interpretation. A sale can be set aside under O. 21, r. 90 only on the ground of material irregularity or fraud in publishing or conducting it. Where an applicant seeks to set aside a sale on the ground that his property has been sold and that the property does not belong to the judgment-debtor, he is not complaining of any material irregularity or fraud in publishing or conducting the sale. The section assumes that the Court has jurisdiction to sell but in the procedure that is adopted, that is, either in publishing or conducting the sale, there was a material irregularity. Where the complaint is that the property not belonging to the judgment-debtori sold, the sale is a nullity because what would be sold and purchased would be only the right and title of the judgment-debtor and if he has no title, nothing would pass under the sale, and no question of setting aside the sale would arise. This is the view taken by the learned Judges of the Allahabad High Court in *Shirin Begam* v. *Agha Ali Khan*[3], on the corresponding S. 311, Civil Procedure Code. Burkitt, J., in the course of the judgment remarked thus at p. 145:

"..... the words 'set aside' are inapplicable to the case of a sale which is null and void. That which is a nullity cannot, from its very nature, be 'set aside' as was held by the Bombay High Court in *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri*[4]."

With these observations I respectfully agree. Mr. Ramakrishna Aiyar relied on a number of cases on O. 21, r. 89, but

1. (1888) I.L.R. 15 Cal. 488 (F.B.). 2. (1892) I.L.R. 16 Mad. 476.
3. (1895) I.L.R. 18 All. 141. 4. (1886) I.L.R. 11 Bom. 429.

Cherappan v. Sankara Aiyar.

it is not necessary for me to deal with them because the expression used there is "any person holding an interest in the property", whereas the language used in O. 21, r. 90 is "any person whose interests are affected". The fact that under the section no relief can be given unless the applicant has sustained substantial injury shows that the person claiming by title paramount was not meant to be the person whose interest is affected by the sale. It may be that a cloud is cast on his title by reason of the sale which might furnish a cause of action for a declaratory suit; but casting a cloud on title is not substantial injury within the meaning of the rule. Mr. Ramakrishna Aiyar relied on a ruling in *Mt. Mehr Bano* v. *Sher Mahomed*[1], for the view that even strangers can come in under O. 21, r. 90. If the decision was meant to lay down that persons claiming by title paramount to that of the judgment-debtor can make the application under that section, I respectfully dissent. The petitioners are not in any way affected by the sale. What was sold was only an undivided share in certain items and if the purchaser wants to realise the fruits of his purchase, he will be obliged to file a suit for partition and separate possession of the share purchased and it will be open to the petitioners to resist his claim and therefore they are not in any way hurt.

In the result the Civil Revision Petition fails and is dismissed but I make no order as to costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

N. Kunjithapatham Pillai .. *Appellant* (12th Respondent)*

v.

Saraswathi Ammal and others .. *Respondents (Petitioners).*

Kunjithapatham Pillai v. Saraswathi Ammal.

Limitation Act (IX of 1908), Art. 182 (2)—Appeal from order on execution petition—Death of appellant—Abatement for want of legal representative—Order of appellate court dismissing the appeal on the ground of abatement of appeal—Starting point for limitation for fresh E. P.

Where an appeal from an order allowing an E. P. abated on 23—6—1933 by reason of the appellant's death on 23—3—1933 and the failure to apply to bring her L. R. on record within 90 days therefrom, but there was a formal

1. A.I.R. 1936 Lah. 969.

* A.A.O. No. 206 of 1939. 10th March, 1941.

Kunjithapatham Pillai *v.* Saraswathi Ammal.

order by the appellate court on 17—9—1935 stating that the appeal had abated, on the question whether limitation for a fresh E. P. would start from 7—9—1935,

Held, that limitation would run from the latter date only and that an order stating that an appeal had abated for want of legal representatives came within Cl. 2 of Art. 182 of the Limitation Act and time ran from the date of such order for the execution of the decree.

Gohur Bepari v. *Ram Krishna Shaha*, (1927) 32 C.W.N. 387, followed.

Appeal against the order of the District Court of West Tanjore at Tanjore dated 25th January, 1939, and made in E. P. No. 25 of 1938 in O. S. No. 5 of 1925.

R. Sundaralingam for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—The only question raised in this appeal is whether the petition in the Court below was barred by limitation. The article which is admittedly applicable is Art. 182 of the Limitation Act. The question is whether the petition was presented within three years after the date of the final order in E. P. No. 139 of 1930. That E. P. was allowed by the District Court on the 3rd August, 1932, and an appeal preferred from it by the respondent Sivagamu Amma is said to have abated on the 23rd June, 1933, because Sivagamu Amma the appellant therein, died on the 23rd March, 1933, and no application to bring her legal representative on record was made within 90 days from that date. An application was made to set aside the abatement (C.M.P. No. 3812 of 1933) and that was dismissed on 17th November, 1933. There was however a formal order made on the 17th September, 1935, by a Bench of this Court to the following effect: "Appellant dead. Appeal abates." If this order of 17th September, 1935, can be said to be the final order in the appeal, it is admitted that there would be no bar of limitation. If, on the other hand, the date from which the three years period of limitation is to be counted is taken as 23rd June, 1933, when the actual abatement took place or as 17th November, 1933, when the application to set aside the abatement was dismissed, the bar of limitation would apply.

The main question argued before us on behalf of the appellant is that the order made on 17th September, 1935, is not a final order. The real objection seems to be that because the order was unnecessary and was made at a time when one of the parties was dead and unrepresented, it cannot be regarded as an order at all, and therefore not a final order. Some deci-

Kunjithapatham Pillai *v.* Saraswathi Ammal. — Pandrang Row, J.

sions have been quoted to us in support of the proposition that an order in so many words declaring that a suit or appeal has abated is not necessary under the law as it stands, but no authority has been quoted which goes to the extreme length of declaring that when an order is actually made declaring that an appeal has abated, that order is to be treated as if it had never been made. The exact point appears to us to have been decided in *Gohur Bepari's* case[1], and that decision has received the approval of their Lordships of the Judicial Committee as will be seen from *Husain Asghar Ali* v. *Ramditta Mal*[2]. *Gohur Bepari's* case[1], decided that an order stating that an appeal has abated comes within Cl. 2 Art. 182 of the Limitation Act and time runs from the date of such order for the execution of the decree. This is a decision on the very point which we have to decide and in view of the fact that it has received the approval of the Privy Council, we see no reason for not following that decision. It is perhaps necessary for us to say that we concur entirely in the view which has been taken in that case. It follows from this that the plea of limitation was rightly dismissed by the Court below.

This appeal therefore fails and is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE SOMAYYA.

Mathrukovil Kizhakkappat Matathil Ramalinga Aiyar. *Appellant* (Decree-holder—Petitioner—Respondent)*

v.

Thavanur Matathil Krishna Pattar's son Swaminatha Aiyar. *Respondent (1st Defendant—Respondent Appellant).*

Ramalinga Aiyar *v.* Swaminatha Aiyar.

Civil Procedure Code (V of 1908), S. 13—Foreign judgment—Cochin subject—Change of domicil—Effect on jurisdiction of Cochin Court over the subject to pass decree executable in British Indian Courts—British Nationality and Status of Aliens Act (1914), (4 and 5 Geo. V, c. 17), S. 2 (1) (a)—Effect.

A person born of Cochin parents in British India, where they ordinarily resided, does not lose his Cochin nationality by acquiring by birth British

1. (1927) 32 C.W.N. 387. 2. (1932) I.L.R. 60 Cal. 662 at 668 (P.C.).

* A.A.A. O. No. 71 of 1939. 26th March, 1941.

Kamalinga Aiyar *v.* Swaminatha Aiyar.

nationality. The fact that he could claim British nationality under S. 2 (1) (*a*) of the British Nationality and Status of Aliens Act, 1914 will not preclude him from having a dual status. Accordingly Courts in Cochin have jurisdiction to pass a decree against such a subject capable of execution in a British Indian Court. Any renunciation of his Cochin nationality after the passing of the decree will not affect the jurisdiction of the Cochin Courts to pass such decree.

Appeal against the order of the Court of the Subordinate Judge of Tellicherry, North Malabar, dated 21st September, 1938 and passed in A. S. No. 4 of 1938 (A. S. No. 310 of 1937, District Court) preferred against the order of the Court of the District Munsif of Cannanore dated 25th August, 1937, and passed in R. E. P. No. 305 of 1937 (E. P. No. 10 of 1937, District Court) in O. S. No. 165 of 1110 M. E. District Court, Trichur.

B. Sitarama Rao and *S. Venkatachala Sastri* for Appellant.

T. M. Krishnaswami Aiyar and *C. K. Viswanatha Aiyar* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice—This appeal raises a question of international law. It arises out of execution proceedings instituted in the Court of the District Munsif of Cannanore. The appellant had obtained a decree against the respondent in the District Court of Trichur, which is in the State of Cochin. For the purpose of execution the appellant caused the decree to be transferred to the District Court of Tellicherry. The District Judge, however, sent the decree to the Court of the District Munsif of Cannanore in order that he might hear and decide the application for execution. When the application came on for hearing, the respondent challenged the right of the Court to execute the decree. He claimed that he was a British subject with a residence outside the Cochin State and therefore the decree could not be enforced against him in a British Indian Court.

The respondent is a British subject because he was born in British India, but his parents were subjects of the State of Cochin. The fact that he could claim British nationality under S. 2 (1) (*a*) of the British Nationality and Status of Aliens Act, 1914, does not, however, preclude him from having a dual status. Dual nationality is now well recognised. S. 13 of the Code of Civil Procedure states that a foreign judgment shall be

Ramalinga Aiyar *v.* Swaminatha Aiyar.

Leach, C.J.

conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, except under certain circumstances which are set out. There is only one exception with which the Court is now concerned and that is, the decree must have been pronounced by a Court of competent jurisdiction. The Trichur Court could only be a Court of competent jurisdiction within the meaning of S. 13 if the respondent were a Cochin subject, or were resident within its jurisdiction when the suit was instituted, or had submitted to its jurisdiction. It is common ground that he was resident in British India at the time of the institution of the suit and that there was no submission to the jurisdiction of the Trichur Court.

The District Munsif held that the respondent was a Cochin subject and that the appellant was entitled to proceed to execute the decree which he had obtained in Trichur, but on appeal the Subordinate Judge of Tellicherry reversed the decision of the District Munsif on the ground that the respondent, although born of Cochin parents, had lost his Cochin nationality by reason of his change of domicile. There can be no doubt that here the Subordinate Judge erred. Domicile is not a factor. *See* Dicey's "Conflict of Laws" (5th Edition p. 405). Therefore, if the respondent is a Cochin national the fact that he had changed his domicile of origin, if it be a fact, could not affect the right of the Cochin Court to adjudicate on a claim against him.

In his evidence in the District Munsif's Court the respondent stated that he was not a Cochin subject and this statement has been said to amount to a renunciation of his Cochin nationlity, but renunciation after the decree had been passed against him cannot help him. See *Vecht* v. *Taylor*[1]. In that case the appellant was born in London in 1882. His father and mother were both Dutch subjects, but were ordinarily resident in Great Britain. On the 8th November, 1916 he was arrested on a charge of failing, when called up for military service, to appear at the time and place appointed. The case was adjourned to the 15th November, 1916. On the 9th November, 1916, the appellant made a declaration of alienage under S. 14 (1) of

1. (1917) 116 L.T. 446.

the British Nationality and Status of Aliens Act of 1914, and as the result claimed that he was not a British subject and therefore not liable to be called up for military service. The Divisional Court (Lord Reading, C.J., Ridley and Rowlatt, JJ) said that the first and fatal answer to the appellant's case was that nothing which happened after the 8th November, could be an answer to the charge of failing to submit himself to the military authorities before that date. In accordance with the same principle, if the respondent was a Cochin subject at the date of the passing of the decree any declaration renouncing his Cochin nationality after the passing of the decree would leave the position unchanged.

As domicile is not a factor and as it is common ground that the respondent was not resident in Cochin at any time material and had not submitted to the jurisdiction of the Trichur Court, the question resolves itself into whether under the law of Cochin, he was a Cochin subject as well as being a British subject at the date of the institution of the suit. From the time of the passing of 25 Edward III, a son of British parents born abroad has always been regarded as a British subject. There were statutes passed in the reigns of Anne, George II and George III dealing with the question of nationality, but the right of the son of a British subject to claim the nationality of his father has throughout been recognised. The position of the grandson does not call for mention in this case. There was no statute in Cochin until 1932 when the Cochin State Nationals Definition Act was passed. S. 2 of the Act states that descendants of emigrants from the Cochin State, born abroad, shall be considered to be state nationals for two generations. The respondent was born in 1896 and it has been accepted on behalf of the appellant that the statute cannot be given retrospective effect. In these circumstances the Court has to decide what was the law in the Cochin State at the time the respondent was born. This question was not considered in the Courts below, but it has to be considered in this Court.

It is manifest from a decision of a Full Bench of the Chief Court of Cochin given in the year 1931 that before 1932 the law of Cochin was the same as the English law on the subject. The case was that of *Meenakshi Amma* v. *Subramania Aiyar*[1]. There it was expressly recognised that a member of a

1. (1931) 22 Coch.L.R. 393.

Ramalinga Aiyar *v.* Swaminatha Aiyar.

Leach, C.J.

Cochin tarwad could acquire a foreign nationality by birth or otherwise and that a person could at one and the same time be the subject of more than one State. The Court had to consider whether a person born of Cochin parents had acquired British nationality and after recognising that dual nationality could exist the Court found that the appellant had acquired British nationality and was liable under a decree passed by the Subordinate Judge of Calicut which had been transferred to Trichur for execution. That case differs from the present case in that the decree was passed by a British Indian Court and sent to a Cochin Court for execution, whereas here we have a decree passed by a Cochin Court sent to a British Indian Court for execution, but the principle is the same. The Chief Court of Cochin was the highest Court of the Cochin State at the time and the pronouncement by a Full Bench of the Court must be accepted as an authoritative statement of the law which existed in the State before the passing of the Act of 1932.

It cannot be denied that the respondent at birth was a subject of the Cochin State, because he was born of Cochin parents. The fact that he was born in British India did not affect his status in Cochin, and at the time of the institution of the suit he had not lost that status, which means that the Trichur Court was a Court competent to try the appellant's suit against the respondent.

For these reasons we allow the appeal and restore the decision of the District Munsif. The appellant is entitled to his costs here and in the Subordinate Court.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Ramayya *v.* Bollanka Co-operative Society.

Maddimsetti Ramayya .. *Appellant* (Plaintiff)*

v.

The Liquidator of Bollanka Co-operative Credit Society, Ramachandrapur taluk, care of Deputy Registrar of Co-operative Societies, East Godavari and another. *Respondents (Defendants).*

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* S.A. No. 269 of 1940. 14th March, 1941.

Ramayya *v.* Bollanka Co-operative Society.

Madras Co-operative Societies Act (VI of 1932), Ss. 48, 65 and r. 22 (17)—Sale by co-operative society—Claim to the property by stranger—Dismissal of—Suit to set aside under r. 22 (17) without leave of Registrar—If maintainable.

S. 48 of the Madras Co-operative Societies Act only contemplates cases where proceedings have to be initiated against a society and not to cases where a society was itself a party to an order in proceedings instituted by virtue of the Co-operative Societies Act.

Where in execution of a decree a Co-operative Society brought certain properties to sale and a claim preferred under r. 22 (17) (*a*) of the rules made under the Madras Co-operative Societies Act was dismissed by the sale officer, the claimant is entitled to file a suit to set aside the order on his claim petition without the leave of the Registrar. Cases which are expressly provided in the Act are specifically saved by S. 48 from the condition as to leave. R. 22 (17) (*a*) to (*c*) takes effect as if enacted in the Act by virtue of S. 65 cl. (4) and as the rule specifically provides for a suit to set aside the claim order within six months, the prohibition under S. 48 cannot apply to such a suit.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 147 of 1939 preferred against the decree of the Court of the District Munsif of Ramachandrapur in O. S. No. 230 of 1938.

K. Bhimasankaram for Appellant.

A. Lakshmayya for Respondents.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether the plaintiff's suit is barred by S. 48 of the Madras Co-operative Societies Act. Both the lower Courts have dismissed the suit on the ground that it is so barred.

The question is whether this view is tenable. The facts briefly are as follows. The first defendant co-operative society obtained a decree against the second defendant in claim No. 2235 of 1932-33 for Rs. 604-13-4 and in execution of the same brought the properties to sale. The plaintiff preferred a claim under r. 22 (17) (*a*) of the Rules made under the Madras Co-operative Societies Act on the ground that he was a purchaser of the property under a registered sale deed dated 7th February, 1922. But the said claim was dismissed by the sale officer on 29th June, 1938. The plaintiff thereupon filed the present suit on 16th November, 1938, within six months of the said order to set aside the said sale and to establish his right to the property.

The view taken by both the lower Courts is that under S. 48 of the Co-operative Societies Act the plaintiff should have obtained leave of the Registrar to institute the suit, that

Ramayya v. Bollanka Co-operative Society.

the said leave is a condition precedent to such institution and he having failed to do so, his suit must fail. S. 48 of the Co-operative Societies Act runs thus:

> " Save in so far as is expressly provided in this Act, no civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose."

It will be seen that the section itself saves cases which are expressly provided in the Act and it is only in cases where no such provision is made that the condition that no suit or legal proceeding shall lie against the society except by leave of the Registrar operates. S. 65 of the Co-operative Societies Act provides that the Local Government may make rules to carry out all or any of the purposes of this Act, and one of the purposes provided for is the investigation of claims and objections that may be preferred against any attachment effected by the Registrar or an officer empowered by him. In pursuance of this provision rules have been made and S. 65 (4) provides that all rules made under that section shall be published in the Fort St. George Gazette and on such publication shall have effect as if enacted in this Act. Such rules have been published and they take effect as if enacted in this Act and therefore form part of the Act. R. 22 (17) (*a*) to (*c*) provides for investigation of claims and objections. R. 22 (17) (*a*) provides that where a claim or an objection is preferred, the sale officer should investigate the claim or objection and dispose of it on the merits and r. 22 (17) (*c*) is to the effect that where a claim or objection is preferred, the party against whom the order is made may institute a suit within six months from the date of the order to establish his right which he claims to the property in dispute but subject to the result of such suit, the order shall be conclusive. Therefore this clause expressly provides that a suit should be instituted within six months to set aside the order of the sale officer to establish the claimant's right to the property. As this suit is expressly provided for by the Act, it would come within the saving provided in S. 48. The society itself by its liquidator was a party to the order in the claim proceedings and the suit is only a continuation of the claim proceedings. Vide *Phul Kumari* v. *Ghanshyam Misra*[1]. It is

1. (1907) 17 M.L.J. 618: L.R. 35 I.A. 22: I.L R. 35 Cal. 202 (P.C.).

Ramayya v. Bollanka Co-operative Society.

not possible to understand why, when the society itself was a party to an order, any further leave is necessary from the Registrar. That is why no restriction is pla d in r. 22 (17) (c) that the leave of the Registrar should be obtained before the institution of the suit. It would hardly be in the contemplation of the Legislature that leave should be sought from the Registrar at whose instance the sale was ordered. If the Registrar should decline to give leave or delay giving leave for six months there will be no remedy for the plaintiff and according to r. 22 (17) (c) the order on the claim petition would be conclusive. S. 48 only contemplates cases where proceedings have to be initiated against the society and not to cases where a society itself was a party to an order in proceedings instituted by virtue of the Co-operative Societies Act. It seems to me therefore that the suit is maintainable. I therefore set aside the decrees of both the lower Courts and remand the suit for disposal according to law. Two cases were relied on by Mr. Lakshmayya on behalf of the respondent, namely, *Subbayya* v. *Thippa Reddi*[1] and *Govinda Chetti* v. *Uttukottai Co-operative Society*[2], but none of them have any bearing on the question in issue in this case.

In the result the appeal is allowed and the suit remanded to the file of the District Munsif of Ramachandrapur for disposal. The respondents will pay the costs of the appellant throughout. The appellant will be entitled to refund of Court-fee.

Leave to appeal granted.

S.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Land Acquisition Officer, Calicut v. Subba Rao.

The Land Acquisition Officer, Calicut. *Appellant** (*Respondent*)

v.

S. V. Subba Rao and another .. *Respondents* (*Claimants*).

Land Acquisition Act (I of 1894)—Assessing value of property—Method of calculation of amount to be awarded as compensation.

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1. (1939) 2 M.L.J. 604.
2. (1940) 2 M.L.J. 241: I.L.R. 1940 Mad. 929.

* Appeal No. 224 of 1939. 4th March, 1941.

Land Acquisition Officer, Calicut *v.* Subba Rao

In arriving at the proper value in 1935 of a site with building thereon for purposes of awarding compensation under the Land Acquisition Act the proper course will be to capitalise the annual rental value of the property at 33-1/3 years' purchase in accordance with the practice of this Presidency of calculating the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. *Collector of Kistna* v. *Zamindar of Challapalli,* (1937) 2 M.L.J. 744: I.L.R. 1938 Mad. 431 followed.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut dated 7th November, 1938 and passed in Land Acquisition Case No. 157 of 1936.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

K. Kuttikrishna Menon for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—The subject-matter of this appeal is a small plot of land in Calicut measuring 2 cents which has been acquired for the purpose of a telephone exchange. Notification was issued in 1935. The evidence shows that at the time of the notification a building was standing upon the site which had originally consisted of four rooms on the ground floor and three rooms in the upper storey. In 1932, however, one of the rooms on the ground floor had been destroyed, and the whole of the upper storey had also been destroyed on account, as the claimant puts it, of a portion of the Anjuman building falling upon it. The owner of this property claimed Rs. 22,000 for it. The Land Acquisition Officer awarded Rs. 2,700. He arrived at this figure by calculating the annual rental actually derived from the property (it should be mentioned here that the rooms in the lower storey were let out as shops at Rs. 15 a month). Deducting three months' rent as necessary expenditure for repairs and the payment of tax to the Municipality, the remaining nine months' rent comes to Rs. 135. This sum capitalised at 20 years' purchase amounts to Rs. 2,700. The claimant was dissatisfied with this award and the matter was referred to the learned Subordinate Judge of Calicut. The learned Judge held that by the expenditure of a small sum of money some use could have been made of the original fourth room on the ground floor and an additional rent of Re. 1 per month obtained. He calculated therefore the net rent after deducting necessary expenses at Rs. 144 and capitalised this sum at 33-1/3 years' purchase instead of 20 years, following the decision of a Bench of this Court in *Collector of Kistna* v. *Zamindar of Challapalli*[1].

1. (1937) 2 M.L.J. 744: I.L.R. 1938 Mad. 431.

Land Acquisition Officer, Calicut v. Subba Rao

King, J.

The amount of Rs. 2,700 was thus increased to Rs. 4,800. Against this decision the Government has appealed and the claimant has filed a memorandum of cross objections. It should also be mentioned at this stage that under S. 27 (2) of the Act the Subordinate Judge in enhancing the award of the Collector ordered that no costs should be paid by the Collector to the claimant.

The first question which arises in this appeal is whether the learned Subordinate Judge was correct in adopting 33-1/3 years' purchase in capitalising the rental value of the property. We are of opinion that he was correct. It is clearly laid down in the case already cited that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. It is no doubt argued on behalf of the Government in this appeal that a purchaser of house property in a Municipality like Calicut would expect to get more for his money than if he had invested it in Government securities. But on this point there is no evidence available in the proceedings before the learned Subordinate Judge, and we have not been shown any authority in which any distinction of this kind has been drawn between sites in a Municipality and sites in the country. We are of opinion that the learned Subordinate Judge was right in following the authority of *Collector of Kistna* v. *Zamindar of Challapalli*[1], and in view of the fact that there was evidence before him that the rate of interest obtainable on Government securities in 1935 was only 3 per cent. the method of capitalisation by taking 33-1/3 years' purchase is mathematically correct.

The other question raised in the appeal is one of costs. It is argued that the learned Subordinate Judge, acting under S. 27 and finding that the claimant had made an extravagant claim would have better exercised his discretion not only by refusing costs to the claimant but by ordering the claimant to pay part of the Collector's costs. We see no good reason for interfering with the discretion exercised by the learned Subordinate Judge, and particularly so in view of the manner in which we proceed to dispose of the memorandum of cross objections.

The main question raised in the memorandum of cross objections is an objection to the procedure of the Land Acqui-

1. (1937) 2 M.L.J. 744: I.L.R. 1938 Mad. 431.

Land Acquisition Officer, Calicut v. Subba Rao

King, J.

sition Officer and to a lesser extent the procedure of the learned Subordinate Judge in refusing to recognise that the true rental value of the property acquired might not be something higher than the rent actually received by the claimant. No doubt on this basis an additional rent of Re. 1 has been allowed by the learned Subordinate Judge in making his calculations. But we do not think that this amount is sufficient. As already stated, there is evidence that before 1932 the building was a larger one with more accommodation available. There is evidence that for a short time in 1932 a rent of Rs. 9 was actually received from the upper storey. There is evidence that the reason for the collapse of the upper storey and of one of the rooms below was not any structural defect in the building itself but the fact that a neighbouring building fell upon it and this evidence has not been subjected to any cross-examination. We think therefore that although this aspect of the case has not been dealt with in any detail in the evidence, it is reasonably certain that a purchaser by expending whatever is necessary to put the building once again into proper order, and restoring it to its original size could obtain a rental considerably higher than Rs. 15. Of course to do this he would have to incur considerable expenditure, but we feel certain that the net result would be to his advantage. It is conceded that if in fact the present owner of the property has neglected it in such a way as not to derive the true economic rent from it, he should not be penalised on this account by his not being awarded the true market price. The true market price is what a purchaser would give with all possibilities of the purchase present to his mind. It is of course difficult for us to assess this true market value in view of the paucity of the evidence. But we are of opinion that justice will be done as between both parties by assessing this rental value at Rs. 20 a month.

The result will be that the amount payable to the claimant should be enhanced to Rs. 180 multiplied by 33-1/3 and to this of course will be added the usual 15 per cent. compensation. Now that we have enhanced not only the award of the Land Acquisition Officer, but the award of the learned Subordinate Judge, we are certainly unable to regard the claimant's original claim as so extravagant as to require that he should be called upon to pay any of the Collector's costs. The result is

that the appeal is dismissed with costs, and the memorandum of cross-objections allowed with proportionate costs,

K, C. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE PATANJALI SASTRI.

Y. G. Peria Muniswami Mudali and others. *Appellants* (Defendants 4 to 7 and L. R. of 7th Defendant)*

v.

Sena Narasappa Mudali (deceased) and others. *Respondents (Plaintiffs and Defendants 1 to 3 and L.Rs. of Plaintiffs).*

Madras Estates Land Act (I of 1908), Ss. 6 cl. (6) and 112—Ijaradar—*Sale by, for arrears of rent, under S. 112—Sale of some lands and mortgage of other lands by ryot—Transferee recognised as ryot by accepting rent—Procedure under S.* 146 *not followed—If recognition enough—Transferee if a defaulter—Notice to transferee of sale—No notice of sale to transferor—Sale, if valid—No exchange of patta with transferee—If sale valid—Objection if can be taken in a civil court—Auction sale by* ijaradar *and purchase by* ijaradar *during period of* ijara—*Effect of—If purchase valid.*

A transferee of ryoti land in an estate who has been accepted by the landholder as the ryot becomes a defaulter on failure to pay rent notwithstanding that the procedure contemplated by S. 146 has not been complied with. A transferee could be recognised as a ryot without any formality and if he was so recognised he became a defaulter on failure to pay rent irrespective of whether a patta was issued to him or not.

Definition of 'defaulter' in *The Midnapore Zamindari Co.* v. *Muthuppudayan,* (1920) 40 M.L.J. 213: I.L.R. 44 Mad. 534, held to be too limited.

The provisions of S. 112 could not however be invoked by the landholder unless he had in fact issued a patta to the transferee and a sale without such patta is unlawful. But where notice of sale has been duly served on the defaulting ryot he must file a suit in a Revenue Court within 30 days; otherwise he will be precluded from challenging the sale on any of the grounds which could be urged in a suit under S. 112.

Lakshmana Aiyar v. *Aiyaswami Chettiar,* (1941) 1 M.L.J. 1, explained.

Raju Goundan v. *Kuppu Goundan,* A.I.R. 1936 Mad. 402, approved.

Where a ryot sold a portion of his holding and mortgaged the other portion, and the landholder recognised the transferee as the ryot the transferee became the ryot of the purchased holding and when he commits default in payment of rent, he is a defaulter and a sale with notice to him under S. 112 though without notice to the transferor is valid.

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* S. A. No. 820 of 1936. 21st February, 1941.

F.B.

Muniswami Mudali *v.* Narasappa. Mudali.

With regard to the mortgaged portion, the transferor continues to be the ryot and a sale with notice to the mortgagee alone but without notice to the transferor is invalid and the sale can be questioned by a suit in a civil Court.

Rajah of Ramnad v. *Venkataramier*, (1922) 43 M.L.J. 264: I.L.R. 45 Mad. 890 (F.B.), applied.

The right of occupancy referred to in S. 6 cl. (6) is the right of *permanent* occupancy and anything short of this can be purchased by the *ijaradar.*

When an *ijaradar* purchases a holding during the period of his *ijara* in a sale held by him for arrears of rent, what happens is that the defaulting tenant loses his holding in which he held an occupancy right, while the *ijaradar* acquires the holding but without acquiring the occupancy right. S. 6 (6) does not operate as an absolute bar to the *ijaradar* purchasing at the auction.

Mahammad Gosukoni v. *Mahammad Sekka Maracayer,* (1935) 70 M.L.J. 146: I.L.R. 59 Mad. 779, approved.

If after his purchase the *ijaradar* lets in a tenant during the period of the *ijara* the tenant will automatically acquire a permanent right of occupancy. If he does not let in a tenant the *ijaradar* will be left on the expiration of his *ijara* merely with the right to possession of a non-occupancy ryot.

Appeal against the decree of the District Court of Chittoor dated the 3rd February, 1936 in A. S. No. 69 of 1935 preferred against the decree of the Court of the District Munsif of Sholinghur dated the 24th January, 1935, in O. S. No, 54 of 1934.

S. Ramaswami Aiyar, S. V. Venugopalachari and *S. A. Seshadri Aiyangar* for Appellants.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

23rd October 1940. The Opinion of the Court was as follows:

Leach, C.J.

The Chief Justice.—This appeal raises questions of importance with regard to the interpretation of the Madras Estates Land Act, 1908. As the case is not concerned with any of the alterations made by the amending Acts of 1934 and 1936 the sections to which I shall refer in the course of this judgment will be those of the original Act.

On the 30th November, 1925, Sadayappa Govindappa Mudali, a tenant of ryoti lands in the village of Malapudi, which is in the Karvetnagar Zamindari, sold his interest in certain of the lands to one Kanniappa Mudali and mortgaged his interest in other of the lands to one Kandappa Mudali. The lands sold to Kanniappa have been referred to as the A schedule lands and the lands mortgaged to Kandappa as the B

F.B.

Muniswami Mudali *v.* Narasappa Mudali.

Leach, C. J.

schedule lands, and it will be convenient to continue these descriptions. On the 29th June, 1926, Kanniappa sold his rights in the A schedule lands and Kandappa assigned his rights as mortgagee in the B schedule lands to the first respondent. The owner of the Zamindari was one Vijayammal, who leased the whole village to the fourth appellant in 1929 for three faslis. The period of the lease commenced from the 1st July, 1929, and terminated on the 30th June, 1932. As the result, the fourth appellant became the *ijaradar*, or the farmer of the rents, of the A and B schedule lands and subject to the prohibition of S. 6 (6) of the Act which says that an *ijaradar* shall not, while so holding, acquire otherwise than by inheritance or devise a right of occupancy in land comprised in the *ijara*. When Vijayammal granted this three years' lease to the fourth appellant the first respondent was in possession of the A schedule lands as a ryot with a permanent right of occupancy, and admittedly he continued to hold the lands in such capacity under the fourth appellant. It has been suggested in the course of this appeal that he also held the B schedule lands in the same capacity, but this has not been proved and it must be assumed that they were being cultivated by Sadayappa Govindappa Mudali or his sub-tenants. So far as this appeal is concerned, the first respondent must be treated merely as the mortgagee of the B schedule lands. The first respondent defaulted in the payment of his rent in respect of the A schedule lands for fasli 1339 (1929-30) and default was also made in the payment of the rents due for this period in respect of the B schedule lands. The result was that the fourth appellant as the *ijaradar* issued notices under S. 112 of the Madras Estates Land Act, but these notices were only served upon the first respondent. It is common ground that no *patta* was ever tendered to the first respondent, but he was accepted as the lawful transferee and as the holder of the permanent right of occupancy of the A schedule lands. The notices issued by the fourth appellant under S. 112 were ignored and in due course the lands comprised in both the schedules were sold by the Collector for default in payment of rents, the fourth appellant being the purchaser. The sales took place on the 26th August, 1931, that is, before the term of the *ijara* expired, but possession was not delivered to him till the 4th February, 1933, which was more than seven months after the term had expired.

F.B.

Muni-swami Mudali *v.* Narasappa Mudali.

Leach, C.J.

On the 2nd February, 1934, the first and second respondents filed a suit in the Court of the District Munsif of Sholinghur for a decree setting aside the sale of the A schedule lands on the ground of irregularity and directing that possession be given to them. They also asked for a declaration of their rights as mortgagees of the B schedule lands. The second respondent is the brother of the first respondent. There were seven defendants, the third, fourth and fifth respondents, and the four appellants in this appeal. The third, fourth and fifth respondents were made parties as sub-tenants of the first and second respondents who had attorned to the fourth appellant after he had purchased the A schedule lands at the auction. The first and second appellants purchased from the fourth appellant the interest which he acquired in the suit properties in the auction, and the third appellant is his agent. The plaintiffs-respondents averred that the sale was invalid because notice under S. 112 had not been served on the original *pattadar* Sadayappa Govindappa Mudali, that S. 6 (6) operated as an absolute bar to the fourth appellant becoming the auction purchaser, and that after the sale had taken place the rents which were owing were paid, as the result of which the rights of all the defaulting ryots were restored. The fourth appellant and the other contesting defendants denied that the suit was maintainable and averred that the lands had been lawfully sold. They also denied that there had been any payment of the arrears of rent after the sale had taken place. The District Munsif held that the sale was invalid because notice had not been served on the *pattadar* under S. 112 and that consequently the suit was cognizable by a Civil Court. He considered that S. 6 (6) was not a bar to the *ijaradar* purchasing at the auction, and he accepted the evidence of the plaintiffs-respondents that after the sale the arrears of rent had all been paid and the position of the ryots fully restored. On these findings he granted a decree declaring that the plaintiffs-respondents were entitled to the A schedule lands as owners and to the B schedule lands as mortgagees and directing the defendants to surrender possession of the A schedule lands to the plaintiffs. The appellants appealed to the District Judge of Chittoor. The District Judge considered that the chief question which arose for consideration was whether an *ijaradar* who had bought in a ryot's land for arrears of rent was entitled to hold the land as

F.B.

Muni-swami Mudali v. Narasappa Mudali.

Leach, C.J.

an occupancy ryot after he had ceased to be a landholder, and as in his opinion S. 6 (6) operated as a bar he held that the Collector should have refused to deliver the lands to the fourth appellant. On this ground he dismissed the appeal. The other questions raised in the trial Court were argued but in the opinion of the District Judge they did not really matter, although he held that the allegation of the plaintiffs-respondents that the fourth appellant had accepted the arrears of rent and treated the rent sale as a nullity was both 'false and an obvious after-thought.' In making this sweeping assertion the District Judge did not discuss the evidence and it will be necessary to return to this matter later.

In this Court the appellants have advanced two arguments in support of their appeal. In the first place they say that the suit was not maintainable because the Revenue Court alone had jurisdiction. On the assumption that the first respondent was the holder of the *kudivaram* right in both the A and the B schedule lands they say that inasmuch as he was served with notice under S. 112 he ought to have filed a suit in the Revenue Court. That was, it is urged, his only remedy. The second contention is that the District Judge entirely misconstrued the effect of S. 6 (6). The plaintiffs-respondents meet the first argument by saying that the A and B schedule lands stand on different footings as the first respondent was not the holder of the B schedule lands, but was merely a mortgagee, and that in any event, there was no valid sale inasmuch as no notice was served on the original *pattadar*, Sadayappa Govindappa Mudali, no other *patta* having been issued since he was in occupation of the lands. They deny that the first respondent was a defaulter within the meaning of S. 112 and would have it that the case comes within the Full Bench decision of this Court in *Rajah of Ramnad* v. *Venkataramier*[1]. They also say that the District Judge correctly interpreted S. 6 (6), but that he erred in holding against them on the question whether the fourth appellant had accepted payment of all the arrears of rent after the sale had taken place.

The appellants obviously cannot treat their case with regard to the B schedule lands as being on the same basis as the A schedule lands. As I have already indicated there is no evidence that the first respondent was ever in occupation of the

1. (1922) 43 M.L.J. 264: I.L.R. 45 Mad. 890.

F.B.

Muni-swami Mudali v. Narasappa Mudali.

Leach, C.J.

B schedule lands as a ryot; in fact, the fourth appellant and the other contesting defendants made no averment to the contrary in their written statements. Therefore it will be necessary to deal with the A and the B schedule lands separately. For the moment, I will confine my observations to the case of the plaintiffs-respondents so far as the A schedule lands are concerned.

S. 111 says that when an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof, in the manner provided by the Act in satisfaction of what is due with interest and costs of the sale. S. 112 provides that when the landholder intends to avail himself of the powers given by S. 111, he shall serve on the defaulter through the Collector a written notice stating the amount due for arrears, interest, and costs, the period for which and the holding in respect of which it is due, and informing him that if he does not pay the amount or file a suit before the Collector contesting the right of sale within thirty days from the date of service of the notice, the holding or any part thereof specified in the notice will be sold. If the arrear is not paid and no suit contesting the right of sale is instituted within the time stated the landholder may apply to the Collector for sale. Notice was served on the first respondent and as he took no steps to contest the right of sale before the Collector, and as all the requirements of the Act with regard to the proclamation of sale and the holding of the auction were complied with the sale must be held to be valid so far as the A schedule lands are concerned, if the first respondent is in law a defaulter within the meaning of S. 112.

The question of the meaning to be attached to the word, 'defaulter' in S. 112 was raised and decided recently by a Full Bench of this Court of which I and my learned brother Patanjali Sastri were members in *Lakshmana Aiyar* v. *Aiyaswami Chettiar*[1], [S. A. No. 353 of 1937—since reported in *Lakshmana Aiyar* v. *Aiyaswami Chettiar*[1].] It was there held that a transferee of ryoti land who has been accepted by the landholder as the ryot is a defaulter, notwithstanding that the procedure contemplated by S. 146 has not been complied with. In *The Midnapore Zamindari and Co.* v. *Mutkupudayan*[2],

1. (1941) 1 M.L.J. 1.
2. (1920) 40 M.L.J. 213: I.L.R. 44 Mad. 534.

F.B.
Munisswami Mudali v. Narasappa Mudali.
Leach, C.J.

it was held that the word 'defaulter' within the meaning of the Madras Estates Land Act denotes only the person who is the registered *pattadar* or his heir or the person whom the landholder has become bound to recognize as the ryot under S. 146 of the Act. The Full Bench considered that this definition was too limited and the landholder might, if he so chose, accept the transferee without being served with a notice in writing or a certified copy of a decree or order of a Civil Court establishing the transfer or by the production of a sale certificate, whichever happened to be appropriate. The Full Bench pointed out, however, that before action can be taken under S. 112, S. 53 requires that the landholder shall have issued a *patta* to the transferee, not necessarily bearing his name, but a *patta* which is intended to be the transferee's *patta*. In that case, a transferee had been accepted as a ryot without any formalities and a *patta* had been issued to him though it bore the name of the transferor. In the course of the argument in the present case it was suggested by Mr. Satyanarayana Rao, on behalf of the plaintiffs-respondents that the Full Bench judgment should be read as deciding that a person could not be a defaulter within the meaning of S. 112, unless in addition to being recognised by the landholder as the ryot a *patta* had been issued to him. There is nothing in the language used in the judgment in that case which justifies such a construction, and in order to avoid a similar argument being raised again, I, as a member of the Full Bench and as the member who delivered the judgment, desire to say that what was laid down there was that a transferee could be recognised as a ryot without any formality and if he was so recognised he became a defaulter within the meaning of S. 112, irrespective of whether a *patta* was issued to him or not. In view of the provisions of S. 53, S. 112 could not, however, be invoked by the landholder unless he had in fact issued a *patta* to the transferee. It follows from the decision of the Full Bench in *Lakshmana Aiyar* v. *Aiyaswami Chettiar*[1] (S.A. No. 353 of 1937) that the first respondent was a defaulter within the meaning of S. 112, but as a *patta* was not issued to him either by the *Zamindarini* or by the fourth appellant as the *ijaradar*, the sale was unlawful.

But this does not mean that the plaintiffs-respondents were entitled to challenge the validity of the sale in a suit in a

1. (1941) 1 M.L.J. 1.

F.B.
Muni-swami Mudali v. Narasappa Mudali.
Leach, C.J.

Civil Court. S. 189 (1) of the Act says that all suits and applications of the nature specified in parts A and B of the schedule can be heard and determined by a Collector or other Revenue Officer specially authorized under the Act, and no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made. Clause No. 12 of Part A relates to a suit 'to contest the right of sale of a holding.' Therefore a suit to contest the right of sale of a holding can only be brought in a Revenue Court. Sub-S. (3) of S. 189 provides that the decision of a Revenue Court or of an appellate or revisional authority in any suit or proceeding under the Act on a matter falling within the exclusive jurisdiction of the Revenue Court shall be binding on the parties thereto and persons claiming under them, in any suit or proceeding in a Civil Court in which "such matter may be in issue between them." This sub-section does not however, detract from the absolute prohibition contained in sub-S. (1). It only means that where a matter has been decided in a Revenue Court and the decision there is one of the factors in a Civil suit the finding of the Revenue Court cannot be questioned and must be taken as conclusive on the particular point at issue, in the Civil suit. The position then is this. Where notice has been duly served upon a defaulting ryot he must file a suit in a Revenue Court within thirty days; otherwise he will be precluded from challenging the sale on any of the grounds which could be urged in a suit under S. 112. And there is authority of this Court for this assertion.

In *Rajah of Ramnad* v. *Venkataramier*[1], the Court had to consider a case where no notice under S. 112 was given to the ryot by the landholder of his intention to sell. There was a complete disregard of the requirements of S. 112 in this respect and it was held that such a case did not come within Cl. 12 of Part A of the schedule. Consequently the Civil Court had jurisdiction. The judgment did not go beyond the particular facts of the case and cannot be taken as having any application to a case where the notice was duly served although the question referred to and answered by the Full Bench was very wide. In *Ayyamudali Velalan* v. *Sourimuthu Udayan*[2], Jackson, J., held

1. (1922) 43 M.L.J. 264: I.L.R. 45 Mad. 890.
2. (1927) 53 M.L.J. 222.

F.B.

Muni-swami Mudali v. Narasappa Mudali.

Leach, C.J.

that where a ryot, upon whom notice had been served under S. 112, contested the landlord's right of sale on the ground that a *patta* had not been tendered to him under S. 53 he was bound to bring a suit in the Revenue Court as such a suit fell within Cl. 12 of Part A of the schedule. The learned Judge rightly pointed out that the decision in *Rajah of Ramnad* v. *Venkataramier*[1], had here no application. In deciding that the Civil Court had no jurisdiction in such a case Jackson, J., relied on the decision of this Court in *Irulappan Servai* v. *Veerappan*[2], where it was said that the absence of a *patta* or *muchilika* would be a ground for a suit before the Collector under the provisions of Cl. 12. The latest decision on this question is that given by Venkataramana Rao, J., in *Raju Goundan* v. *Kuppu Goundan*[3], where the learned Judge said:

"The correct view in my opinion is that no suit will lie in a Civil Court to set aside a sale on any of the grounds which could have been urged to contest the right of sale in a suit under S. 112, whether it relates to jurisdiction or mere irregularity in procedure. But where there is no notice of sale, or where the ground of attack relates only to matters arising out of or consequent on the sale and generally could not be urged in a suit under S. 112, the jurisdiction of the Civil Court is not taken away."

With these observations I am in full agreement.

When he was served by the fourth appellant with a notice under S. 112 the proper course, if he wished to contest the right of sale of the A schedule lands, was for the first respondent to file a suit in the Revenue Court. The fact that no *patta* had been issued to him would have entitled him to a decision in his favour. He refrained, however, from taking this course and so far as the A schedule lands are concerned he cannot challenge the validity of the sale in a Civil Court. The sale was held after due compliance with all the procedure contemplated by the Act and must stand, unless the evidence tendered by the plaintiffs-respondents justifies a finding that after the sale had taken place the landholder accepted payment of the arrears and thereby cancelled the sale.

Turning now to the B schedule lands, it is accepted that notice was merely served on the first respondent, who was the mortgagee. Neither the *pattadar* nor his sub-tenants were given any intimation of the intention to sell for default in payment of the rents due. The omission to serve the *pattadar*

1. (1922) 43 M.L.J. 264 : I.L.R. 45 Mad. 890.
2. (1921) 42 M.L.J. 113.
3. A.I.R. 1936 Mad. 402.

F.B.

Muniswami Mudali *v.* Narasappa Mudali.

Leach, C.J.

brings the case so far as the B schedule lands are concerned directly within the judgment in *Rajah of Ramnad* v. *Venkataramier*[1]. Therefore the plaintiffs-respondents are in a position to maintain the suit to this extent.

The next question for decision is the effect of S. 6 (6). In my opinion the right of occupancy referred to in this subsection is the right of permanent occupancy and anything short of this may be purchased by the *ijaradar*. The right of permanent occupancy is not the only right of occupancy contemplated by the Act. S. 46 provides the procedure by which a 'non-occupancy ryot' of a holding, that is a ryot without a permanent right of occupancy, can, subject to certain exceptions which I shall mention in a moment, convert his interest in the land into a right of permanent occupation for agricultural purposes. He must tender a sum equal to two and a half times the annual rent payable in respect of the land together with the cost of preparing the necessary instrument. If he does so, the landholder must confer upon him a permanent right of occupancy. Exceptions, however, are made in the cases falling under sub-Ss. (4) and (5) of S. 6, and sub-S. 4 of S. 8. Sub-S. (4) of S. 6 states that admission to waste land under a contract for the pasturage of cattle and admission to land reserved *bona fide* by the landholder for forest under a contract for the temporary cultivation with agricultural crops shall not by itself confer upon the person so admitted a permanent right of occupation. Sub-S. (5) of that section provides that when a landholder has reclaimed waste land by his own servants or hired labour he may by contract in writing prevent any person from acquiring a permanent right of occupancy in respect of that land during a period of thirty years from the date of the first cultivation after reclamation. Sub-S. (4) of S. 8 says that in cases where the interest of the ryot in the holding has passed to the landholder by transfer for valuable consideration before the passing of the Act otherwise than at a sale for arrears of rent, or has passed by inheritance, the landholder shall have the right for a period of twelve years from the passing of the Act of admitting any person to the possession of the land on such terms as may be agreed upon and the person so admitted shall not be entitled during this period to the benefit of S. 46. Therefore Ss. 6 and

1. (1922) 43 M.L.J. 264 : I.L.R. 45 Mad. 890.

F.B.

Munisami Mudali *v.* Narasappa Mudali.

Leach, C. J.

8 when read in conjunction with S. 46 also show that a person may be in lawful possession of ryoti land for purposes of agriculture without having a permanent right of occupation. S. 153 sets out the grounds on which a non-occupancy ryot may be liable to ejectment by a suit in a Revenue Court.

Emphasis has been laid by the learned advocate for the plaintiffs-respondents on the fact that in sub-Ss. (1), (3), (4) and (5) of S. 6 the words 'permanent right of occupancy' are used and that in sub-S. (6) the expression is merely "right of occupancy", but the explanation for this is that sub-S. (6) was taken from the Bengal Tenancy Act, 1885, and the draftsman forgot that he had used the adjective "permanent" in the other sub-sections. Sub-S. (3) of S. 23 of the Bengal Tenancy Act as it then stood read, "A person holding land as an *ijaradar* or farmer of rents shall not while so holding acquire a right of occupancy in any land comprised in his *ijara* or farm." In the Bengal Tenancy Act there is no reference to "permanent occupancy" but only to "right of occupancy", although the right contemplated is a permanent right. The Calcutta High Court has consistently construed S. 23 (3) as not preventing an *ijaradar* from becoming a purchaser at a sale of an occupancy holding. If he bought at a sale held in default of payment of rent, the occupancy right only ceased and he was entitled to hold the land as a non-occupancy holding, to use the words of Sen, J., in *Midnapore Zamindari* v. *The Secretary of State for India in Council*[1], which is the most recent case dealing with the subject and in which the earlier cases are referred to.

The effect of S. 6 (6) of the Madras Act was considered by a Bench of this Court in *Muhammad Gosukani* v. *Muhammad Sekka Maracayar*[2], an appeal under Cl. 15 of the Letters Patent preferred against a decree passed by Curgenven, J., in a second appeal. Curgenven, J., said:

> "What happens is that the defaulting tenant loses his holding, in which he held an occupancy right, while the *ijaradar* acquires the holding, but without acquiring the occupancy right."

This opinion was accepted by the Bench which heard the appeal, and I consider rightly so. S. 130 expressly permits a landholder to bid for or purchase a ryot's holding which is to

1. (1938) 43 C.W.N. 57.
2. (1935) 70 M.L.J. 146: I.L.R. 59 Mad. 779.

F.B.

Munisami Mudali v. Narasappa Mudali.

Leach, C. J.

be put up for sale for arrears of rent. An *ijaradar* is the landholder for the time being and it is difficult to see why he should be put in a less advantageous position than a permanent landholder when he has had occasion to bring a ryot's holding to sale for default in payment of rent. If a landholder buys his tenant's interest, that is, the *kudivaram* right, his purchase does not change the character of the land from ryoti to non-ryoti. The landholder in such circumstances may cultivate the holding himself, but if he lets it to a tenant for the purposes of cultivation, except in the exceptional cases provided for in the act, the tenant acquires the right of permanent occupancy. The position will not be changed if an *ijaradar* purchases. If after his purchase he lets in a tenant during the period of the *ijara* the tenant will automatically acquire a permanent right of occupancy. If he does not let in a tenant the *ijaradar* will be left, on the expiration of his lease merely with the right to possession of a non-occupancy ryot. Moreover to read S. 6 (6) as prohibiting an *ijaradar* from buying in at a sale might lead to great injustice. There might be no other bidders, either as the result of boycott or lack of interest. Is the *ijaradar* in such circumstances compelled to leave the defaulting tenant in possession? The intention of the Legislature could not have been to put an *ijaradar* in such a disadvantageous position. I have stated what I consider to be the reason why the word 'permanent' was omitted from sub-S. (6) of S. 6, and I do not consider that this omission makes any difference. For these reasons I hold that S. 6 (6) does not operate as a bar to the *ijaradar* purchasing at the auction.

The only other question which remains to be considered is that with regard to the finding of the District Judge that the plaintiffs-respondents had falsely claimed to have paid the fourth appellant the arrears of rent subsequent to the sale. The District Munsif after a detailed examination of the evidence came to the conclusion that the evidence was true and the District Judge ought not to have reversed this finding without stating his reasons. As he considered that S. 6 (6) decided the appeal he could have abstained from considering any question of fact, but he did not content himself with this and therefore should have examined the evidence fully and stated his reasons for differing from the District Munsif. As the District Judge's judgment stands this Court has no guidance as to what

F.B.

Munisami Mudali v. Narasappa Mudali.

Leach, C. J.

was in his mind and as it has become necessary for this Court to decide the question of fact the case will have to be sent back to the District Judge for a statement of his reasons for holding that the evidence adduced by the plaintiffs-respondents on the payment of arrears was false and an afterthought. The District Judge will be directed to submit his reasons to this Court within three weeks.

The position may be shortly put in this way. The suit does not lie so far as it challenges the right of sale of the A schedule lands, but it does lie on the question of whether the sale was rendered nugatory by reason of the acceptance of the arrears of rent after the sale. So far as the B schedule lands are concerned the plaintiffs-respondents are entitled to a declaration that the sale does not affect the position of the first respondent as a mortgagee.

The question of costs will be decided when the case is further considered after the District Judge has submitted his reasons for his finding on the facts.

Venkataramana Rao, J.

Venkataramana Rao, J.—I agree.

Patanjali Sastri, J.

Patanjali Sastri, J.—I agree and have nothing to add.

[After the report was received, their Lordships examined the evidence and held:]

* * * *

In these circumstances we agree with the learned District Judge and give a finding under S. 103 of the Code of Civil Procedure in favour of the fourth appellant.

The result is that the plaintiffs-respondents will get a declaration that so far as the B schedule properties are concerned the sale does not affect the position of the first respondent as mortgagee, but in other respects their suit will be dismissed. The parties will receive and pay proportionate costs throughout.

S.V.V. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Krishna Reddy v. Satyam.

Vanga Krishna Reddy .. *Petitioner* (1st Defendant)*

v.

Kosana Peda Satyam and others .. *Respondents.*

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* C. M. P. No. 235 of 1941. 12th March, 1941.

Krishna Reddy *v.* Satyam.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 14 (1)—Office of village blacksmith—Devolution by custom on minors—Suit for recovery of emoluments of office—Claim to mesne profits for more than three years before suit—Jurisdiction of Revenue Court—Limitation Act (IX of 1908), S. 6—Applicability.

The office of village blacksmith had devolved in accordance with custom on the plaintiffs notwithstanding that they were minors. In a suit by them for the recovery of the lands forming the emoluments of the office in the Court of the Sub-Collector a decree was passed for the possession of the lands and for mesne profits for the years 1931-1939 inclusive. In *certiorari* proceedings to quash the decree so far as it granted mesne profits for more than the three years immediately preceding the suit,

Held, that as the plaintiffs were never disqualified by reason of their minority for holding the office and S. 6 of the Limitation Act did not apply the Collector had no power to grant the plaintiffs a decree for mesne profits for a period greater than three years.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling upon the Sub-Collector, Rajahmundry and the District Collector of East Godavari the third and the fourth respondents therein to submit all the records in S. S. No. 21 of 1939 and S. A. No. 8 of 1940 on their respective files and to quash the judgment and decree therein as passed without jurisdiction so far as it relates to past mesne profits for 1931 to 1937.

Kasturi Seshagiri Rao and *D. Suryaprakasa Rao* for Petitioner.

G. Chandrasekhara Sastry for Respondents.

The Order of the Court was pronounced by

Leach, C.J.

The Chief Justice.—The petitioner was the first defendant in a suit brought by the first and second respondents, in the Court of the Sub-Collector of Rajahmundry for the recovery of lands forming the emoluments of the office of village blacksmith in the village of Arikirevula which is in the East Godavari District. The plaintiffs-respondents obtained a decree for the possession of the lands and for the payment to them of an amount representing the mesne profits for the years 1931-1939 inclusive. The petitioner says that the Revenue Court had no power to grant to the plaintiffs-respondents a decree for mesne profits for more than the three years immediately preceding the suit, and he asks the Court in *certiorari* proceedings to quash that part of the decree which is in excess of the trial Court's jurisdiction.

Krishna Reddy v. Satyam.

Leach, C. J.

It has been found, and is now accepted to be the case, that the office of the village blacksmith devolved in accordance with custom on the plaintiffs-respondents, notwithstanding that they were minors. The office of village blacksmith appears in the list of village offices set out in sub-S. (4) of S. 3 of the Madras Hereditary Village Offices Act, 1895. S. 10 (1) states that a person shall not be eligible for appointment to one of the offices in the list given in sub-S. (1) of S. 3, unless he has attained the age of majority, but this provision is not applied in respect of offices falling within S. 3 (4). Succession to the offices mentioned in S. 3 (4) is governed by the provisions of S. 12, which says that succession to such offices shall devolve " in accordance with the law or custom applicable thereto at the date on which this Act comes into force." As already indicated custom allows the office of the village blacksmith to devolve upon a minor, and at all material times the plaintiffs-respondents have been the holders of this office and entitled to the lands forming its emoluments. There has been a specific finding to this effect. It appears that the plaintiffs-respondents were registered as persons entitled to succeed to the office, apparently under the mistaken idea that the procedure contemplated by S. 10 (5) applied. Registration was not necessary in this case, but the fact that the names of the plaintiffs-respondents were registered does not in any way affect their legal position.

The petitioner relies on S. 14 (1), which reads as follows:—

"No suit preferred before a Collector under the last preceding section shall be entertained which is not preferred within three years from the date of the cause of action arising, whether such date be before or after the commencement of this Act:

Provided that, in the case of a person who, by reason of minority, was disqualified for holding office, the right to sue for such office or for the recovery of the emoluments thereof shall accrue from the date of his attaining majority."

S. 13 contains provisions relating to suits for the recovery of offices and of their emoluments and this is a suit of that nature. By reason of the first clause of S. 14 the Collector is prohibited from entertaining any such suit unless it has been preferred within three years from the date of the cause of action. If the cause of action accrued more than three years before the presentation of the plaint the Revenue Court has no jurisdiction to try it. The proviso to S. 14 (1) does not help

Krishna Reddy v. Satyam.

Leach, C.J.

the plaintiffs-respondents, as it only applies to the case of a person who by reason of minority was disqualified for holding the office. The plaintiffs-respondents were never disqualified. S. 6 of the Limitation Act does not apply [*see* S. 29 (2) (*b*) of that Act]. For these reasons we are of the opinion that the Collector had no power to grant the plaintiffs-respondents a decree for mesne profits for a period greater than three years. The position is not a very satisfactory one but the Court can only interpret the sections. It is for the Legislative authority to make an amendment if it considers that the Act operates unfairly.

The result is that we quash the decree so far as it awards the plaintiffs-respondents mesne profits for more than three years immediately preceding the suit. The petitioner does not contend that the decree is invalid in other respects and therefore this Court's order will merely be confined to the matter of mesne profits.

The petitioner is entitled to his costs.

K.S. ——— *Decree quashed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

[*In the matter of* the Indian Companies Act VII of 1913
and
In the matter of the Garland Petroleum Co. (Madras), Limited, in liquidation.]

M. F. R. D'Cruz .. *Petitioner**

v.

K. N. Viswanathan (the Official Liquidator) .. *Applicant.*

D'Cruz v. Viswanathan.

Company—Winding up—Uncalled share money, if assets—Preference shareholders—Right to be repaid out of unpaid ordinary share capital.

Uncalled share money upon issued shares at the date of the winding up of a company forms part of the assets of the company.

Preference shareholders being entitled in winding up to return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to repay the preference share capital. Such payment is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares.

Where the Articles of Association provided that "no dividend shall be payable except out of the net profits arising from the business of the company" the preference shareholders are not entitled to be paid any fixed cumulative preferential dividend from out of the unpaid ordinary share capital.

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* Appln. No. 2332 of 1940 in O. P. No. 77 of 1938. 15th November, *1940.*

Application for directions in O. P. No. 77 of 1938. D'Cruz v. Viswanathan.

William Lobo for Petitioner.

Official Liquidator in person.

The Court delivered the following

JUDGMENT.—The capital of the company was Rs. 50,00,000 divided into 1,50,000 7½ per cent. preference shares of Rs. 10 each and 3,50,000 ordinary shares of Rs. 10 each. Of these, 702 preference shares were issued and held by 46 persons representing in the aggregate issued capital of Rs. 7,020 and 13,245 ordinary shares were issued and held by 105 persons representing issued ordinary share capital of Rs. 1,32,450. 68 of the ordinary shares have been fully paid and the remainder are partly paid. The matters which now require decision are as follows:—

1. Whether the holders of the preference shares are entitled to be repaid the amount of their capital out of the calls made upon the ordinary shareholders in respect of the unpaid portion of their share money, and

2. Whether, in addition, the preference shareholders are entitled to a cumulative dividend at 7½ per cent. upon each preference share.

Cl. 5 of the Memorandum of Association, which deals with capital, is as follows:—

"The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up therein respectively and shall have priority as to such dividend and also as to return of capital in the winding up over all other shares in the capital for the time being of the company, but shall not carry any further right to participate in profits or assets. The rights hereby attached to the said preference shares may be modified in accordance with the Company's Articles of Association."

This clause gives to the preference shareholders a priority over the ordinary shareholders to participate in the company's assets and to return of capital, in the case of winding up, over the other shares in the capital of the company. Art. 9 is the only article which has any relevance to the matter now before me, the material portion of which is as follows:

"The Cumulative Preference Shares carry a fixed cumulative dividend at the rate of 7½ per cent. per annum on the capital for the time being paid thereon and shall both as regards dividend and capital rank in priority to the Ordinary Shares but without any further right to participate in the profits or assets."

I do not find any appreciable modification or alteration in the extent of the provisions of Cl. 5 of the Memorandum of Association in Art. 9. It is quite clear that, whatever profits the company might have made, the preference shareholders

D'Cruz *v.* Viswanathan.

would be entitled only to 7½ per cent. dividend upon the amount of their subscribed capital, and before winding up, the annual dividend of 7½ per cent. being cumulative, it would follow that, a preference shareholder would be entitled to look to the company for payment of dividend in respect of any year in which it was not paid, out of any future earnings, the dividend must be paid upon preference shares before the ordinary shares are entitled to receive any benefit. Another matter which is beyond doubt is that if in a liquidation the assets exceed the liabilities and after payment of all the debts and after return of capital invested by the preference shareholders and by the ordinary shareholders a surplus remains, then that surplus will be divisible amongst ordinary shareholders and the preference shareholders will be entitled to no more than the amount of their subscribed capital.

The matter which now requires decision is whether the unpaid portion of the shares held by the ordinary shareholders can be called up to repay to the preference shareholders the amount of their capital. This involves consideration of the question whether the unpaid or uncalled capital upon issued shares forms part of the capital or assets or both of the company. If unpaid share money does form part of the capital and assets, then since under Cl. 5 and Art. 9 preference shareholders are entitled to return of capital in a winding up in priority to all other shareholders, it must follow that, after payment of all the debts, the preference shareholders are entitled to be repaid the amount of their investment out of calls made upon the ordinary shareholders. Counsel on behalf of some ordinary shareholders have informed me that they are unable to find any authority which has decided that unpaid or uncalled share money does not form part of the assets or capital of the company. In my view it does. Supposing a call had been made by the company which was due and paid on the day before the company went into liquidation, that money would form part of the assets of the company. The fact that it has not been called up before the winding up but remains unpaid until the liquidator has exercised his powers under S. 156 of the Companies Act, does not make the unpaid share capital excluded from the assets or capital of the company. In re *Sheppard's Corn Malting Company*: Ex parte *Lowenfield*[1], observations

1. 70 L.T. 3.

D'Cruz *v.* Viswanathan.

are made by learned Lords Justices which are relevant to the matter now to be considered. Lindley, L.J., at p. 5 in the course of his judgment said:

> "I do not think it is possible to read, in this contingency, 'surplus assets' in such a sense as to exclude a call whether or not it is wanted at all."

Davey, L.J., referring to the judgment in the Court below at p. 6, said:

> "I understand the substance of it, but I do not quite understand the form—that the surplus assets do not include uncalled capital. I suppose he means by that, and from his judgment, to say, that surplus assets do not include capital which has been called up, or may be called up, for the purpose of adjusting the rights of the contributories, *inter se*, because undoubtedly the surplus assets conceivably consist wholly of capital which was uncalled at the commencement of the winding up, and had been called during the winding up."

The above observations of the learned Lords Justices express the view that uncalled capital at the date of the winding up does form part of the assets of the company. In *Wakefield Rolling Stock Co.*, In re[1], Vaughan Williams, J., at p. 172 said:

> "It must be remembered that in a winding-up the property of the company includes the uncalled capital, and that the rights arising from unequal contributions on shares of equal amounts must be adjusted out of the property, including uncalled capital, not required to satisfy prior claims."

The preference shareholders being entitled in winding up to return of capital in priority to other shares, in my view it means that unpaid ordinary share capital can be called up to meet the amount required to repay the preference share capital. In cl. 5 it is provided that, except the priority specified, preference shares shall not carry any further right to participate in profits or assets. This makes it clear that in regard to the right specified the preference shares are to participate in the profits and assets of the company. In Art. 9 the words "shall both as regards dividend and capital rank in priority to the ordinary shares but without any further right to participate in the profits or assets" also clearly indicate that to the extent specified preference shares are entitled to priority in the profits and assets. I hold therefore that the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares.

1. (1892) 3 Ch. D. 165.

D'Cruz v. Viswanathan.

A further matter is whether these preference shareholders are entitled to payment of a sum equivalent to 7½ per cent. upon the capital of each share from the date of the issue of the preference share. Cl. 5 of the Memorandum provides that preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up and Art. 9 provides to the same effect. Art. 155 is as follows:

"No dividend shall be payable except out of the net profits arising from the business of the company."

No dividend can be paid unless the company makes profits. This company never made any profits, but always incurred losses. No dividend can therefore be paid. The priority of the preference shares for payment of 7½ per cent. is in regard to dividend. As there were no profits which could justify a dividend, there can be no dividend payable to the preference shareholders. The contention put forward on behalf of the preference shareholders is that each share is entitled to a sum equivalent to 7½ per cent. from the amount of the capital. That would amount to interest being payable each year. Neither the Memorandum nor the Articles provide for any interest. In my view, as there were no profits no dividends could be declared and were not declared; nothing is payable to the preference shareholders in respect of dividend or interest and they are entitled only to repayment of the actual share capital. There will be an order accordingly.

In this application the Official Liquidator seeks authority to draw cheques in favour of the holders of 68 ordinary fully paid shares to make payments to them. In my view, this application is premature. I make no order in regard to that at present.

As regards costs, for counsel for preference shareholder No. 121 I allow a sum of Rs. 50. For the two learned counsel who appeared on behalf of two other preference shareholders they have merely adopted the argument of Mr. Lobo, and I allow Rs. 17-8-0 each. For the two learned counsel for ordinary shareholders I allow Rs. 35 each. This will be payable by the Official Liquidator out of the assets. The Official Liquidator will have Rs. 5 (stamp).

K. S. *Ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Javvadi Narasimhamurti .. *Appellant** (*Plaintiff*)

v.

The Maharajah of Pittapur and another .. *Respondents* (*Defendants*).

Narasimhamurti *v.* Maharajah of Pittapur.

Transfer of Property Act (IV of 1882), S. 53—Alienation in favour of creditor—Consideration partly fictitious—Transaction when to be avoided in entirety—Setting aside fraudulent transfer—Burden of proof.

When a debtor with a view to defeat or delay his creditors colludes with one of those creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to that creditor. on the finding that the transaction as a whole was a collusive transaction intended to defeat or delay creditors, the transaction should be set aside as a whole and the creditor who is a party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby.

Case-law discussed.

Ordinarily speaking when a transaction is attacked under S. 53 of the Transfer of Property Act the burden lies on the attacking party to show in the first instance that the transaction was a fraudulent transaction intended to defeat and delay creditors. When a *prima facie* case has been established on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram dated 31st August, 1937, in A.S. Nos. 10 and 14 of 1937 preferred against the decree of the Court of the District Munsif of Razole dated 11th November, 1936, in O. S. No. 72 of 1935.

M. Appa Row for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises a question under S. 53 of the Transfer of Property Act. The appellant, who was the plaintiff in the Court below, got a small cause decree against the second defendant and in discharge of that decree he got a mortgage from the second defendant for a sum of Rs. 1,000 on 23rd March, 1934. Besides the amount of Rs. 450 which went to discharge the small cause decree, there were two other debts of the second defendant which were purported to have been discharged out of the consideration for the mortgage. These two debts have been found to be fictitious. In a suit of 1931

* S. A. No. 169 of 1938. 11th February, 1941.

Narasimhamurti v. Maharajah of Pittapur.

the first defendant had got a decree for rent against the second defendant and on 8th May, 1934, in execution of that rent decree he attached the property covered by the mortgage in favour of the appellant. Presumably this property was not the property on which the rent decreed fell due, so that there was no question of a first charge for rent. The appellant filed a claim in the execution proceedings on the strength of his mortgage. The claim petition was rejected and hence he had to file the present suit. The first Court found that the mortgage was good to the extent of Rs. 450 which went to discharge the small cause decree, that the other items of consideration were not true and gave a decree that the mortgage was valid and binding to the extent of Rs. 450 only. The lower appellate Court agreed with the findings of fact, namely, that the consideration was true to the extent of Rs. 450 which went to the discharge of the small cause decree but that the balance of Rs. 550 represented fictitious payments, one of which was alleged to have been made by the appellant, the mortgagee, himself. The lower appellate Court also came to the conclusion that the transaction as a whole being in fraud of creditors, it must be declared void as a whole and could not be held valid to the extent to which the money went in discharge of a prior debt due to the mortgagee.

Now in dealing with cases falling under S. 53 of the Transfer of Property Act in which the consideration is held to be partly good, it is necessary to distinguish between certain classes of cases and to remember that S. 53 of the Transfer of Property Act does not apply to transactions which, though supported by good consideration, might in case of an insolvency be impeached as fraudulent preferences. There are three main classes of cases: (1) those in which that portion of the consideration which is true goes to discharge a prior simple debt of the transferee himself (as in the present case); (2) cases in which that portion of the consideration which is true goes to the discharge of a prior mortgage-debt on the property transferred. These cases raise questions of subrogation and, under S. 92 of the Transfer of Property Act as amended in 1929, questions of registration, with which we are not now concerned; (3) cases in which that portion of the consideration which is true goes to discharge prior simple debts due to third parties and not to the transferee. In such cases the transfer cannot be supported by the argument that the transferee is to some extent

getting a payment of his own debt and at the most conniving at what might be considered a fraudulent preference. Although in *Loorthi Odayar* v. *Gopalaswami Aiyar*[1], such a transaction, being in the form of a mortgage, was held to be good to the extent to which the consideration went in discharge of other debts of the transferor, this decision has been criticised in *Appalaraju* v. *Krishnamurthy*[2] and *Muthuvasu Chettiar* v. *Velu Muruga Nadar*[3], and it is doubtful whether it can now be considered good law. A further distinction has been made in some of the cases between fraudulent transfers by way of sale and fraudulent transfers by way of mortgage and there has been a tendency to regard a mortgage which is supported by good consideration only to the extent to which it discharges a prior simple debt due to the mortgagee as standing in a better position than a sale carried out in similar circumstances. This distinction has been by no means universally accepted and it is difficult to see how the general body of creditors are in any better position when the debtor's property is put out of their reach by a mortgage for a consideration which is largely fictitious, than when the same object is achieved by a fraudulent sale.

The appellant relies strongly on the decision of Sundara Aiyar, J., sitting singly in *China Pitchiah* v. *Peda Kotiah*[4]. The facts of that case are not very fully stated, but it appears that the mortgage which was attacked was to a certain extent supported by the discharge of a prior debt to the mortgagee and that the rest of the consideration was fictitious, the debtor being not at the time in a position to pay all his debts. The learned Judge points out that in so far as the mortgage was a fraudulent preference, it does not come within the mischief of S. 53 of the Transfer of Property Act and he seems to draw a distinction between a simple mortgage the effect of which is to give the real creditor only a security for his true debt, though fictitious debts are joined along with the true debt and a similar case where the transaction is in the nature of a sale or a mortgage with possession. The learned Judge states that the plaintiff's claim is only that of a simple mortgagee and his claim is simply to recover his money and the fact that the mortgage is for an amount larger than he really paid, could be no reason for not upholding it to the extent that it is supported by a debt

1. (1923) 46 M.L.J. 125.
2. (1931) 34 L.W. 949.
3. (1939) 2 M.L.J. 362.
4. (1911) I.L.R. 36 Mad. 29.

Narasimhamurti v. Maharajah of Pittapur.

existing at the date of the mortgage and the learned Judge distinguishes *Chidambaram Chettiar* v. *Sami Aiyar*[1], as being a case of sale. Sundara Aiyar, J.'s decision has been referred to frequently in subsequent cases of this Court. In some of those cases it has been merely differentiated on the ground that it relates to a mortgage held to be in part a fraudulent preference and has no bearing on cases of a sale—*cf. Muthuvasu Chettiar* v. *Velu Muruga Nadar*[2]. In *Sama Row* v. *Doraisami Chettiar*[3], the case is distinguished on the ground that there was no finding of any collusion between the mortgagor and the mortgagee whereby the fictitious sum was to be held by the mortgagee to defeat the creditors of the mortgagor; and though the facts in *Sama Row* v. *Doraisami Chettiar*[3], are almost identical with those in *China Pitchiah* v. *Peda Kotiah*[4], the learned Judges, on a clear finding that there was collusion, hold that the mortgage though supported by prior debts to the mortgagee to the extent of more than half of the consideration was a fraudulent transfer taken as a whole and could not be split into two transactions one of which was good and the other was bad. A similar view was taken by the Bench which decided *Rajabhadar Mudaliar* v. *Thiruvengada Mudaliar*[5], which was also a mortgage case and the learned judges observed that if it is proved satisfactorily that only a portion of the consideration recited in the document did really pass, it is open to the Court to come to the conclusion that the transaction was intended to defeat or delay creditors and that in such a case, the proper order of the Court should be to set aside the transaction as a whole, because a transaction which is intended to defeat or delay creditors cannot be good in part and bad in part. This decision does not actually refer to the ruling in *China Pitchiah* v. *Peda Kotiah*[4], though the reasoning of the decision must be deemed incompatible with that case. In *Visvanatha Reddi* v. *Venkata Reddi*[6], the learned Judges had to deal with a case of a sale for Rs. 2,000 which was supported by good consideration only to the extent of Rs. 500 and in dealing with the case in *China Pitchiah* v. *Peda Kotiah*[4], they observe:

" If the learned Judge meant to lay down that in all cases where a mortgagee paid only a portion of the consideration that he should be given

1. (1906) 16 M.L.J. 427: I.L.R. 30 Mad. 6.
2. (1939) 2 M.L.J. 362.
3. (1912) 24 M.L.J. 266.
4. (1911) I.L.R. 36 Mad. 29.
5. A.I.R. 1928 Mad. 20.
6. A.I.R. 1927 Mad. 278.

Narasimhamurti v. Maharajah of Pittapur.

a decree for that portion on the footing of that mortgage, with due respect, we are unable to agree. If a person who is in embarrassed circumstances in order to shield his property from his creditors transfers it to another and if only a portion of the considertion recited in the document of transfer is paid and the balance is left with the transferee for his benefit and if this is done to the knowledge of the transferee, then the transaction is one coming under S. 53. . . . . . Where the transfer is bad under S. 53, the transferee is not entitled as a matter of right to get a mortgage decree for the amount actually paid by him. The decision in *China Pitchiah* v. *Peda Kotiah*[1], is opposed to the decisions of this Court as well as of the Privy Council."

The case in *Ponnuswami Pillai* v. *Quadir Mohideen Rowther*[2], was one of an usufructuary mortgage with a provision for the transaction to be treated as a sale if the money was not repaid within five years. Of the consideration for this deed, part was due to the mortgagee himself and it was held that this sum and one other item of consideration was true, but that the rest was fictitious and that the whole transaction was intended to defraud creditors. The learned Judges consider the leading cases including the decision in *China Pitchiah* v. *Peda Kotiah*[1], and hold that the decision in *Chidambaram Chettiar* v. *Sami Aiyar*[3], which was confirmed by the Privy Council in *Chidambaram Chettiar* v. *Srinivasa Sastrigal*[4], establishes that where a transaction is intended to defeat and delay creditors, the mere fact that a portion of the consideration was paid is no ground for not setting aside the transaction entirely and that in such a case the whole transaction has to be set aside. They also observe that the trend of authority clearly is in support of the view that unless there is a previous charge or mortgage which has been paid off, the mere fact that a portion of the consideration has been proved to have been paid is no ground for supporting a transaction entered into to defeat or delay creditors as valid to the extent of the consideration actually paid. It is true that this was not a case of a simple mortgage. But the general pronouncement of the law on the subject is quite inconsistent with the view taken by Sundara Aiyar, J., in *China Pitchiah* v. *Peda Kotiah*[1].

It must, I think, be taken as established so far as Madras is concerned that when a debtor with a view to defeat or delay his creditors colludes with one of those creditors and creates a

1. (1911) I.L.R. 36 Mad. 29.
2. (1930) M.W.N. 1145.
3. (1906) 16 M.L J. 427: I.L.R. 30 Mad. 6.
4. (1914) 26 M.L.J. 473: I.L.R. 37 Mad. 227 (P.C.).

Narasimhamurti v. Maharajah of Pittapur.

mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to that creditor, on the finding that the transaction as a whole was a collusive transaction intended to defeat and delay creditors, the transaction should be set aside as a whole and the creditor who is a party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby.

It is contended that even assuming so much, there should be a finding that the mortgagee was a party to the fraud. Now, ordinarily speaking, when a transaction is attacked under S. 53 of the Transfer of Property Act, the burden lies upon the attacking party to show in the first instance that the transaction was a fraudulent transaction intended to defeat and delay creditors. When a *prima facie* case has been established on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration. In *Narayana Pattar* v. *Viraraghavan Pattar*[1], which is a mortgage case similar to the present case, the learned Judges observed:

> "We think that the inclusion of such debts (that is fictitious debts) in a document which would otherwise not be within the section, is *prima facie* evidence of an intention to defeat or delay the creditors, and it would lie upon the parties who wish to take advantage of the document to show that there was no such intention."

Now in the present case it has been found that out of a consideration of Rs. 1,000, Rs. 450 represented a good debt due to the transferee and the balance was made up of two fictitious debts, one of which is alleged to have been discharged by the transferee himself and it is found that the evidence of this alleged payment by the mortgagee is not true evidence and that the transaction as a whole was intended to defeat and delay creditors. In the face of such findings, it seems to me impossible to contend that the mortgagee was an innocent party who played no part in the fraud, except in so far as he secured the payment of his own debt. When once it is established that the mortgagee has set up as true an item of consideration which to his knowledge was false and that the transaction as a whole was intended to defeat and delay creditors, the inference is irresistible that the mortgagee himself was a party to this

1. (1899) I.L.R. 23 Mad. 184.

scheme of fraud. It follows therefore that even assuming that it is necessary to prove that the mortgagee was an active party to the scheme of fraud, the findings in the present case make such an inference irresistible. Narasimhamurti v. Maharajah of Pittapur

In the result, therefore, I agree with the conclusion of the lower appellate Court and dismiss the appeal with costs. (One set of costs for the two appeals before the lower appellate Court.)

Leave refused.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Bhuloganatham Pillai and others ... *Appellants** (*Defendants*)

v.

Rajagopala Pillai and another ... *Respondents* (*Plaintiffs*).

Tort—Nuisance—Suit for injunction—Averment of special damage to plaintiff to support his claim—Necessity.

Bhuloganatham Pillai v. Rajagopala Pillai.

Even where the erection of a wall across a public road constitutes a nuisance to the plaintiffs and therefore there will be special damage, it will still be necessary for the plaintiffs to aver in their plaint that they have suffered special damage and make it the basis of their claim for relief.

Appeal against the order of the District Court of South Arcot dated the 25th August, 1939 and made in A.S. No. 76 of 1938 preferred against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 718 of 1936.

S. Ramachandra Aiyar for Appellants.

S. Panchapagesa Sastri and *P. S. Ramachandran* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The respondents instituted a suit in the Court of the District Munsif of Chidambaram for the issue of a mandatory injunction against the appellants requiring them to remove a wall which they have built close to the respondent's house. The wall is six feet high and according to the respondents it has been built across a public road. The respondents say that as the result of the obstruction to the road they are unable to approach their house from the left and the enjoyment of their property has been seriously interfered with.

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* A. A. O. No. 436 of 1939. 20th March, 1941.

Bhuloganatham Pillai v. Rajagopala Pillai.

Leach, C.J.

They have not stated all this in the plaint, but have left it to be inferred from a plan which they filed with the plaint. If the respondents' allegations are true, there can be no doubt that the appellants' action does seriously affect them as the owners of the house, and therefore they have suffered special damage. Before the District Munsif the appellants raised the plea that the suit could not be maintained because the respondents had not expressly averred special damage. The appellants succeeded in persuading the District Munsif to accept this plea and dismiss the suit.

The respondents appealed to the District Judge of South Arcot, who reversed the judgment of the District Munsif and remanded the case to the District Munsif for trial on the merits. In adopting this course the District Judge relied on the decision of this Court in *Munusami* v. *Kuppusami*[1]. In that case Wadsworth, J., held that the judgment of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*[2] had established that the English rule requiring special damage to be shown in an action by a member of the public for the removal of an obstruction to a public way does not apply in India. The appellants contend that Wadsworth, J., has not correctly interpreted the judgment of the Judicial Committee and they ask that the decision of the District Munsif be restored.

In *Manzur Hasan* v. *Muhammad Zaman*,[2] the Privy Council held that a civil suit for a declaration lies at the instance of a private individual against those who interfere with a religious procession or its appropriate observances when the procession is passing along a public street and does not interfere with the use of the street by the public and complies with the lawful directions of the Magistrates. In that case the Judicial Committee considered the decisions of this Court in *Parthasarathi Iyengar* v. *Chinnakrishna Aiyangar*,[3] and *Sadagopachariar* v. *Ramarao*,[4] in which it was held that a civil suit lies against those who prevent a religious procession passing along a public highway, without the necessity of proving special damage. Their Lordships also considered the decision of the Bombay High Court in *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*[5],

1. (1939) 1 M.L.J. 392: I.L.R. (1939) Mad. 870.
2. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).
3. (1882) I.L.R. 5 Mad. 304.
4. (1902) I.L.R. 26 Mad. 376.
5. (1877) I.L.R. 2 Bom. 457.

Bhuloga-natham Pillai *v.* Rajagopala Pillai.

Leach, C.J.

where it was held that a civil suit does not lie in such a case without proof of special damage. Their Lordships accepted the opinion of this Court as being the correct one.

In the Bombay case the plaintiffs who were Muhammadans had sued to establish their right to carry tabuts in procession along a public road and alleged that the defendants had obstructed them. The plaintiffs did not allege any personal loss or damage caused to them by the action of the defendants and it was held that in those circumstances the suit could not be maintained. The remedies provided by the English law in the case of a public nuisance were discussed at length and the decision was based on the English rule that there must be special damage averred and proved before a private individual can be granted an injunction in such a case. The judgment of the Board was delivered by Lord Dunedin who with reference to the Bombay decision said:

"The judgment really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action.

In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India."

The Calcutta High Court in *Mandakinee Debee* v. *Basanta Kumaree Debee,*[1] and the Lahore High Court in *Municipal Committee, Delhi* v. *Mohammad Ibrahim,*[2] have interpreted this passage as meaning that the English rule ought never to be applied in India and as already indicated Wadsworth, J., has come to the same conclusion. In *Chowdhury Bibhuti Narayan Singh* v. *Maharaja Sri Guru Mahadev Asram Prasad Sahi Bahadur,*[3] a Bench of the Patna High Court arrived at a different conclusion. It was there held that the English rule had not been rejected except in cases relating to religious processions along public streets. In delivering the judgment of the Bench, Meredith, J., stated that if the matter ever came up for decision before the Privy Council again it would be pointed out that the decision of their Lordships in *Manzur Hasan* v. *Muhammad Zaman,*[4] was limited

" to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage."

1. (1933) I.L.R. 60 Cal. 1003. 2. (1934) I.L.R. 16 Lah. 517.
3. (1940) I.L.R. 19 Pat. 208.
4. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P. C).

Bhuloganatham Pillai v. Rajagopala Pillai.

Leach, C.J.

It is not necessary for the purpose of disposing of the present appeal to decide whether the passage quoted from the judgment of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*[1] applies to all suits relating to public nuisances but even if it were necessary we should not feel disposed to indulge in prophecy. It is here abundantly clear that if the respondents' allegations are correct, the wall erected by the appellants must constitute a nuisance to the respondents. We have been told that in England it has been held that because a person is compelled to go a longer way round by reason of an obstruction in a public street it does not follow that he has suffered special damage. It is not necessary to consider such a case, nor is it necessary to consider whether the law was correctly interpreted by this Court in *Siddeswara* v. *Krishna*,[2] because there can be no doubt that if the facts alleged in the present case are true, the wall will interfere with the enjoyment of the respondents' house and therefore there will be special damage. The respondents are, however, in error in not averring in their plaint that they have suffered special damage and making this the basis of their claim. We are told that when the case was before the District Judge on appeal from the decision of the District Munsif the respondents asked for permission to amend their plaint in this respect, but the District Judge did not consider it necessary to deal with the application because in his opinion the decision of Wadsworth, J., in *Munusami* v. *Kuppusami*,[3] was sufficient for the respondents' case. The application for leave to amend has been renewed in this Court and we consider that it should be granted. The respondents will be allowed to incorporate suitable amendments on the presentation of a formal application to amend.

For the reasons we have indicated the appeal fails and will be dismissed with costs.

K. S. *Appeal dismissed.*

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1. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).
2. (1890) 1 M.L.J. 321: I.L.R. 14 Mad. 177.
3. (1939) 1 M.L.J. 392: I.L.R. (1939) Mad. 870.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Chidambaram Pandaram ... *Appellant** (*Petitioner-4th Defendant*)

v.

Lakshminarayana Chettiar ... *Respondent* (*Respondent-Decree-holder*).

Chidambaram Pandaram *v.* Lakshminarayana Chettiar.

Civil Procedure Code (V of 1908), O. 21, r. 90—Application to set aside sale—Security demanded after admission of petition—Dismissal of petition on ground of security not having been furnished—Whether orders passed with jurisdiction.

Where an application to set aside a sale under O. 21, r. 90, Civil Procedure Code, was dismissed on the ground that the security required to be furnished by an order made earlier but after the admission of the petition had not been furnished,

Held, that since the order to furnish security was passed without jurisdiction because of the fact that only after admitting the petition under O. 21, r.90 a demand for security was made and not before as required under the rule, the order for security itself at the later stage was wrong and therefore the order dismissing the application to set aside the sale, on the ground of security not having been furnished was also wrong.

Appeal against the order of the Court of the Subordinate Judge of Coimbatore dated the 14th November, 1939 and passed in E. A. No, 832 of 1939 in E. P. No. 292 of 1938 in O. S. No, 79 of 1936.

A. C. Sampath Aiyangar for Appellant.

T. S. Anantaraman and *C.D. Venkataramanan* for Respondent.

The judgment of the Court was delivered by

Pandrang Row. J.

Pandrang Row, J.—This is an appeal from the order of the Subordinate Judge of Coimbatore dismissing an application to set aside a sale under O. 21, r, 90, Civil Procedure Code, on the ground that the security required to be furnished by his order made a few days earlier, had not been furnished. The only ground taken in this appeal is that the order of the Subordinate Judge requiring security to be furnished is itself without jurisdiction and therefore the order dismissing the petition to set aside the sale on the ground that the security has not been furnished is wrong.

There is no doubt that in this case the learned Subordinate Judge did not bear in mind that under O. 21, r. 90 the Court

* C.M.A. No. 540 of 1939. 26th March, 1941.

Chidambaram Pandaram v. Lakshminarayana Chettiar.
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Pandrang Row, J.

could demand security only before admitting the application and not afterwards. In this case it is clear from the endorsements made on the petitions that notice was ordered in both the petitions, that is the petition to set aside the sale and also the petition to dispense with security and the Advocate on the other side was actually heard before orders were passed in both the petitions. It cannot therefore be said that either of the petitions had not been admitted. Usually and rightly the issue of a notice to the other side is regarded as a step showing that the petition has been admitted and certainly the actual hearing of the other side before orders are passed is only making the matter more certain. It is quite possible of course that the lower Court did not intend really to admit the petitions, but if in law the procedure adopted by it has necessarily the effect of having brought about the admission of the petitions, it is not possible for us now to regard them as not having passed the admission stage when the order to give security was made. We must therefore uphold the appellant's contention that the order requiring security was one passed without jurisdiction and that accordingly the order dismissing the application on the ground that security had not been furnished is wrong and must be set aside. The appeal is accordingly allowed and the petition remanded to the Court below for being heard according to law. The appellant is entitled to his costs of this appeal from the respondents.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Insolvency Jurisdiction.]

PRESENT:—MR. JUSTICE SOMAYYA.

In the matter of S.P.S.A.L. Ramaswamy Chetty, an Insolvent.

Ramaswamy Chetty, *In re.*

Insolvency—Official Assignee—Incurring of costs—Whether as between himself and estate the Official Assignee to pay costs personally—Ordinary Court's jurisdiction limited in deciding the matter.

The Official Assignee in the City of the Madras or the Official Receiver in the mofussil is an officer of Court discharging his function to the best of his ability. They ought not to be made personally liable for costs as between them and the estate which they represent unless they are guilty of gross misconduct in taking the action which they take. Where the Official Assignee or the Official Receiver is a defendant or respondent and is not guilty of gross misconduct in his defence, the usual rule ought to be that the costs should come out of the estate. In any case it is for the Insolvency Court of

* I. P. No. 419 of 1932. 10th January, 1941.

which he is the officer to say whether he ought to debit it against the estate or not and the Court trying the suit or application has no jurisdiction to say anything on the matter.

Pitts v. *La Fontaine*, (1880) L.R. 6 A.C. 482, followed.

In cases where the Official Assignee or Official Receiver is a defendant and he does not appear, no costs ought to be given against him personally.

Dansk Rekylriffel Syndikat Aktieselskab v. *Snell*, (1908) 2 Ch. 127 and Ex parte *Stapleton*: In re *Nathan*, (1875) L.R. 10 Ch. 586, followed.

Balakrishna Menon v. *Uma*, (1928) 55 M.L.J. 873: I.L.R. 52 Mad. 263 at 267, relied on.

Official Assignee (V. Thiagaraja Aiyar) in person.

The Court delivered the following

JUDGMENT.—The decree in O. S. No. 13 of 1925 was being executed by the Official Assignee of Madras in the Sub-Court of Devakottah. Meanwhile another person who obtained a decree in O. S. No. 56 of 1931 brought certain properties to sale in execution of his decree. Some properties were sold in execution of that decree and the deposit of one-fourth of the purchase money was made on 23rd September, 1940. Mr. R. Rama Aiyar, Advocate, Devakottah, who was appearing for the Official Assignee of Madras wrote on 24th September, 1940, intimating the proceedings in O. S. No. 56 of 1931. He advised the Official Assignee that an application for rateable distribution must be filed and stated that the matter was urgent. This was in view of the fact that the application for rateable distribution, if any, should be filed before the purchaser paid the balance of the purchase money into Court. On 26th September, 1940, the Official Assignee sent the necessary papers and the application was filed in the Sub-Court of Devakottah. In the course of the hearing of that application it transpired that at a prior stage in the course of execution of the decree in O. S. No. 56 of 1931, the judgment-debtor gave a charge to the decree-holder over some of the properties for the purpose of obtaining time for payment of the decree amount. It was those properties that were brought to sale and the money in Court represented the sale proceeds of those properties. Taking the view that the proceeds realised from the sale of those properties were not available for the purpose of rateable distribution under S. 73, Civil Procedure Code, the Subordinate Judge rejected the application of the Official Assignee with costs. Then he made the following direction:—

"Having regard to the facts of this case, I think that I must also state in this application that the costs of this application shall not be debitable to the estate of the insolvent whom the petitioner is said to represent."

Ramaswamy Chetty, *In re.*

The Official Assignee after getting the necessary information from his advocate files this report and requests that he should be authorised to pay the costs which he himself incurred and which he was directed to pay to the opposite side in this application from out of the estate which he represents. I see absolutely no justification for the direction made by the Subordinate Judge. Further I doubt very much whether he had any jurisdiction to make this direction. The Official Assignee in the City of Madras or the Official Receiver in the mofussil is an officer of Court discharging his function to the best of his ability. Some are salaried officers and some are remunerated otherwise. They ought not to be made personally liable for costs as between them and the estate which they represent, unless they are guilty of gross misconduct in taking the action which they take.

When the Official Assignee or the Official Receiver files a suit in a Court other than the Insolvency Court of which he is the insolvency officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case, the plaintiff or the applicant, that is, the Official Assignee or the Official Receiver is always personally liable for costs. Before filing the suit or the application he ought to see whether there are funds in the estate and in cases where there are no funds, it is his duty to take an indemnity from someone before filing the suit or the application. Even in such cases the Court trying the suit or the application may say that the costs should come out of the estate, but unless it is so said, the plaintiff or the applicant will always be personally liable to the successful party.

But where the Official Assignee or the Official Receiver is a defendant or a respondent, the position is different. In such a case he has to defend the action or at least to put the plaintiff or the applicant to proof of his claim and to watch the proceedings to see that the claim is properly proved. In such a case there is no justification whatever for the Court to make the Official Assignee or the Official Receiver personally liable to the plaintiff. Even if he had remained *ex parte* some costs would have to be paid to the plaintiff or the applicant and that can only be out of the estate. So where the Official Assignee or the Official Receiver appears and is not guilty of gross mis-

conduct in his defence, the usual rule ought to be that the costs should come out of the estate. Ramaswamy Chetty, *In re.*

In any case the Court before which the suit or the application comes on, has no jurisdiction to say whether the Official Assignee or the Official Receiver should or should not debit it as against the estate which he represents. That is a matter for the Insolvency Court of which he is the Officer. It is not merely the costs payable to the other side that are involved. He incurs some expenses in addition to those which he is obliged to pay to the other side. Even where he is successful, what he gets from the other side may not represent all that he spends. In all those cases, the usual rule is that he is entitled to debit it to the estate which he represents. In cases where his action is grossly unfair and loss is occasioned to the estate by his negligent conduct, there is ample provision in the Insolvency Act to make the Official Assignee or the Official Receiver personally liable for all the loss caused to the estate by his negligence or misconduct. But that is for the Insolvency Court to say whether he ought to debit it against the estate or not. The Court trying the suit or application has, in my opinion, no jurisdiction to say anything on this matter.

In *Pitts* v. *La Fontaine*[1], the Judicial Committee said:—

"In an action at law a trustee in bankruptcy would be liable in the same way as any other plaintiff. In a case where a trustee makes an application, the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid. . . . .

In every case of that kind, of course, the question may arise whether the trustee, having had to pay costs to the party aggrieved by an unsuccessful and improper claim, may not, if he has acted *bona fide*, have a case for recouping himself out of the bankrupt's estate if there are funds. *That is a question to be determined in a Court of Bankruptcy in an administration of the bankrupt estate.* Any order of their Lordships here against La Fontaine would, of course, leave that question open. It is a question with which their Lordships have nothing to do and on which they express no opinion. But it is clear that, whatever La Fontaine's rights in that respect may be, it affords no reason for depriving Mr. Pitts of that which the order gave him and gave him, consistently with the general law."

In cases where he is a defendant and he does not appear, no costs ought to be given against him personally. In *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*[2], the Court of Appeal laid down that where the trustee in bankruptcy is a defendant,

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1. (1881) 6 A.C. 482. 2. (1908) 2 Ch. 127.

Ramaswamy Chetty, *In re.*

costs ought not to be given against him personally:

"In the present case, the matter is additionally complicated by the fact that the defendant Snell became bankrupt, and the proceedings were ordered to be carried on as against his trustee in bankruptcy, but the trustee entered no appearance. Under those circumstances I think the costs ought not to be given against him personally."

The reason is also obvious. He is brought into Court against his wish and he does not take any part in the proceedings other than watching the proceedings. In a case where he is made a defendant, the proper thing for the Official Assignee to do is merely to see that the claim is properly proved and to watch the proceedings unless there are funds in the estate to pay the plaintiff's costs or he is indemnified by a creditor to put forward defences and fight the plaintiff. He is entitled and indeed, he is bound in my opinion to appear for the purpose of seeing that the claim is properly proved and if he does no more than that, the principle laid down by the Court of Appeal in the case just referred to should apply. In Ex parte *Stapleton*: In re *Nathan*[1], the Court of Appeal decided that a trustee in bankruptcy who is a respondent to a successful appeal will not be ordered to pay costs personally, that is, if he is only a respondent and not the appellant, even if the appeal succeeds, the order will not be made for costs personally but the order will be for payment of costs out of the estate.

James, L.J., said:

"The order will be for payment of the costs out of the estate, not by the trustee personally. He is not the appellant."

No doubt that is not an inflexible rule, and in a proper case an order for costs against him personally might be made. In re *Neil Mackenzie*: Ex parte *The Sheriff of Hertfordshire*[2], Lindley, M. R., dealing with the request that the respondent who was the trustee in bankruptcy should not be made personally liable said this as regards the decision in Ex parte *Stapleton*: In re *Nathan*[1]:

"I do not think the practice is so settled as that. The Court must consider what is the trustee's right in each particular case. Our order now is that the appeal must be allowed with costs."

Wallace and Thiruvenkatachariar, JJ., pointed out in *Balakrishna Menon* v. *Uma*[3] that when the matter arises not in the Bankruptcy Court but in the ordinary Civil Court, and the

1. (1875) 10 Ch. D. 586.
2. (1899) 2 Q.B. 566.
3. (1928) 55 M.L.J. 873 : I.L.R. 52 Mad. 263.

order is that the plaintiff or defendant (appellant or respondent) is directed to pay costs, it means that he is to pay the costs personally even when he is the Official Receiver but there they were dealing with the construction of an order which had already been passed against the Official Receiver in a civil suit. At p. 267 this is what they say:

" It follows that in a case like the present, in which we are concerned with a decree in an ordinary action, the party mulcted in costs is personally liable for those costs and the Official Receiver is therefore under the decree in question, personally liable for the costs. It is open to him to apply to the Insolvency Court for an order that he may reimburse himself out of the estate. It may, even, be open to him to reimburse himself out of the estate, without an order of the Court; *and, as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.*"

That even a Civil Court may in a proper case order costs to come out of the estate and not pass an order against the Official Receiver personally is recognised on p. 274. So the result is that the ordinary Civil Court may as between the parties to that action give costs against the Official Receiver without limiting it to the estate in his hands. In such a case he will be personally liable whether as a plaintiff or as a defendant. But in doing so, the Courts will be guided by what I have stated above as to the rules which should guide the Court before passing a decree of the one kind or the other. But it is not the province of the Civil Court to say whether the Official Assignee or the Official Receiver can, as between himself and the estate which he represents, take the costs out of the estate or not. In the words of Wallace, J., in the case just referred to:

" It is open to the Official Receiver to reimburse himself out of the estate even without an order of the Insolvency Court and as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs."

The request of the Official Assignee is granted.

K. C. —— *Request granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

A. V. Viswanatha Sastri and others.. *Appellants* (Plaintiffs)*

v.

A. R. Murugappa Chetti and another. *Respondents (Defendants 1 and 2).*

Viswanatha Sastri *v.* Murugappa Chetti.

* L.P.A. No. 77 of 1938. 28th November, 1940.

Viswanatha Sastri *v.* Murugappa Chetti.

Madras City Tenants' Protection Act (III of 1922)—Lease—Clause permitting sub-lease for certain purposes only—Sub-tenants erecting superstructure on land which was not one of the mentioned purposes—Suit for ejectment of sub-tenants—Whether sustainable.

Where a lessee went into possession of the suit properties in 1916 under a registered lease for five years, and the lease though permitting sub-letting of houses and buildings on the land prohibited the lessee from creating other sub-tenancies, and on those terms the leases were renewed from time to time, and in 1931 the third appellant became the lessee, and in the meanwhile certain sub-lessees had erected a superstructure on a part of the vacant land without any objection from their landlords, in a suit for ejectment of the sub-lessees, on the question whether the sub-tenancy could be deemed to have commenced before the Madras City Tenants' Protection Act, 1922, came into force so as to attract its provisions,

Held, that the sub-lessees had failed to show that the tenancy in question had been created before the commencement of the Madras City Tenants' Protection Act, 1922 and that in view of the fact that the sub-tenancy under which they were holding was on the facts to be deemed as created as late as 1934, the suit for ejectment could be maintained without the notice required by S. 11.

Appeal under cl. 15 of the Letters Patent against the judgment of Pandrang Row, J., dated 10th August, 1938 and passed in C.C.C.A. No. 84 of 1935 preferred against the decree of the City Civil Court, Madras, dated 30th September, 1935 and passed in O. S. No. 240 of 1934.

S. Rangachariar for Appellants.

W. S. Krishnaswami Naidu for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellants instituted the suit out of which this appeal arises in the City Civil Court for a decree for the ejectment of the respondents from premises situate in Mottai Gardens, Washermanpet, Madras. The respondents claimed that they were tenants within the meaning of the Madras City Tenants' Protection Act, 1921 and that the suit could not be maintained as the notice required by S. 11 of the Act had not been given. The City Civil Court Judge held that the Act did not apply and decreed the suit. On appeal to this Court Pandrang Row, J., held that the Act did apply and that the plea raised by the respondents was a valid one. Accordingly he allowed the appeal and dismissed the suit with costs. The appellants have preferred the present appeal from the decision of Pandrang Row, J.

In order to appreciate the contentions of the respective parties it is necessary to refer in some detail to the facts. The third appellant is a lessee from the first and second appellants of certain properties, which include the properties in suit. The

Viswanatha Sastri v. Murugappa Chetti.

Leach, C.J.

first and second appellants are the receivers appointed in a partition suit and by an order of this Court passed in 1925 took possession of all the properties from one Kasim Sahib, to whom they had been leased. The properties comprised a market and houses, shops and vacant land in the vicinity of the market. According to the lease deed, there are four blocks of property. The market comprises one block, a house and shops in Venkatakrishnan Street another block, a house and shops in the Tiruvottiyur High Road a third block, and shops and vacant land in Mottai Gardens a fourth block. The four blocks have been referred to in these proceedings and in the partition suit as 'the market.' Kasim Sahib went into possession of the properties on the 5th January, 1916, under a registered deed, which gave him a lease of the premises for five years. Although the contract allowed him to sublet the houses, shops and the stalls in the market, it prohibited him from creating any other subtenancies. He was also prohibited from converting the existing buildings and from erecting fresh ones. This lease was renewed for a period of three years on the 5th January, 1921, on similar terms. A further lease for three years was granted on the 27th April, 1924, also on the same terms. The partition suit was filed in 1924, and it involved all the properties leased to Kasim Sahib. When the receivers were appointed they ejected Kasim Sahib for breaches of the conditions of his tenancy, and leased all the properties to three persons of whom the third appellant was one. This lease continued for three and a half years. On the 27th August, 1929, the properties were leased for three years to the third defendant in the suit out of which this appeal arises. On the 1st November, 1931, the properties were leased to the third appellant, who is still the lessee.

In 1917 Kasim Sahib sublet a part of the vacant land in Mottai Gardens to the respondents and they erected thereon a shed for the purposes of storing firewood. They were dealers in firewood. Kasim Sahib had no power to allow the respondent to erect this building, but he did not interfere and he accepted rent from them in respect of it. When the receivers took possession of the property in 1925 no objection was taken to the action of the respondents in erecting this building and they granted a new lease knowing that the lessees would be accepting rent from the respondents in respect of the building. The respondents commenced their occupation in 1927 as the daily

Viswanatha Sastri v. Murugappa Chetti.

Leach, C.J.

tenants of the lessee and throughout have continued in occupation on this basis. On each occasion when a fresh lease was granted the respondents accepted the lessee as their landlord and paid to him the daily rent. The present suit was filed by the appellants in 1934. The question which the Court is called upon to decide is whether the present tenancy of the respondents must be deemed to have commenced before the 21st February, 1922, when the Madras City Tenants' Protection Act came into force. If they are to be deemed to be holding under a tenancy created after the Act came into force it is conceded that they will not be entitled to the benefit of the Act, as S. 1 (3) provides that the Act shall apply only to tenancies of land created before the commencement of the Act. S. 2 (2) states that land does not include buildings, and much has been said as to whether the respondents' tenancy was a tenancy of the land or of the building. It may be taken that the tenancy which was originally created was a tenancy of the land because the plot of which they got possession and in respect of which they paid rent had no superstructure on it at the outset.

We accept the argument advanced on behalf of the appellants that the respondents must be deemed to be in possession under a tenancy created after the Act came into force. A sub-lessee can have no greater rights than his landlord and when the landlord's lease terminates any sub-tenancy created by him ceases to exist. The respondents were originally the sub-tenants of Kasim Sahib, but his lease of the properties terminated in 1925, and with the termination the respondents' sub-tenancy came to an end. On each occasion when a new lease was created there was a new sub-tenancy and the respondents must be deemed to be in possession under a sub-tenancy which commenced on the 1st October, 1934.

Mr. Krishnaswami Naidu has laid great stress on the definition of the word 'tenant' in sub-S. (4) of S. 2 of the Act. The sub-section defines the word 'tenant' as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and as including persons who continue in possession after the termination of the tenancy. The learned advocate says that the respondents derive title from Kasim Sahib, but that is obviously not the case. At one time they did derive title from him, but that title came to an end and they derived title from others after the Act came into operation.

Viswanatha Sastri v. Murugappa Chetti. —— Leach, C.J.

Mr. Krishnaswami Naidu has suggested that he receives help from the words 'includes persons who continue in possession after the termination of the tenancy'. These words would help the respondents if they were now in possession in continuation of the sub-tenancy created by Kasim Sahib, but unfortunately for them that is not the case. In *Ranganatham Chetti* v. *Ethirajulu Nayudu*[1], the Privy Council considered the definition of the word 'tenant' in S. 2(4) and held that to obtain the benefit of the remaining sections of the Act including S. 12, a tenant must show that his tenancy was created before the commencement of the Act. The respondents have failed to show that; in fact the evidence clearly demonstrates that the sub-tenancy under which they are now holding was created as late as 1934.

For these reasons the appeal will be allowed and the decree of the trial Court restored with costs throughout.

Inasmuch as the receivers took no action after Kasim Sahib's interest in the properties had ceased in 1925 and the respondents were allowed to continue in possession on the basis of paying rent to the then lessees we think that six months will be a reasonable time to give them for the removal of the superstructure.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

Thimmappa Chettiar .. *Appellant** (*Nil*)

v.

Thangavelu Chetty and another .. *Respondents* (*Defendant and Plaintiff*).

Thimmappa Chettiar v. Thangavelu Chetty.

Practice—Costs—Assignee from decree-holder impleaded in appeal, actively supporting lower Court's decree—Liability for costs of appeal and of trial.

Where the assignee of a money-decree who was made a party in an appeal against the decree by the defendant, actively supported the decree, an order directing him to pay to the defendant who succeeded in the appeal not merely his costs of the appeal but also of the trial will not be improper.

Ramji Morarji v. *J. E. Ellis and the Standard Oil Company of New York*, (1895) I.L.R. 20 Bom. 167, applied.

Appeal against the decree of the District Court of South Arcot in A.S. No. 221 of 1936 preferred against the decree of

1. (1940) 1 M.L.J. 24: L.R. 67 I.A. 25: I.L.R. (1940) Mad. 172 (P.C.).

* S.A. No. 693 of 1938. 15th April, 1941.

Thimmappa Chettiar *v.* Thangavelu Chetty.

the Court of the District Munsif of Tirukoilur in O.S. No. 51 of 1934.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellant.

S. Venkataraman for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in the suit obtained a decree against the defendant which he assigned to the appellant to whom he was indebted in some sums of money. The appellant was to execute the decree and give credit to the plaintiff in respect of any fruits he obtained from execution. After the assignment the defendant appealed against the decree which had been passed against him. The appellant as the assignee-decree-holder was made a party to the appeal and appeared together with the plaintiff by learned counsel. The defendant's appeal succeeded and in his judgment the learned District Judge directed that the appellant should pay the costs of the appeal and also the costs of the trial Court.

It is against the order for costs against the appellant that he files this appeal. It is contended that as the appellant appeared together with the plaintiff, no order for costs should be passed against him and further as he was not interested in the suit until after the decree, he should not be ordered to pay the costs of the trial. It is conceded that the counsel on behalf of the appellant as well as on behalf of the plaintiff argued the appeal and contended that the decree should stand and should not be vacated. The appellant did everything that he could to obtain the dismissal of the appeal by the defendant and to assert the correctness of the decree which at the time of the hearing of the appeal had been assigned in his favour.

In my view, the order of the District Judge was correct and the appellant should be directed to pay the costs both of the appeal before the learned District Judge and of the trial Court. In *Ramji Morarji* v. *Ellis*[1] in the course of the judgment at p. 171, the view is expressed that, an assignee of a claim in the suit who in view of his assignment is made a party to the suit should be made liable for costs. I respectfully agree with the observation in that case.

1. (1895) I.L.R. 20 Bom. 167.

The result is that this appeal is dismissed with costs of the first respondent.

Leave to appeal is refused.

K.S. *Appeal dismissed.*

Thimmappa Chettiar *v.* Thangavelu Chetty.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Kancherla Veeraswami .. *Appellant* (Petitioner—3rd party auction-purchaser)*

v.

Paramkusam Nammayya and others ... *Respondents (Respondents—Decree-holder and Judgment-debtors).*

Veeraswami *v.* Nammayya.

Civil Procedure Code (V of 1908), O. 21, r. 93—Application for refund of poundage and interest on the purchase-money—Limitation.

An auction-purchaser filed an application under O. 21, r. 93, Civil Procedure Code, for refund of the poundage and interest on the purchase-money, the actual purchase-money having been recovered by him through Court on an earlier occasion. The decision of the first Court setting aside the sale was carried up to the High Court in appeal by not only the auction-purchaser but also by others, and the appeals were disposed of only on 6—10—1937, though the original order setting aside the sale was on 15—11—1934.

Held, that in the circumstances, the date of the appellate Court's decree must be taken as the starting point of limitation and the application for refund of the poundage, etc., was not barred by time.

Appeal against the order of the District Court of East Godavari at Rajahmundry dated the 13th August, 1938 and made in E. A. No. 14 of 1938 in O.S. No. 18 of 1928 on the file of the Court of the Subordinate Judge of Ellore.

K. Kameswara Rao for Appellant.

Respondents not represented.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This appeal raises a question of limitation and it is unfortunate that the respondents do not appear. The Court below has held that the application for refund of poundage and interest on the purchase-money is barred by limitation. The application was by the auction-purchaser under O. 21, r. 93 of the Code of Civil Procedure for refund of the poundage and interest on the purchase-money, the actual

* C. M. A. No. 70 of 1939. 25th March, 1941.

Veeraswami v. Nammayya.
—
Pandrang Row, J.

purchase-money having been recovered by him through the Court on an earlier occasion. Apparently the lower Court was of opinion that Art. 181 applied and that the starting point of limitation was the date on which the sale was set aside by the first Court, even though the decision of the first Court setting aside the sale was carried up to the High Court in appeal by not only the auction-purchaser but also by others, and the appeals were disposed of only on 6th October, 1937, though the original order of the first Court setting aside the sale was on 15th November, 1934. The appellate decision is reported in *Satyanandam* v. *Nammayya*[1]. It is not clear that Art. 181 necessarily applies to a case of this kind and that Art. 182 will have no application. It must be remembered that Art. 181 is what may be called the residuary article because the article reads as follows:—

"Applications for which no period of limitation is provided elsewhere in this schedule or by S. 48 of the Code of Civil Procedure."

It follows therefore that if Art. 182 would apply, Art. 181 cannot. It has been held in some cases that applications for refund in circumstances like these, where a sale is set aside by the Court are in the nature of applications for restitution or, at any rate, applications in execution. For instance in the Full Bench decision in *Macha Koundan* v. *Kottora Koundan*[2], this right of the auction-purchaser to obtain a refund is described as a right to obtain a refund in execution, as distinct from a right to obtain refund by way of a separate suit. The view taken in *Girdhari* v. *Sital Prasad*[3] appears to be undoubtedly a reasonable view even if Art. 181 is considered to be the article applicable, and Art. 182 would not apply. The sale was no doubt set aside by the executing Court, but the matter having been taken up in appeal, the right to apply for a refund could not be said to have become definite or conclusive so long as the validity of the sale remained *sub judice* and pending decision of the appellate Court; on the other hand it seems hardly reasonable to require that the auction-purchaser who has appealed and who desires to contend that the sale is valid should nevertheless be bound to file an application for refund, merely because it is

1. (1937) 47 L.W. 51.
2. (1935) 69 M.L.J. 750: I.L.R. 59 Mad. 202 (F.B.).
3. (1889) I.L.R. 11 All. 372.

possible that more than three years would be taken for the decision of the appeal. On the whole we are of opinion that the more reasonable view to take in a case of this description is to take as the starting point the date of the appellate Court's decree. If so, it follows that the application is not barred by time. The appeal is accordingly allowed and the petition is directed to be restored to file and dealt with according to law. The appellant is entitled to his costs in this Court; the costs in the Court below should be provided for in the revised order of the lower Court.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

M. Ramanathan Chettiar (minor) and another ... *Petitioners* (Petitioners—Defendants 2 and 3)*

v.

Pr. Km. Subramaniam Chettiar ... *Respondent (Respondent—Plaintiff).*

Madras Debt Conciliation Act (XI of 1936), Ss. 9 and 25—Dismissal of application for conciliation with permission to file fresh petition—Fresh petition in pursuance—Stay of execution of decree—If can again be granted.

In dismissing an application for conciliation after it was pending for eight months a Debt Conciliation Board granted in its order liberty to the petitioner to apply again. It was contended that a fresh application filed in pursuance of the liberty given must be treated as a restoration of the previous application and that therefore the debtor was entitled to obtain again an order for stay of execution of a decree against him.

Held, that the distinction between S. 7 and S. 9 would make the permission granted by the Board to apply again, one which the Board had no jurisdiction to grant. Even if the two applications are treated as one, where more than one year has passed without conciliation being effected the petition must according to S. 17 be dismissed. Therefore the debtor cannot obtain again a stay of execution of the decree.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Sivaganga, dated 23rd February, 1940 and made in E. A. No. 114 of 1940 in E. P. No. 126 of 1939 in O. S. No. 94 of 1932.

B. K. B. Naidu for Petitioners.

T. L. Venkatarama Aiyar for Respondent.

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* C. R. P. No. 622 of 1940. 7th April, 1941.

Ramanathan Chettiar v. Subramaniam Chettiar.

The Court delivered the following

JUDGMENT.—This petition raises a question under S. 25 of the Madras Debt Conciliation Act. The facts are that the petitioner applied to the Debt Conciliation Board under the Act in February, 1939. His application was allowed to remain pending for eight months and was then dismissed, the Board granting him in its order of dismissal liberty to apply again. While the first application was pending, stay of execution of a decree against the petitioner was in force. The second application was made in February, 1940, and the petitioner again applied for stay of execution of the same decree. Stay was refused by the learned Subordinate Judge, and the question at issue in this revision petition is whether the learned Judge had any jurisdiction to refuse stay.

It is conceded by the learned advocate for the petitioner in his argument before me that if the application to the Board of February, 1940, is to be treated as a new application in respect of the same debt, no stay can be granted. This has been laid down by Judges of this Court in *Ellappa Chettiar, In re*[1] and in *Roopchand Merlacha* v. *Sha Motaji Mokanaji*[2]. He therefore contends that in effect the application made in February, 1940, having been made under the express permission granted by the Board to renew the previous application, must be treated as if it was a restoration of the previous application and therefore that the rulings which have been cited present no obstacle to his obtaining an order for stay. He has cited in his favour a case decided by Wadsworth, J., in *Roopchand Merlacha* v. *Sha Motaji Mokanaji*[2]. That case dealt with an application which was rejected by the Board under S. 7 as it did not comply with the requirements of Ss. 5 and 6. But as pointed out in the latter decision *Roopchand Merlacha* v. *Sha Motaji Mokanaji*[2], there is a very important distinction between an application dismissed under S. 7 and an application dismissed in the ordinary course under S. 9. The rejection of an application under S. 7, it is expressly provided, shall not preclude the applicant from making a fresh application whereas there is no such provision to be found in S. 9. It does not seem to me therefore that a case which deals with the rejection of an application under S. 7 can be of any assistance to the petitioner in the present petition.

1. (1939) 2 M.L.J. 727. 2. (1940) 2 M.L.J. 283.

This distinction between S. 7 and S. 9 would appear to make the permission granted by the Debt Conciliation Board in dismissing the application a permission which it had no jurisdiction to grant. Even if the Board had jurisdiction to allow a petition to be suspended in this way for an unlimited period it is clear that the effect of their decision in the present case has been to contravene the provisions of S. 17. S. 17 provides that an application must be dismissed if no amicable settlement has been arrived at under S. 14 within twelve months from its date. It will be seen that if the two applications in the present case are treated as one, more than twelve months had actually elapsed from the date when the application was first made to the date when the present petition for stay of execution was put in. On the ground that the Debt Conciliation Board had no jurisdiction to extend the consideration of the application over a period of more than twelve months and also on the ground that on the merits of the case I can see no reason whatever for the granting of any order of stay to the petitioner I refuse to interfere with the decision of the learned Subordinate Judge and dismiss this petition with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Gadde Subbayya ... *Petitioner* (Decree-holder—1st Respondent)*

v.

Raja Kandukuri Venkata Hanumantha Bhushanarao and another. *Respondents (Petitioner and 2nd Respondent).*

Subbayya v. Venkata Hanumantha Bhushanarao.

Madras Agriculturists' Relief Act (IV of 1938), S. 19, Proviso—Applicability—Preliminary mortgage decree affirmed by Privy Council—Application for scaling down—Privy Council if 'Court' and its decision if "decree" within S. 19, Proviso—Costs awarded by Privy Council—Adjustment under S. 19 and entering up of full satisfaction and dismissal of application for final mortgage decree—Revisability—Competency of Provincial Legislature to make laws affecting His Majesty's prerogative rights.

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*C.M.A. No. 408 of 1940 (converted into C.R.P. No. 656 of 1941) and C.R.P. 1270 of 1940 and C.M.P. No. 5982 of 1940. 1st May 1941.

Subbayya *v.* Venkata Hanumantha Bhushanarao.

After a preliminary decree on a mortgage passed in favour of the petitioner had been affirmed by the Privy Council, Madras Act IV of 1938 having come into force, the debtor applied to the Court of first instance for scaling down the decree and the creditor applied for the passing of a final decree. More than twice the amount of principal having already been paid by the debtor, after adjusting all costs (including costs awarded by the Privy Council) full satisfaction was recorded under S. 19 of Act IV of 1938, and the application for final decree was dismissed. The decree-holder filed revision petitions against those orders and also applied in the High Court for payment of costs ordered in his favour by the Privy Council from out of the deposit of Rs. 4,000 made by the debtor as security for costs of the Privy Council appeal.

Held, (*i*) that the dismissal of the application for a final decree for sale being appealable as a decree no revision petition against that order was competent. *Subbalakshmi Ammal* v. *Ramanujam Chetty,* (1918) 35 M.L.J. 552: I.L.R. 42 Mad. 52 and *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah,* (1921) 42 M.L.J. 51, relied on.

(*ii*) that the mortgage suit must be considered to be pending till a final decree under either sub-r. (1) or sub-r. (3) of O. 34, r. 5, C. P. Code, is passed and since the refusal to pass a final decree in this case was based solely on the order made under S. 19 of Act IV of 1938, the decree-holder is not barred from claiming that some balance of amount was due under the preliminary decree.

(*iii*) that it is not correct to regard the Privy Council as a foreign tribunal in relation to appeals preferred from Courts of this Province and an application to scale down a decree passed by the Privy Council has to be made to the Court of first instance (*i.e.*) a Court of this Province. C.M.A. 424 of 1940—(1941) 1 M.L.J. (N.R.C.) 57, distinguished.

(*iv*) that the Privy Council was a 'Court' and its decision a 'decree' properly so called which fell within the purview of Act IV of 1938.

(*v*) that it is competent generally speaking for the Provincial Legislature to make laws affecting His Majesty's prerogative rights except of course in so far as such prerogative rights may be comprised in matters specially excepted. But the prerogative has no concern with the curtailment or modification of the rights of the parties by a local law such as the Agriculturists' Relief Act although such rights may have been ascertained and defined by an order of His Majesty in Council.

(*vi*) that the deposit being merely as security for the costs of the Privy Council appeal and the liability for costs having arisen and been discharged by appropriation of amounts already received in respect of the decree as provided for in S. 19 of the Act the decree-holder can no longer claim any payment and the deposit will have to be returned to the judgment-debtor.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge of Narsapur dated the 23rd January, 1940 and passed in C.M.Ps. Nos. 506 of 1938 and 949 of 1939 respectively in O.S. No. 51 of 1927, etc.

M. Appa Rao and *K. Ramamoorthi* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) instructed by *The Government Solicitor, P. Satyanarayana Rao* and *S. Venugopala Rao* for Respondents.

Subbayya
v.
Venkata
Hanumantha
Bhushanarao.

Patanjali
Sastri, J.

The judgment of the Court was delivered by

Patanjali Sastri, J.—These petitions relate to the petitioner's claim to recover his costs, etc., in Privy Council Appeals Nos. 99 and 100 of 1933 in which a preliminary mortgage decree for Rs. 26,302-3-6 passed in favour of the petitioner was upheld by His Majesty in Council on the 26th September, 1936.

The petitioner applied in C.M.P. No. 949 of 1939 in the lower Court for a final decree for the balance of the amount due under the preliminary decree after giving credit for amounts paid from time to time by the respondent judgment-debtor, and the latter filed I.A. No. 506 of 1938 to scale down the decree under the Madras Agriculturists' Relief Act (hereinafter referred to as the Act). Both these applications were dealt with together and the learned Subordinate Judge finding that sums already paid by the respondent amounted to more than twice the principal amount of the debt after adjusting such payments towards all costs decreed to the petitioner including the costs now claimed directed full satisfaction of the decree to be recorded under S. 19 of the Act and dismissed the application for a final decree. From these orders the decree-holder has preferred these civil revision petitions and he has also filed C.M.P. No. 5982 of 1940 in this Court as an alternative remedy praying that the sum of £138-13-11 awarded as costs by His Majesty in Council be paid over to him out of the deposit of Rs. 4,000 made by the respondent as security for costs of the Privy Council appeals. It may be mentioned here that the only dispute between the parties related to the adjustment of costs of the Privy Council appeals under the proviso to S. 19 of the Act.

Preliminary objections were raised on behalf of the respondent to the maintainability of the civil revision petitions. The dismissal of the application for a final decree for sale being appealable as a decree, it was contended that C.R.P. No. 1270 was incompetent. This objection must prevail as this Court has held in *Subbalakshmi Ammal* v. *Ramanujam Chetty*,[1] and *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah*,[2] that the dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96

1. (1918) 35 M.L.J. 552: I.L.R. 42 Mad. 52.
2. (1921) 42 M.L.J. 51.

Subbayya v. Venkata Hanumantha Bhushanarao.

Patanjali Sastri, J.

of the Code of Civil Procedure. As regards C.R.P. 656 of 1941 it was urged that the refusal of the Court below to pass a final decree having now become final, the petitioner could not be allowed to contend that a balance was still due to him under the preliminary decree as affirmed by the Privy Council. There is no force in this objection. The Court below did not purport to dismiss the suit as, indeed, it could not do, having regard to the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*[1] and it would be open to the petitioner, if he succeeded in this civil revision petition, to ask for a final decree to be made for the balance claimed to be due under the preliminary decree, as the refusal to pass a final decree was based solely on the order made under S. 19 of the Act. Furthermore, it is still open to the respondent to apply for a decree in terms of O. 34, r. 5 (1) of the Code of Civil Procedure, and the suit must be considered to be pending till a final decree under either sub-r. (1) or sub-r. (3) of O. 34, r. 5 is passed. We therefore overrule the preliminary objection.

Turning now to the merits, the petitioner raised two contentions, namely, first, that the Privy Council was not a 'Court' and its decision was not a decree properly so called and did not therefore fall within the purview of the Act; and secondly, assuming that the order of His Majesty in Council was a decree of a Court within the meaning of S. 19 of the Act, the order being one made in exercise of His Majesty's prerogative, the Provincial Legislature had no power to pass any law affecting such order. As these contentions involved questions of general importance in which the Provincial Government might be interested, we directed notice of the petitions to be issued to the Advocate-General and we had accordingly the advantage of hearing his arguments.

On the first point, it is no doubt true that in the case of an appeal to the Privy Council, the Judicial Committee make a report to His Majesty containing their recommendations regarding the disposal of the case and the final order disposing of the appeal is that of His Majesty in Council. But this form is a survival from the past history of the status and function of the Privy Council, and its preservation, doubtless due to the peculiar tendency which has often marked British constitu-

1. (1924) 47 M.L.J. 441: L.R. 51 I.A. 321: I.L.R. 4 Pat. 61 (P.C.).

Subbayya v. Venkata Hanumantha Bhushanarao.

Patanjali Sastri, J.

tional changes of masking them by the retention of the original forms, should not be allowed to obscure the real character and function of the Judicial Committee after its reorganisation by the Judicial Committee Acts of 1833 and 1844. As observed by Field, J., in *Gopal Sahu Deo* v. *Joyram Tewary*[1].

"The essentials of a Court are (*i*) the *actor*, or plaintiff; (*ii*) the *reus*, or defendant; and (*iii*) the *judex*, or judicial power, which ascertains the facts, applies the law, and, if injury has been done, affords a remedy by its officers or otherwise. An examination of the statutes which regulate the Judicial Committee of the Privy Council will show that this tribunal possesses all these essential elements of a Court."

The same view was expressed by their Lordships of the Privy Council in *British Coal Corporation* v. *The King*[2], where after examining the provisions of the statutes referred to above, their Lordships observed:

"It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred."

The petitioner's learned counsel however placed reliance upon the observation in *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy*[3], where their Lordships say that an Order in Council is "not properly speaking the decree of a Court but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council." But this was said with reference to the forms and procedure employed by their Lordships and it was indicated that in substance an Order in Council did no more than "prescribe what shall be the final decree in the cause leaving it to be executed by the ordinary process of the Courts in India." It is worthy of note that O. 45, r. 15 which prescribes the procedure to enforce orders of the King in Council speaks of "the decree passed or order made on appeal to His Majesty." We have therefore no hesitation in rejecting this contention of the petitioner.

The next question relates to the competency of the Provincial Legislature to make laws affecting a decree or order passed on appeal to His Majesty. It was said that an order of His Majesty in Council was an act done in exercise of

1. (1881) I.L.R. 7 Cal. 620 at 626. 2. (1935) A.C. 500.
3. (1872) 14 M.I.A. 465.

Subbayya
v.
Venkata
Hanu-
mantha
Bhushana-
rao.
——
Patanjali
Sastri, J.

His prerogative right and the Provincial Legislature had no power to affect prerogative rights by legislation. In the first place, it is somewhat difficult to see how any royal prerogative can be said to be affected by a provision, which (so far as it is material here) enacts that a judgment-debtor, if he is an agriculturist, shall be entitled to have all payments made or amounts recovered in respect of any decree applied first in payment of the costs decreed to the creditor. In doubting the correctness of the view adumbrated in some decisions in India that an order of His Majesty in Council was not subject to any law of limitation on the ground that, such an order being an act done by virtue of Royal prerogative, it was not competent to the Indian Legislature to prescribe a time limit, for its enforcement, their Lordships observed in the case last mentioned:

" It (the Order in Council) may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence—a matter with which the prerogative has no concern." (p. 493).

It seems to us for a similar reason that the prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of His Majesty in Council.

However that may be, we are clearly of opinion that it is competent, generally speaking, for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. There was some difference of opinion under the Indian Councils Act, 1861, as to whether a Provincial Council had power to affect the prerogatives of the Crown, although this Court held that it had such power after an elaborate examination of the relevant provisions of that Act—see *Bell* v. *The Municipal Commissioners for the City of Madras*[1]. The matter was however placed beyond doubt by S. 84 (1) (*a*) of the Government of India Act, 1915, as amended by the Government of India (Amendment) Act, 1916, and it was settled law before the present Constitution Act was passed in 1935 that a local Legislature had power to make laws affecting the prerogatives of the Crown. This power was of considerable practical importance, for, as observed by Bhashyam Aiyangar, J., in *Bell* v. *The Municipal Commissioners for the City of Madras*[1]:

"If it were otherwise, the powers of the Provincial Legislature to make

1. (1902) 12 M.L.J. 208: I.L.R. 25 Mad. 457 at 480.

laws for the peace, order and good government of the province would be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogative of the Crown in India and the validity of no few enactments of the Provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the royal prerogative" (p. 480).

It would indeed be odd if the new Constitution Act which was passed in response to much political agitation in the country aimed at securing substantially enlarged powers to the Legislatures in India should be found in practice to have deprived them of an important power which they had previously possessed. We see no reason to suppose that this could have been the intention of Parliament and we are convinced on an examination of the relevant provisions that such is not their effect. S. 99 provides that:

"Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State and a Provincial Legislature may make laws for the Province or any part thereof,"

and S. 100 defines and delimits the respective jurisdictions of the Federal and the Provincial Legislatures with reference to the subject-matter of legislation. The legislative authority thus conferred is subject only to "the provisions of this Act" and is otherwise unrestricted. There is no provision which excepts generally the prerogatives of the Crown. It was suggested that S. 110, Cl. (*b*), sub-Cl. (*i*) saving *inter alia* "the sovereignty . . . . of the Crown in any part of India" was such a provision, as a law affecting the prerogative of the Crown affected its "sovereignty". We cannot agree that this term imports the prerogative rights of His Majesty. Prerogative is no doubt an attribute of sovereignty but is not the same thing as territorial sovereignty which alone is saved. On the other hand, we find sub-Cl. (*iii*) of the same provision expressly saving a particular prerogative right of His Majesty, namely, the right to grant special leave to appeal from any Court. The conclusion is therefore irresistible that it is within the competence of the Legislatures in India to make laws derogating from other prerogative rights except of course in so far as such prerogatives may be comprised in matters specially excepted.

In this connection learned counsel for petitioner laid stress on the absence in the new Act of provisions like S. 80-A and S. 84 (1) (*a*) of the earlier Act, and argued that it must be inferred that Parliament did not intend to confer

Subbayya v. Venkata Hanumantha Bhushanarao.

Patanjali Sastri, J.

such power on the Legislatures in India. We cannot attach any significance to the omission of these provisions in the present Act which discloses a totally different scheme with its practically exhaustive enumeration of legislative powers and their distribution among the Central and Provincial Legislatures on a Federal basis. The matters enumerated in the various Legislative Lists in Schedule VII to the Act and the residual powers of legislation provided for in S. 104 cover the entire field of Governmental activities compendiously described as "peace and good government" in S. 80-A of the Act of 1919, while S. 84 (1) (*a*) of that Act was, as pointed by Bhashyam Aiyangar, J., in *Bell* v. *The Municipal Commissioners for the City of Madras*[1], really superfluous and came to be inserted only *ex majore cautela* for reasons connected with the history of constitutional development in this country. It is a well established principle that within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself—*The Queen* v. *Burah*[2], *Hodge* v. *The Queen*[3] and *Croft* v. *Dunphy*[4]. In this connection the weighty observations of their Lordships in the *British Coal Corporation's case*[5], already referred to, should also be borne in mind:

"In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards* v. *Attorney-General for Canada*[6]: 'Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs'."

Another contention was based upon the decision of this Bench in *Santhappa* v. *Sowrappa Holiappa Bulla*,[7] where it was held that the term 'decree' in S. 19 of Act IV of 1938 must be taken to refer to decrees passed by Courts in this Presidency. It was argued that the Privy Council sitting and functioning in London was a foreign tribunal and S. 19 could not therefore apply to decrees passed on appeal thereto. This

1. (1902) 12 M.L.J. 208: I.L.R. 25 Mad. 457.
2. (1878) 3 A.C. 889.
3. (1883) 9 A.C. 117.
4. (1933) A.C. 156.
5. (1935) A.C. 500.
6. (1930) A.C. 124 at 126.
7. C.M.A. No. 424 of 1940—(1941) 1 M.L.J. (N.R.C.) 57.

Subbayya v. Venkata Hanumantha Bhushanarao.

Patanjali Sastri, J.

argument proceeds upon a misapprehension of the effect of that decision. The *ratio decidendi* there was that the procedure provided by S. 19 was inapplicable to decrees passed outside this province as decrees had to be scaled down under that section by Courts which passed them, and the Legislature of this province could not make laws directing Courts in other provinces to scale down decrees passed by them. The position however is entirely different in respect of a decree passed on an appeal to the Privy Council taken from this province, as the application to scale down such decree has to be made to the Court of first instance, that is a Court of this Province (Explanation to S. 20 of the Act read with S. 37 of the Civil Procedure Code). Nor is it correct to regard the Privy Council as a foreign tribunal in relation to appeals preferred from Courts of this Province. The observations of their Lordships in the Canadian case already referred to *British Coal Corporation* v. *The King*[1] are here pertinent:—

"It is said that this class of appeal is a matter external to Canada; emphasis is laid particularly on the fact that the Privy Council sits in London . . . But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal".

It only remains to consider C.M.P. No. 5982 of 1940 and the argument advanced in connection therewith that the petitioner is, in any case, entitled to payment of the costs claimed out of the deposit of Rs. 4,000 made by the respondent in this Court in P. C. A. No. 99 of 1933. The said deposit was made under O. 45, r. 7, Civil Procedure Code, which provides that the applicant shall within the time specified "furnish security in cash or in Government securities for the costs of the respondent." It is thus clear that the deposit in question was made merely by way of security for any liability for costs which might arise in case the appeal failed. Such liability having arisen and been discharged by appropriation of amounts already received in respect of the decree as provided for in S. 19 of the Act, the petitioner can no longer claim any payment and the deposit will have to be returned to the respondent.

1. (1935) A.C. 500 at 521.

Subbayya v. Venkata Hanumantha Bhushanarao. Patanjali Sastri, J.

In the result, all the petitions fail and are dismissed. The petitioner will pay the costs of the first respondent in C.R.P. No. 656 of 1941. Following the Federal Court practice referred to in *Subramanian Chettiar* v. *Muthusami Goundan*[1] we allow no costs to the Advocate-General. We do not think that the case involves any substantial question of law as to the interpretation of the Government of India Act and we decline to certify that it is a fit case for appeal to the Federal Court.

K.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MOCKETT.

Pattu Achi .. *Appellant** (*2nd Defendant*)

v.

V. Rajagopala Pillai (Plaintiff) and others *Respondents* (*Defendants 1, 3 to 5*).

Pattu Achi v. Rajagopala Pillai.

Hindu Law—Adoption—Successive adoptions—Alienation by widow between death of first adopted son and before second adoption—Adopted son's right of suit to set aside—Whether postponed till death of the widow.

On 9th February, 1891, a widow possessing her husband's authority adopted a boy who after becoming a major died unmarried in February, 1907. In 1922 the widow entered into an agreement of partition with *M* (the then nearest male reversioner) under which the estate was divided between them, the intention being that each should have an absolute interest in the allotted portion. It was common ground that the transaction did not operate as a surrender of the estate to *M* and did not bind the reversion. In 1926 the widow adopted one *R* on the strength of the power conferred on her by her husband and with the consent of the nearest sapinda. *R*, after attaining majority, filed a suit to recover the property delivered to *M* in pursuance of the partition of 1922. On the question whether *R's* right to recover the property is postponed until the death or re-marriage of the widow,

Held, that there is no overriding reason why the rule as to the setting aside of unauthorised alienations by a widow, which has been applied in the case of a first adoption should not be applied in the case of a second adoption, made by her after succeeding as heir to the first adopted son and that the adoption of *R* gave him an immediate right to sue to recover the property alienated by the widow.

Authorities discussed and decision of King, J., affirmed.

Appeal preferred under S. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice King, dated 3rd May, 1940 and passed in S. A. No. 518 of 1937—A.S. No. 42

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1. (1941) 1 M.L.J. Suppl. 1.

* L.P.A. No. 17 of 1940. 6th March, 1941.

of 1936, Sub-Court, Mayavaram (O.S. No. 75 of 1934, District Munsif's Court, Mayavaram). Pattu Achi v. Rajagopala Pillai.

K. Rajah Aiyar, K. Venkataramani and *V. Ramaswami* for Appellant.

T. M. Krishnaswami Aiyar and *C.A. Seshagiri Sastri* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This appeal raises a question of importance and also of difficulty relating to the Hindu law of adoption. Venkatachalam Pillai, the husband of the second respondent, died in 1890. No child had then been born to him, but two months after his death his widow was delivered of a still-born female child. Before his death Venkatachalam Pillai authorised his wife to make an adoption in case the child she was expecting should prove to be a female. Although Venkatachalam Pillai indicated a preference for a boy named Pichai Pillai should it become necessary to adopt a son to him it has been found as a fact that the power was of a general nature and conferred authority on the second respondent to make another adoption should the adopted boy die. On the 9th February, 1891, the second respondent adopted Pichai Pillai, who was murdered in the month of February, 1907. Pichai Pillai had attained majority, but was unmarried. On the death of Pichai Pillai the nearest male reversioner to the property which had formed Venkatachalam Pillai's estate was one Muthukumara Pillai. In 1922 the second respondent entered into an agreement of partition with Muthukumara Pillai under which the estate was divided between them, the intention being that each should have an absolute interest in the allotted portion. It is common ground that this transaction did not operate as a surrender of the estate to Muthukumara Pillai and did not bind the reversion. Leach. C.J.

In 1926 the second respondent adopted the first respondent in exercise of the power conferred upon her by her husband. She had also received the consent of the nearest sapinda. On attaining majority the first respondent filed a suit in the Court of the District Munsif of Mayavaram to recover the property which was delivered to Muthukumara Pillai as the result of the partition in 1922. This is the suit out of which the present appeal arises. The defendants were the second respondent, the appellant (the widow of Muthukumara Pillai) and the third,

Pattu Achi *v.* Rajagopala Pillai.

Leach, C.J.

fourth and fifth respondents, who were joined as alienees of the property in suit. The District Munsif held that the adoption of the first respondent was valid, that the partition deed entered into by the second respondent with Muthukumara Pillai was invalid and that the first respondent was entitled to sue for the recovery of the property which had passed to Muthukumara Pillai without waiting for the death of the second respondent. There were other findings, but it is not necessary to refer to them. The appellant appealed to the Subordinate Judge of Mayavaram, who concurred in the findings of the District Munsif. The appellant then appealed to this Court, again without success, but the learned Judge who heard the second appeal (King, J.) gave a certificate under Cl. 15 of the Letters Patent which has permitted of the present appeal.

Mr. Rajah Aiyar, on behalf of the appellant, desired to raise the question of the validity of the first respondent's adoption, but this was not open to him. Whether Venkatachalam Pillai gave his wife oral authority to make a second adoption in the event of the first adopted son dying is a question of fact and the judgment of the Subordinate Judge is conclusive on the point. But even if it were not, the right of the second respondent to make a second adoption cannot be challenged as the second respondent received the consent of the nearest sapinda before she adopted the first respondent. The only question which arises in this appeal is whether the adoption of the first respondent gave him an immediate right to sue to recover the property taken by Muthukumara Pillai under the partition deed, or whether his right of action is postponed until the death or re-marriage of the second respondent. There is no decision of this Court directly bearing on the question and the decisions of other High Courts in India which have bearing cannot be deemed to have settled the law. In these circumstances, it is necessary to consider what are the principles which apply.

When a Hindu dies leaving a widow and no issue, the widow takes the estate as his heir and she has, to use the words of Bhashyam Aiyangar, J., in *Sriramulu* v. *Kristamma*[1]:

> "an absolute right to the fullest beneficial interest in her husband's property for her life and she has a personal interest therein, which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life, or speaking more accurately, for the term of her widowhood."

1. (1902) 12 M.L.J. 197: I.L.R. 26 Mad. 143 at 148.

Pattu Achi v. Rajagopala Pillai.

Leach, C.J.

By adopting a son to her husband a widow divests herself of this estate and the property devolves upon the adopted son unaffected by any alienation made by her, unless made as the result of necessity. In *Sriramulu* v. *Kristamma*[1], Bhashyam Aiyangar, J., sitting with Davies, J., held that by adopting a son to her deceased husband the widow could not defeat alienees of her interest in the property and that the son could not sue to recover possession from alienees until her death or the termination of her widowhood. This decision was, however, overruled by a Full Bench of this Court (Wallis, C.J., and Oldfield and Kumaraswami Sastri, JJ.) in *Vaidyanatha Sastri* v. *Savithri Ammal*[2]. In view of the observations of the Privy Council in the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*[3] and *Bonomali Roy* v. *Jagat Chandra Bhowmick*[4], it was clear that the decision in *Sriràmulu* v. *Kristamma*[1] could not be allowed to stand. In the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*[3], Sir James Colvile in delivering the judgment of the Board said:

"The rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes,"

and this rule was applied by the Judicial Committee in *Bonomali Roy* v. *Jagat Chandra Bhowmick*[4], when deciding a question of limitation. In overruling *Sriramulu* v. *Kristamma*[1], the members of the Full Bench were not detracting anything from what Bhashyam Aiyangar, J., had said with regard to a widow's rights in the estate up to the time of the adoption by her of a son to her husband, but in view of the judgments of the Privy Council in the cases referred to they were bound to decide that by the adoption she divests herself of the estate, which thereupon devolves upon the adopted son unaffected by alienations made by her without necessity.

A Hindu widow has a right of surrendering her interest in her husband's estate in favour of the nearest male reversioner or reversioners, but in *Subbamma* v. *Subramaniam*[5], this Court held that a surrender by a Hindu widow does not affect alienations made by her before the surrender. Such alienations are binding on the reversioners so long as she is alive. In

1. (1902) 12 M.L.J. 197: I.L.R. 26 Mad. 143.
2. (1917) 33 M.L.J. 387: I.L.R. 41 Mad. 75 (F.B.).
3. (1868) 12 M.I.A. 397 at 443.
4. (1905) 15 M.L.J. 267: L.R. 32 I.A. 80: I.L.R. 32 Cal. 669 (P.C.).
5. (1915) 30 M.L.J. 260: I.L.R. 39 Mad. 1035.

Pattu Achi
v.
Rajagopala
Pillai.

Leach, C.J.

Sundarasiva Rao v. *Viyamma*[1], this Court held that the judgment in *Vaidyanatha Sastri* v. *Savithri Ammal*[2], did not affect the validity of the decision in *Subbamma* v. *Subramaniam*[3].

When an adopted son dies and the widow makes a second adoption in pursuance of authority given to her in that behalf the position is not exactly the same as it was when she made the first adoption, because she no longer holds the estate as the heir of her late husband, but as the heir of the deceased adopted son. In *Ramaswami Aiyan* v. *Venkataramayyan*[4], a case in which there was a second adoption, the Privy Council observed:

> " The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety, on which their Lordships give no opinion."

That on the death of the first adopted son the widow holds the estate as his heir is emphasized in *Madana Mohana Deo* v. *Purushothama Deo*[5]. In delivering the judgment of the Board, Viscount Haldane, after pointing out that when Brojo Kishore, the first adopted son, succeeded he became the full owner of the estate from whom heirship must be traced instead of as from the widow's husband, Adikonda, went on to say:

> ". . . . . the widow of the latter was therefore in a different position when she endeavoured to effect the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband Adikonda, which related back to his death. On the second occasion the ownership which had become vested in Brojo Kishore had intervened, and it was only to his estate that she could possibly establish a succession."

As the result of the judicial decisions given since the judgment of the Privy Council in *Ramaswami Aiyan* v. *Venkataramayyan*[4], it is conceded on behalf of the appellant that when the widow lawfully makes a second adoption she again divests herself of her interest in the property, but it is not conceded that the divesting affects alienations made by her after she had gained possession of the property as the heir of her son. It is contended that in the case of a second adoption

1. (1925) 49 M.L.J. 266: I.L.R. 48 Mad. 933.
2. (1917) 33 M.L.J. 387: I.L.R. 41 Mad. 75 (F.B.).
3. (1915) 30 M.L.J. 260: I.L.R. 39 Mad. 1035.
4. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 at 101 (P.C.).
5. (1918) 35 M.L.J. 138: L.R. 45 I.A. 156: I.L.R. 41 Mad. 855 at 859 (P.C.).

the principle stated in *Subbamma* v. *Subramaniam*[1], should be applied. The reasons given for asking the Court to differentiate between a first and a second adoption are these. A son is superior to a widow as an heir and when a widow makes a fresh adoption she is creating an heir who comes in front of her. In adopting a second time the widow is not creating an heir to her deceased husband's estate. That estate no longer exists; it has become the estate of the first adopted son. By the second adoption she creates an heir to her son's estate and here she is in a superior category, because a mother comes before a brother under the Hindu law of Succession. In these circumstances it is said that the principle stated in *Ramaswami Aiyan* v. *Venkataramayyan*[2] and applied in *Bonomali Roy* v. *Jagat Chandra Bhowmick*[3] cannot be applied here.

At this stage it will be convenient to refer to the cases which have been quoted in argument and have direct bearing on the question under discussion. These comprise three decisions of the Calcutta High Court, namely, the decisions in *Govindo Nath Roy* v. *Ram Kanay Chowdhry*[4], *Rai Jatindranath Chowdhuri* v. *Amritlal Bagchi*[5] and *Hamed Gazi* v. *Sadat Ali Sikdar*[6], the decision of the Bombay High Court in *Hanmant Subbayya* v. *Krishna Manjinath*[7] and the decision of the Allahabad High Court in *Lakhmi Chand* v. *Gatto Bai*[8].

In *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*[4], the Calcutta High Court held that where a Hindu widow succeeds to the estate of her adopted son on his death, and before making a second adoption she alienates the property, the adopted son cannot divest the alienee of his rights, and this was said to be the decision of the Privy Council in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*[9]. I am unable to read the judgment in *Bhoobun Moyee Debià* v. *Ram Kishore Acharjee*[9], in the same way. The facts in that case were shortly these. In 1811 a Hindu gave his wife power to adopt a son, but before he died his wife bore him a son. In 1819 by a written instrument the husband gave the wife power to adopt should the son die. The son survived his father, but died

1. (1915) 30 M.L.J. 260: I.L.R. 39 Mad. 1035.
2. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 (P.C.).
3. (1905) 15 M.L.J. 267: L.R. 32 I.A. 80: I.L.R. 32 Cal. 669 (P.C.).
4. (1875) 24 W.R. 183.
5. (1900) 5 C.W.N. 20.
6. (1940) 44 C.W.N. 443.
7. (1925) I.L.R. 49 Bom. 604.
8. (1886) I.L.R. 8 All. 319.
9. (1865) 10 M.I.A. 279.

Pattu Achi v. Rajagopala Pillai.

Leach, C.J.

without issue. He had married and his wife survived him. After the death of the son his mother exercised the power given to her by the instrument of 1819 and adopted a son to her husband. The question which fell for decision by the Privy Council was whether the mother could lawfully make a second adoption inasmuch as on the death of the natural son the estate vested in his widow. It was held that in these circumstances, she was precluded from exercising the authority to adopt given in 1819. The decision did not go beyond that, and therefore the judgment does not help in deciding the question now before the Court.

In *Rai Jatindranath Chowdhuri* v. *Amritlal Bagchi*[1], the Calcutta High Court held that when a Hindu widow adopts a second son upon the death of a first son the second son takes the estate because by adopting a son to her husband in those circumstances the widow must be taken to intend the vesting of the estate which originally belonged to her deceased husband in the second son. It was also held that where a widow makes a second adoption the second adopted son takes the estate immediately on his adoption. Full approval of the judgment in that case was expressed in *Hamed Gazi* v. *Sadat Ali Sikdar*[2].

The Bombay High Court in *Hanmant Subbayya* v. *Krishna Manjinath*[3] expressly held that a second adopted son acquires by virtue of his adoption an inherent right to question alienations made by his adoptive mother before his adoption and that the fact that there was a previous adoption in no way affects his rights. The Court was of the opinion that the second adopted son did not succeed to the first adopted son, but this conflicts with what is said in the passages which I have quoted from the judgments of the Privy Council in *Ramaswami Aiyan* v. *Venkataramayyan*[4] and *Madana Mohana Deo* v. *Purushothama Deo*[5].

The Allahabad High Court held in *Lakhmi Chand* v. *Gatto Bai*[6] that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived in

1. (1900) 5 C.W.N. 20.
2. (1940) 44 C.W.N. 443.
3. (1925) I.L.R. 49 Bom. 604.
4. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 (P.C.).
5. (1918) 35 M.L.J. 138: L.R. 45 I.A. 156: I.L.R. 41 Mad. 855 (P.C.).
6. (1886) I.L.R. 8 All. 319.

Pattu Achi v. Rajagopala Pillai.

Leach, C.J.

the husband's lifetime, and that his title relates back to the death of his elder brother, the first adopted son.

Except for the judgment in *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*[1], which goes far beyond the decision of the Privy Council on which it is based—this was in effect also pointed out in *Hanmant Subbayya* v. *Krishna Manjinath*[2]—the trend of the decisions, it will be observed, is against the appellant's case. Mr. T. M. Krishnaswami Aiyar, on behalf of the respondents, has also relied on the following passage in the latest edition of Mayne's Hindu Law (tenth edition, page 267):

"It will be observed that if the effect of the adoption is to introduce only a brother to the last male holder, the estate of the mother, who is a preferable heir would not be divested. The title of the adopted son however relates back to the death of the adoptive father and the adoption substitutes another son in place of the deceased son. He can be regarded as a coparcener with his brother only under the Mitakshara law, but not under the Dayabagha law, where also the mother's estate is divested by the adoption. The ground of the divesting must therefore be, either that the mother elects to hold the property as her husband's property when she exercises her power of adoption, or that the title of the adopted son relating back to his father's death is the necessary legal result of the power to substitute another son for one deceased. The Madras High Court has in one case held that a widow who had succeeded as heir to an adopted son and made a subsequent adoption after his death, was divested of the self-acquired property of the son first adopted by her (*Suryanarayana* v. *Ramadoss*[3]). This decision does not appear to be sound in principle; the adopted son can only succeed to what is or could have been the property of the adoptive father, and the mother's interest in her husband's estate only could be divested."

Without entering on a discussion of the decision in *Suryanarayana* v. *Ramadoss*[3], the Madras case referred to—Pichai Pillai left no separate property—there is here room for criticism. On a second adoption it is not the mother's interest in her husband's estate which is divested; it is her interest in the estate of her first son. It is also to be remembered that the existence of the deceased father's estate is not a condition precedent to an adoption. In *Amarendra Man Singh* v. *Sanatan Singh*[4], the Privy Council said that it can hardly be doubted that the doctrine of the devolution of property, though recognised as the inherent right of the son, is altogether a secondary consideration when considering the question whether the widow should adopt. In the judgment in that case the Judicial Committee laid great stress on the spiritual side of the

1. (1875) 24 W.R. 183.
2. (1925) I.L.R. 49 Bom. 604.
3. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.
4. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).

Pattu Achi
v.
Rajagopala
Pillai.

Leach, C.J.

act of adoption. Bearing in mind that the validity of an adoption in no way depends on the existence of an estate, that the father's estate, if there is one, becomes the son's estate, when a son is adopted to him; and that on the death of the adopted son the mother succeeds to the property as the son's heir, if he leaves neither issue nor widow, it is difficult to see how the ground of the divesting of the property on a second adoption can be either the assumption that the mother elects to hold the property as her husband's property or that the necessary legal result of the exercise of the power to adopt a second son is that the second son's title relates back to his father's death. However much the widow may intend or even proclaim that she is holding the property as the property of her husband it will not alter its character. Neither intention nor act can change back her first son's property into the estate of her deceased husband. With respect I agree with the observation of Varadachariar, J., in *Subramanian Chettiar* v. *Somasundaram Chettiar*[1], when he said that "even a fiction cannot be carried to illogical limits." Why could not the reason for the divesting be placed on the broad ground that the act of adoption implies it? But the finding of the proper reason is not important when one is faced with a reality.

The right in the second adopted son to sue immediately to set aside an unlawful alienation made by his mother between the death of his brother and his own adoption cannot properly be based on legal fiction. If the right is to be recognised at all it must be because there exists no overriding reason why the rule which has been applied in the case of a first adoption should not be applied in the case of a second adoption. The conclusion at which I have arrived—and I must say, not without hesitation—is that there is no overriding reason and that therefore they should both be placed on the same footing with regard to the setting aside of unlawful alienations made by the widowed mother. The reasons for my conclusion are these:—

(1) There is no authority to be found in the ancient texts for the rule that when the widow adopts a son to her deceased husband he takes the property which formed his father's estate unaffected by unlawful alienations made by his adoptive mother. The rule is of modern growth and seems to have been first

1. (1937) 1 M.L.J. 60: I.L.R. 59 Mad. 1064.

Pattu Achi v. Rajagopala Pillai.

Leach, C.J.

stated in this form in the *Collector of Madura* v. *Motoo Ramalinga Sethupathi*[1].

(2) The rights of the widow in the property which she holds as the heir of her son are co-extensive with the rights which she possessed when she held it as the heir of her husband. In both the cases she possesses the right of alienating for the period of her life, but not beyond, except in case of necessity. In other words the quality of the estate is the same.

(3) If it is right that an alienee should be defeated by a first adoption, except in the case of necessity—and this must be regarded as being well settled—it is difficult to see why he should not be defeated in the case of a second adoption, the widow's powers of alienation being the same when she holds the property as a mother as when she holds it as a widow.

(4) A person contracting with a childless widow does so subject to the knowledge that she may possess, or may be given, a right to adopt.

(5) There is a difference between a widow surrendering the estate to the nearest reversioner and being divested of the property by reason of her own act of adoption. In adopting a son to her deceased husband she is fulfilling what is regarded as a religious duty. In surrendering the estate to the nearest reversioner duty plays no part.

(6) Excluding the case of *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*[2], which was based on a misconception, the High Courts of Calcutta, Bombay and Allahabad have recognised the immediate right of the second adopted son to set aside unlawful alienations, and the earliest of the decisions in which the right was recognised was given as long ago as 1886.

(7) The second adopted son is just as much the son of his father as was the first adopted son and to give him the same rights in the property which had formed his father's estate as were given to his deceased brother involves no undue straining of what is now an accepted doctrine in the case of a first adoption.

(8) To put the second adopted son on the same footing as his deceased brother is in accordance with Hindu conceptions of what is right and proper.

1. (1868) 12 M.I.A. 397. 2. (1875) 24 W.R. 183.

Pattu Achi v. Rajagopala Pillai.

It follows that in my opinion the decision under appeal should not be disturbed and I would dismiss the appeal with costs.

Mockett, J.

Mockett, J.—The judgment of my Lord has analysed the result of a line of authority which, whilst at times approaching, has never with the possible exception of *Hanmant Subbayya* v. *Krishna Manjinath*,[1] directly decided the "question of some nicety" with which the able arguments of Mr. Rajah Aiyar and Mr. T. M. Krishnaswami Aiyar have confronted us in this appeal. Even in *Hanmant Subbayya* v. *Krishna Manjinath*,[1] it does not appear from the report that the Courts were invited to consider the numerous cases to which we have been referred. *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*,[2] was cited but not the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*,[3] nor *Ramaswami Aiyan* v. *Venkataramayyan*,[4] before the Bombay High Court. It is important to note that in *Ramaswami Aiyan* v. *Venkataramayyan*,[4] although the decision in the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*[3], was cited before the Board, Sir Robert Collier still treats as open for discussion the question which it is pressed upon us must be taken to be concluded by the dictum of Sir James Colvile in the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi*.[3]

I accordingly agree that this matter must be regarded as *res integra* so far as this Court is concerned. The ancient texts give us no assistance, a fact which is not surprising in this more material age. The blending of modern principles of inheritance with the purely spiritual idea underlying the Hindu conception of adoption must, as Varadachariar, J., in *Subramanian Chettiar* v. *Somasundaram Chettiar*,[5] has indicated, produce a position where fiction and logic are irreconcilable. It seems to me that only by allowing the modern law of inheritance to predominate in this welter of ideas can we decide this case in favour of the appellant.

Perhaps a modernist would prefer another result, but for the reasons which my Lord has given and with which I am in respectful agreement, I consider that the result of this appeal is more in consonance with, and does no more than apply, the true

1. (1925) I.L.R. 49 Bom. 604.
2. (1865) 10 M.I.A. 279.
3. (1868) 12 M.I.A. 397 at 443.
4. (1879) L.R. 6 I.A. 196: I.L.R. 2 Mad. 91 (P.C.).
5. (1937) 1 M.L.J. 60: I.L.R. 59 Mad. 1064.

principles of Hindu law which, as emphasised, are concerned with spiritual rather than material matters.

Pattu Achi v. Rajagopala Pillai.

Mockett, J.

I therefore agree that this appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

M. S. Aiyar & Company, Raja Street, Coimbatore by C.R.V. Das and others .. *Petitioners** (*Accused*)

v.

G. Srinivasalu Naidu .. *Respondent* (*Complainant*).

M. S. Aiyar & Co. v. Srinivasalu Naidu.

Madras District Municipalities Act (V of 1920), S.306, Cl. (28)—Power of Municipal Council to make bye-laws for prohibition and regulation of advertisements in public streets and parks—If includes power to levy licence fee for advertisements.

S. 306, Cl. (28) of the Madras District Municipalities Act empowering a Municipal Council to make bye-laws for the "prohibition and regulation of advertisements in public streets or parks" does not authorise the levy of a licence fee in relation to advertisements. Accordingly a person cannot be convicted for displaying goods (aerated water) on a bullock cart and having a name board in his shop without paying the fee levied by a Municipal Council for licences for advertisement.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Senior Bench of Magistrates, Coimbatore, B. Cs. Nos. 5329, 5335, 5333 of 1939 and B. C. No. 3868 of 1940 respectively.

K. Bhashyam Aiyangar for *R. Desikan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Crl. R. C. No. 1100 of 1940.

The Court made the following

ORDER.—The petitioner has been convicted and fined by the Senior Bench Court of Coimbatore for advertising without a licence in Coimbatore in two manners, (1) in his bullock cart and (2) by means of a board hung over his roof. Mr. Bhashyam Aiyangar argues that the conviction is without jurisdiction because no offence has been committed. That depends on a consideration of the District Municipalities Act. There is an

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* Crl. R. C. Nos. 1100, 1101, 1103 and 1104 of 1940. 24th April, 1941.
(Crl. R. P. Nos. 1045, 1046, 1048 and 1049 of 1940).

M. S. Aiyar & Co. v. Srinivasalu Naidu.

express provision in the Madras City Municipal Act, S. 129-A which was introduced by the Amending Act X of 1936 making special provision for taxing advertisements but the only provision with regard to advertisements to be found in the District Municipalities Act is S. 306, Cl. (28). S. 306 says:

"The council may make by-laws not inconsistent with this Act or with any other law to provide .. .. .. (28) for the prohibition and regulation of advertisements in public streets or parks."

This section is in the same words as S. 349 (28) of the Madras City Municipal Act (IV of 1919). There will be found in S. 306 several provisions relating to licences, for example, Cl. 10 (*c*) for licensing of builders and surveyors, 18 (*c*) for licensing and controlling of brokers, etc., and 22 (*b*) for the levy of fees for the use of certain burial and burning grounds. 'Licences and fees' are comprehensively dealt with in Chapter XII, which is so headed. Therein are specified a number of acts for which licences are required and for which fees may be levied. But there is no provision there for the granting of any licence or levying of fees in relation to advertisements. The learned Public Prosecutor has rested his case entirely on S. 321 which reads as follows:

"(1) Every license and permission granted under this Act or any rule or by-law made under this Act shall specify the period, if any, for which, and restrictions, limitations and the conditions, subject to which the same is granted, and shall be signed by the executive authority.

(*a*) Save as otherwise expressly provided in or may be prescribed under this Act, for every such licence or permission, fees may be charged on such units and at such rates as may be fixed by the Municipal Council."

There is a distinction in the Act between "licence" and "permission" and "regulating" as an examination of the chapter shows, for example, under S. 255 a licence to use a slaughter-house is required, but under S. 250 permission is required to establish a factory. I observe too that, although private markets can be regulated by by-laws, under Chapter XIV, S. 306 (18) (*b*), licence fees are leviable on them under Chapter XII. Chapter XIV is headed "Rules, by-laws and Regulations", and Chapter XII, as I have already stated, "Licences and fees." The Public Prosecutor contends that under S. 306, Cl. (28) the "regulation of advertisements" would include giving permission to advertise and therefore, by further implication, a power to levy licence fees. But, although in the Act advertisements *may* be prohibited, I can find nowhere that they are prohibited or permitted only by licence as in the case of all the other numer-

ous subjects mentioned. Licensing, permitting and regulating are, in my view, distinct matters and are dealt with distinctly and differently under the Act. The intention of S. 306, Cl. (28) seems to me to empower the Municipality to prohibit altogether advertisements in public streets and parks or to regulate their exhibition, for example as to size and position—no doubt a necessary provision in the interests of the appearance of the streets and parks. I do not think—indeed I think it is contrary to a general reading of the Act—that it can be implied that a further power to levy licence fees in respect of the advertisements is given. But under the by-laws which are attached to the record, it is expressly provided that fees shall be levied. "Regulate" according to the Oxford Dictionary, means "to control by rule, subject to restrictions, moderate, adapt to requirements." It does not seem possible to stretch this meaning to include levying fees, especially when such elaborate provision is made in other parts of the Act for this purpose with regard to other specified matters. What the true meaning and sense of "regulate" in this Act is can be derived from its use in S. 306 (2), (3-B), (9), (10-A), (11), (12), (18-B) and (22-A). It is a general principle, that any provision by which members of the public may be taxed should be clearly stated, so should, in my view, an analogous provision by which any payment can be compelled from them.

My conclusion is therefore that neither directly nor by implication is there any provision in this Act to enable a District Municipality to levy licence fees for advertisements any more than in the City Municipal Act before the introduction of the amending Act of 1936 which provided especially for taxation for advertisements. It is for the Legislature to deal with this omission if it thinks fit. The by-law therefore appears to be *ultra vires*, and in consequence this revision petition will be allowed, the conviction set aside and the fine, if paid, refunded.

Crl. R. Cs. Nos. 1101, 1103 and 1104 of 1940.

The learned Public Prosecutor agrees that my order in Crl.R. C. No. 1100 of 1940 applies to these cases, and the order will be the same.

K. S. *Petitions allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE SOMAYYA AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

M. Jamal Mohamed Sahib, Trustee for "Allajanathud-Deeniya" .. *Respondent.*

F.B. Commissioner of Income-tax, Madras *v.* Jamal Mohamed Sahib.

Income-tax Act (XI of 1922), S. 4, Cl. (3) (1)—Scope—Income endowed by Muslim for benefit of his own descendants—If exempt from assessment as trust for public purpose.

Setting aside of income for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of a Muslim donor is a trust the utility of which is not of a public but clearly of a private nature and the income in the hands of the *muthavalli* is therefore not exempt from taxation.

Reference by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act (XI of 1922).

K. V. Sesha Aiyangar for Petitioner.

B. Pocker for Respondent.

The judgment of the Court was delivered by

Leach, C. J. *The Chief Justice.*—The assessee in this case is the *muthavalli* of a wakf called the Allajanathud-Deeniya, which was created by one Jamal Mohideen Sahib by a deed, dated the 21st December, 1923. The deed directs that half of the annual net income shall be utilised for the expenses of maintenance, education, marriage, funeral and other necessities of such members of the donor's family in the male line as in the opinion of the *muthavalli* are in poor and needy circumstances. The *muthavalli* himself is allowed to benefit from this portion of the net annual income if he also happens to be in poor and needy circumstances. The other half of the annual net income is to be utilised for such charitable purposes as (*a*) helping new converts to Islam by giving them religious instruction, (*b*) giving help to Muslim orphans, (*c*) giving secular, especially industrial and technical education to Muslims, (*d*) helping poor and needy Muslims of the Sunni sect, (*e*) spreading knowledge

* O. P. No. 308 of 1940. 18th March, 1941.

F.B.

Commissioner of Income-tax, Madras *v.* Jamal Mohamed Sahib.

Leach, C.J.

of the Islamic religion, (*f*) giving contributions to public institutions established for the purposes mentioned, and (*g*) starting and maintaining institutions for the purpose of giving education to Muslim orphans, if considered necessary by the *muthavalli*. The deed also provides that if the income allotted for the benefit of the needy members of the donor's family remains unspent for three consecutive years the moneys are to be transferred to a reserve fund.

For the assessment year 1935-36 the Income-tax Officer found that the assessee was in receipt of an income of Rs. 13,907. This includes half of the net income of the trust properties for the year of account. The reason for his finding was that the direction in the deed that half of the income shall be set aside for the needy descendants of the donor does not constitute a trust for charitable purposes within the meaning of S. 4 (3) of the Income-tax Act, 1922. The Income-tax Officer recognised that the deed did constitute a public charitable trust in so far as it dealt with the other half of the net income. The *muthavalli* challenged the validity of the assessment and when the matter came in due course before him, the Commissioner of Income-tax referred the following questions to this Court for decision under the provisions of S. 66 (2) of the Income-tax Act:

(1) Whether the provisions made in the wakf deed dated the 21st December, 1923, for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of the wakf in the male line, constitute a charitable purpose and as such falls within the scope of S. 4, Cl. (3) (*i*) of the Indian Income-tax Act, 1922.

(2) Whether the income allotted under the said wakf deed for the purposes mentioned in question No. (1) which remains unspent for want of beneficiaries is assessable in the hands of the *muthavalli*.

S. 4 (3) (*i*) provides that the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes shall not be liable to income-tax. It is stated that the expression "charitable purposes" includes "relief of the poor, education, medical relief, and the advancement of any other object of general public utility; but nothing contained in Cl. (*i*), Cl. (*i-a*) or Cl. (*ii*) shall operate to exempt from the provisions of the Act that part of the income

F.B.
Commissioner of Income-tax, Madras *v.* Jamal Mohamed Sahib.
Leach, C.J.

of a private religious trust which does not enure for the benefit of the public". The words which constitute the proviso were added by an amendment made in 1939.

The expression "charitable purposes" must be construed strictly. As the result of decisions in England spread over a long period the expression can only be applied to a public charity. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and that is why the amendment was made to S. 4 (3) in 1939. It was made in order to put beyond all doubt the intention of the Legislature not to exempt even private trusts for religious purposes.

In *Commissioners for Special Purposes of Income-tax* v. *Pemsel*[1], a case which was decided by the House of Lords and had reference to the English Income-tax Act of 1842, Lord Macnaghten said:

"How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

Later in his judgment he said:

"On these grounds I have come to the conclusion that the expression 'trust for charitable purposes' in the Act of 1842, and the other expressions in the Act in which the word 'charitable' occurs, must be construed in their technical meaning according to English law."

The Indian Income-tax Act is an enactment expressed in the English language and the words used in it must be given the same meaning as is given in the construction of similar statutes in England. Giving the words their accepted meaning the exemption only applies to a trust the object of which is public utility. In delivering the judgment of the Privy Council in *The Trustees of Tribune Press, Lahore* v. *The Commissioner of Income-tax, Punjab, Lahore*[2], Sir George Rankin said:

"Their Lordships are in agreement with this view and see nothing in the Indian Income-tax Act to discharge the Court of its responsibility in coming to a finding as to the character of the object of a trust—a matter which bears directly upon its validity. It is to be observed moreover, that under the Income-tax Act the test of general public utility is applicable not only to trusts in the English sense but is to be applied to property held under

1. (1891) A.C. 531.
2. (1939) 2 M.L.J. 444: L.R. 66 I.A. 241: I.L.R. (1939) Lah. 475 (P.C.).

F.B.

Commissioner of Income-tax, Madras *v.* Jamal Mohamed Sahib.

Leach, C.J.

trust 'or other legal obligation' a phrase which would include Moslem wakfs and Hindu endowments."

In *Umar Bakhsh* v. *Commissioner of Income-tax, Punjab*[1], the Lahore High Court expressly held that the expression "religious or charitable purposes" in S. 4 (3) (*i*) has to be construed with reference to English law and not to the personal law of the assessee and this opinion was accepted by the Patna High Court in *Humayun Raza Chowdhury* v. *Commissioner of Income-tax, Bihar and Orissa*[2]. The learned Advocate for the assessee (*muthavalli*) has suggested that the decision of the Judicial Committee in *The Trustees of Tribune Press, Lahore* v. *The Commissioner of Income-tax, Punjab, Lahore*,[3] has negatived this opinion, but we cannot read the judgment in that sense. The passage which has just been quoted from the judgment of the Privy Council speaks of the test of general public utility. As this is the test so far as the Indian Income-tax Act is concerned it is not necessary to consider whether the trust here would be deemed to be charitable in England. Even assuming that the Court may have regard to Muslim ideas in deciding whether a Muslim trust fulfils the test of general public utility, it cannot be said that that part of the trust deed which relates to the setting aside of income for the descendants of the donor constitutes a trust for general public utility. The beneficiaries are to be members of the donor's own family. The utility is not of a public, but clearly of a private nature. For these reasons we would answer the first question in the negative.

The second question calls for no discussion. The position is that the *muthavalli* has in his hands income belonging to a private trust. Income of a private trust is not exempt from taxation and the *muthavalli* is assessable in respect of it, because he holds it. It follows that the answer to the second question is in the affirmative.

As the questions referred have been answered against the assessee, he must pay the costs, Rs. 250.

K. S. *Reference answered.*

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1. (1931) I.L.R. 12 Lah. 725: 5 I.T.C. 402 (F.B.).
2. 10 I.T.C. 7.
3. (1939) 2 M.L.J. 444: L.R. 66 I.A. 241: I.L.R. (1939) Lah. 475 (P. C.)

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The National Cycle Importing Company, by Proprietor Amritlal Bhaichand Shaw, Madras. *Respondent.*

F.B.

Commissioner of Income-tax, Madras *v.* National Cycle Importing Company.

Income-tax Act (XI of 1922), S. 26 (2) (as amended in 1939)—Dissolved firm—If 'cannot be found' when all the members are alive and can be found.

Persons who have entered into a partnership with one another are called individually 'partners' and collectively a 'firm'. Where a firm has been dissolved it cannot be said that the firm 'cannot be found' within the meaning of the proviso to S. 26 (2) of the Indian Income-tax Act, 1922, when in fact all the partners are alive and can be found. In the circumstances, the person succeeding to the business should not be assessed on the entire profits earned during the year preceding the dissolution of the firm.

Reference under S. 66 (2) of the Indian Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras for decision of this Court.

K. V. Sesha Aiyangar for Petitioner.

T. S. Venkatesa Aiyar for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The real question which arises in this reference is whether it can be said that a firm which has been dissolved "cannot be found" within the meaning of the proviso to sub-S. (2) of S. 26 of the Indian Income-tax Act, 1922, notwithstanding that all the members of the firm are alive and can be found.

The assessee is the proprietor of a business carried on under the style of the National Cycle Importing Company. Upto the end of the Samvat year, 1994, that is, upto the 23rd October, 1938, this business was owned by the assessee in partnership with two others, Vanamalai Premchand Shaw, and Fulchand Bhaichand Shaw. On the 24th October, 1938, the first day of the Samvat year 1995, the assessee took over the entire business and the partnership was dissolved as from that date. In the Samvat year 1995 the Income-tax Officer assessed the total income of the business for the year 1994 at Rs. 16,500. The assessee's share of this amount was Rs. 7,425 and Fulchand Bhaichand Shaw's share Rs. 4,950, and they

* O.P. No. 24 of 1941. 26th March, 1941.

F.B.

Commissioner of Income-tax, Madras. v. National Cycle Importing Company.

Leach, C.J.

were assessed to income-tax on these amounts respectively. The third partner was not assessed on his share (Rs. 4,125) as the Income-tax Officer was informed that he had ceased to be a partner before the month of October, 1938.

The Commissioner of Income-tax considered that the Income-tax Officer had not adopted the right method of assessment. In his opinion the case falls within the second sub-section of S. 26 of the Act and by virtue of the proviso contained in that sub-section the assessee can be assessed to tax on the full amount of the profits earned during the year 1994. Accordingly he revised the assessment and caused notice to be served on the assessee under S. 33 to show cause why he should not be assessed in respect of the sum of Rs. 16,500 which represented the total profits. The assessee objected to the proposal, and in consequence the Commissioner has referred to the Court for decision the following question:

"Whether in the circumstances of the case the Commissioner of Income-tax was right in setting aside the order of the Income-tax Officer and directing that Amritlal Bhaichand Shaw should be assessed on the entire profits as successor under S. 26 (2) of the Indian Income-tax Act."

We are concerned in this case only with the provisions of S. 26 (2) as it stands as the result of the amendment made in the year 1939. The sub-section now reads as follows:

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of S. 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year:

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place upto the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded, the amount of any tax so paid."

Looking merely at the words used in the first paragraph of the sub-section it would appear that they are only intended to apply to a succession which has taken place during the year of account and not to a succession which has become effective during the year of assessment. Mr. Sesha Aiyangar on behalf of the Commissioner, however, contends that the first paragraph of the sub-section must be read in conjunction with the second paragraph and says that when this is done the sub-

F.B.

Commissioner of Income-tax, Madras *v.* National Cycle Importing Company.

Leach, C.J.

section is wide enough to cover also a succession during the year of assessment. For the purpose of answering the present reference it is not necessary to decide whether the contention is well founded. The Commissioner himself has relied on the wording of the proviso, but it is clear that before the proviso can be brought into operation, it must be established that the person succeeded "cannot be found", that is, he must be dead or has disappeared. The proviso cannot be applied where the person succeeded is alive and his whereabouts are known or can be ascertained. Here, all the three persons who formed the firm whose business was taken over by the assessee are alive and their addresses are known. In *Karuppiah Pillai* v. *Commissioner of Income-tax, Madras*[1], this Court held that a partner who takes over the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2).

What the Court has to decide is whether the Commissioner is right in the opinion which he has formed that a firm 'cannot be found' when it has been dissolved. The Commissioner dissociates the partners in the firm from the firm itself. This appears to us to be going too far. It is quite true that a firm for purposes of assessment to income-tax in some cases is regarded as a unit, but that does not mean that in all cases a firm must be looked upon as a juridical person. S. 2 (6-B) says that the words "firm", "partner" and "partnership" have the same meanings respectively as in the Indian Partnership Act, 1932, and S. 4 of that enactment states that persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm'. This being the position, we are unable to say that the firm 'cannot be found', when all the partners are here and two of them have paid their proportionate share of the tax.

The Court is not concerned with any further provisions of the Act which may help the income-tax authorities in this case. It is only concerned with the question under reference and the decision of the question merely involves the construction of the expression 'cannot be found'. We have indicated that the firm can be found for the purposes of the proviso to S. 26 (2), and the answer to the question formulated by the Commissioner must be in the negative.

1. (1941) 1 M.L.J. 120: 1941 I.T.R. 1: I.L.R. (1941) Mad. 220 (F.B.).

The assessee has succeeded and he is entitled to his costs, Rs. 250. He is also entitled to the refund of his deposit of Rs. 100.

F.B.

Commissioner of Income-tax, Madras *v.* National Cycle Importing Company.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPEL.

Boganathula Venkataswami .. *Petitioner*

v.

Jangiti Pedda Madduleti and others .. *Respondents.*

Venkataswami *v.* Pedda Madduleti

Madras Debt Conciliation Act (XI of 1936), S. 10 (2)—Creditor requesting Board to summon a mortgage deed in the possession of his brother as evidence of his debt—Refusal by Board to summon document and order declaring the debt discharged for failure to furnish proper statement—Propriety.

In a petition by a debtor for conciliation of his debts, there being only one creditor, the creditor requested the Debt Conciliation Board to summon a mortgage deed in the possesssion of his brother who had filed a partition suit against him, as evidence of the debt. But the Board did not comply with the request and declared the debt to be discharged.

Held, that it was the duty of the Board to summon the document and the Board was wrong in declaring the debt, which was admitted by the debtor himself to be due, discharged, on the ground that the creditor did not furnish a proper statement under S. 10 (2) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records from the Debt Conciliation Board, Nandyal in Application 197 of 1939 dated 13th December, 1939 and to quash the order passed by the said Board and direct the Board to dismiss the application under S. 17 of the Madras Debt Conciliation Act.

K. Krishnaswami Aiyangar and *K. S. Jayaram* for Petitioner.

S. Venkatesa Aiyangar for Respondents.

The Order of the Court was delivered by

Leach. C. J.

The Chief Justice.—This is an application to quash an order passed by the Debt Conciliation Board, Nandyal. The Court has frequently had to set aside an order of a Debt Conciliation Board because it had been passed without jurisdiction or in abuse of the powers conferred by the

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* C. M. P. No. 6958 of 1940. 12th February, 1941.

Venkataswami v. Pedda Madduleti

Leach, C.J.

Madras Debt Conciliation Act. In some cases the action taken by the Board has been of a most arbitrary character and the order now complained of is of that nature.

The first, second and third respondents applied to the Board for the settlement of a debt under the Madras Debt Conciliation Act, 1936. According to their petition they had only one creditor, the petitioner, whose debt was secured by a mortgage in respect of immoveable property. The Board issued notice to the petitioner, who was thereupon required by reason of the provisions of S. 10 (1) to submit a statement of the debt owing to him by the respondents. He appeared before the Board and filed the following statement:

"The mortgage bond executed by the petitioners is with my brother Boganathula Venkata Guruviah who has filed a partition suit against me O. S. No. 2 of 1938 in the Court of the District Judge, Kurnool. The document is with him and therefore I cannot mention the exact amount due to us. He also is entitled to a moiety of the amount, and therefore, notice may be kindly issued to him. I will pay the expenses of the notice. I therefore request that a statement of amount may be called for from Boganathula Venkata Garuviah, resident of Mahadevapuram, Sirvel Taluk."

The reason for his request was that the sums paid on account of the mortgage debt were endorsed on the document.

In these circumstances this was a very reasonable request for the petitioner to make to the Board, but instead of complying with it and despite the fact that the debtor respondents had admitted the mortgage debt and were asking for a settlement the respondent Board passed an order in purported exercise of the powers conferred upon it by S. 10 (2) of the Act declaring the debt to be discharged. It is difficult to imagine a more unjust order. In my opinion, this Board has shown itself to be unfit to discharge its duties under the Act. The order will be quashed with costs against all the respondents.

K. S. *Order of the Board quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE GENTLE.

Subramanya Sarma. *In re.*

S. Subramanya Sarma and others .. *Petitioners* (Accused 2 and 4 and 1).*

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* Crl. R. C. Nos. 422 and 443 of 1941. (Crl. R. P. Nos. 418 and 419 of 1941). 2nd May, 1941.

Subramanya Sarma. *In re.*

Legal Practitioner—Advocate an accused—If can appear for co-accused in the same case—Madras Criminal Rules of Practice, r. 82—Scope.

An advocate who is an accused in a criminal case cannot appear and act for the co-accused in the same case. R. 82 of the Criminal Rules of Practice does not authorise a co-accused to appear as counsel in the case.

New Brunswick and Canada Railway Co. v. *Conybeare*, (1862) 9 H.L.C. 711: 11 E.R. 907 and *Nuton* v. *Chaplin*. 19 L.J. (P.C.) 374, relied on.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras dated the 26th April, 1941 and made in C. C. No. 6 of 1941.

K. Bhashyam Aiyangar for *S. Suryaprakasam, S. Viswanathan* and *B. Jagannatha Das* for *P. S. Kailasam* for Petitioners.

The Crown Prosecutor (P. Govinda Menon) with *C. D. Venkataraman* for the Crown.

The Order of the Court was delivered by

Leach, C.J.

The Chief Justice.—These criminal revision petitions raise the question whether an advocate who is accused with others of a criminal offence can appear at the trial as counsel for his co-accused. The petitioner in Crl. R. C. No. 443 of 1941 is a member of the English Bar and has been enrolled as an advocate of this Court. He and six others, two of whom are the petitioners in Crl. R. C. No. 442 of 1941, are accused of having been parties to a criminal conspiracy, the object of which was *inter alia* to commit or abet the commission of certain illegal acts by the public generally or by a class of persons exceeding ten. The illegal acts are specified in the charge sheet. They number six. It will be sufficient to quote the first and the last of these allegations:

"(1) Influencing the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of the war."

"(6) to unite into one organisation the extremist elements in India, revolutionaries, labour and other unions with the object of setting up a state which would be controlled by the workers and peasants."

The proceedings commenced on the 14th March of this year before the Third Presidency Magistrate. The Court sat *de die in diem* from the 14th March until the 24th April, when the second and fourth accused (the petitioners in Crl. R. C. No. 442 of 1941) fell ill. On the 25th April the first accused filed a memorandum stating that he had been instructed to

Subramanya Sarma. *In re.*

Leach, C.J.

appear on behalf of the second and fourth accused and that he wished to enter an appearance on their behalf. The Magistrate considered that it would be improper to allow him to do so and consequently refused permission. His order has led to the filing of the applications now before the Court.

The accused are all in custody and have been in custody throughout. The Court is asked to sanction the first accused stepping from the dock to the place reserved for counsel and appearing there as counsel for two of his co-accused. It has been suggested by Mr. Bhashyam Aiyangar, who appears on behalf of the first accused, that there could be no objection to the first accused being in the dock a part of the time and in counsel's seat for the remainder of the time. This is a startling proposition. I have no hesitation in holding that the Magistrate has passed a correct order. Counsel cannot appear in the same matter both as counsel and party. There is no objection to an advocate who is accused of a criminal offence or is a party in a Civil Court conducting his own defence or his own case. He is fully entitled to do so. But he cannot be in Court in the same matter in the two capacities. Mr. Bhashyam Aiyangar has not been able to produce any authority in support of the proposition that the first accused should be allowed to appear before the Third Presidency Magistrate for his co-accused, and this is not surprising. There is, however, authority that the first accused cannot be allowed to appear as counsel for his co-accused. In *New Brunswick & Canada Railway Co.* v. *Conybeare*[1], the respondent was a barrister. On the first day of hearing the leading counsel for the respondent suggested that the respondent might appear as his junior in the cause. The Lord Chancellor (Lord Westbury) said:

> "Certainly. But not both as party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two characters."

In *Nuton* v. *Chaplin*[2], the Court of Common Pleas held that a barrister, who was a party in an action, civil or criminal, is in the same position as any other party. Wilde, C.J., observed:

> "I do not think that a party in a civil or criminal case, who is also counsel, is in a different position from any other party. In a criminal matter, a party would not be entitled to sit in wig and gown among the bar as his own counsel."

1. (1862) 9 H.L.C. 711: 11 E.R. 907. 2. 19 L.J. (P.C.) 374.

Subramanya Sarma. *In re.*

Leach, C.J.

It is abundantly clear that the first accused cannot be allowed to appear as counsel in the proceedings before the Magistrate.

It has been said, and I do not doubt it, that these petitions have been filed because it would facilitate an early disposal of the case, if the first accused were allowed to appear on behalf of the two accused who have fallen ill. The question however, is not one of expediency; it is one of principle. R. 82 of the Criminal Rules of Practice states that Criminal Courts should, as a rule in cases where there are more accused than one, permit one of them to be authorised by another to appear, plead or act for him in the proceeding, provided that the authority is in writing and signed or contains the thumb impression of the party giving it and is filed in Court. The application to the Magistrate was not made under this rule. In fact the Court has been informed that it was expressly stated to the Magistrate that the application made by the first accused to be allowed to appear as counsel for the second and fourth accused was not intended to be made under this rule. If and when any such application is made it will be heard; but this rule certainly does not authorise a co-accused to appear as counsel in the case.

For these reasons I consider that these petitions should be dismissed.

Gentle, J.

Gentle, J.:—I agree and have nothing to add.

K. S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sree Raja Velugoti Navaneetha Krishna Yachendra Bahadur Varu. *Petitioner* (Counter-Petitioner)*

v.

Sirigiri Ramanujulu Chetty by next friend Irla Pullaiah Chetty. *Respondent (Petitioner).*

Navaneetha Krishna *v.* Ramanujulu Chetty.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Jodi, *whether rent—Person paying the amount whether tenant—Jurisdiction of Court to entertain the application under the Act.*

Where in order to obtain the benefits of the Agriculturists' Relief Act, the respondent herein, who was the proprietor of an agraharam situated in the Kalahasti zamindari paid into Court an amount being the *jodi* alleged to

* C.R.P. No. 1329 of 1939. 12th March, 1941.

Navaneetha Krishna *v.* Ramanujulu Chetty.

be due to the petitioner herein, and prayed for a declaration that the 'rent' due for fasli 1347 had been fully paid up and the petitioner pleaded that the *jodi* payable by the respondent was not 'rent' as defined by S. 3 (iv) of the Act and that therefore the Court had no jurisdiction to entertain the present application preferred under S. 15 (4),

Held, that the agraharam here in question having continued as before the Permanent Settlement to be held on an under-tenure under the zemindar the *jodi* payable by the respondent to the petitioner being payable to a landholder of an estate comes within the purview of S. 15 of the Madras Agriculturists' Relief Act.

Held also, that if the *jodi* payable to the landholder of an 'estate' is rent under Act IV of 1938 the person liable to pay it is a 'tenant' as defined by the proviso to S. 15 (1) for the purposes of the section, and the property in respect of which such rent had accrued should be regarded as his 'holding'. Hence the Court had jurisdiction to entertain the application under the Act.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Special Deputy Collector of Chandragiri Division dated the 12th January, 1939 and passed in M. A. No. 271 of 1938.

P. V. Rajamannar and *K. Subba Rao* and *P. S. Ragavarama Sastri* for Petitioner.

N. C. Subbiah for Respondent.

The judgment of the Court was delivered by

Patanjali Sastry, J.

Patanjali Sastri, J.—This civil revision petition arises out of an application filed by the respondent in the Court of the Special Deputy Collector, Chandragiri, under S. 15 (4) of the Madras Agriculturists' Relief Act. In order to obtain the benefits of the Act, the respondent who is the proprietor of the Muddumudi village, an *agraharam* situated in the Kalahasti zamindari, paid into Court Rs. 21-12-2 being the *jodi* alleged to be due to the petitioner herein, who is the representative in interest of the zamindar, and prayed for a declaration that the 'rent' due for Fasli 1347 had been fully paid up. The petitioner pleaded that the *jodi* payable by the respondent was not 'rent' as defined by S. 3 (iv) of the Act and that therefore the Court had no jurisdiction to entertain the application. This objection was overruled by the Court below and the only question for determination in this civil revision petition is whether the petitioner's contention is correct.

The term 'rent' is defined for the purposes of the Act as meaning not only rent as defined by the Madras Estates Land Act but also 'quit rent, *jodi*, *kattubadi*, *poruppu* or the like payable to the landholder of an estate as defined by the Madras Estates Land Act, 1908, whether a decree, or order of a civil

Navaneetha Krishna *v.* Ramanujulu Chetty.

Patanjali Sastri, J.

or revenue Court has been obtained therefor or not'. The Madras Estates Land Act as amended by the Madras Act XVIII of 1936, contains the following definitions (so far as they are material here):

"S. 3 (2) (d)—'Estate' means any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees.

* * * *

(5) 'Landholder' means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessors-in-title or of any order of a competent Court or of any provision of law."

The petitioner's contention is that the *agraharam* in question is an estate and the respondent and not the petitioner is the 'landholder' thereof, and that therefore the *jodi* due from the respondent is not 'payable to the landholder of an estate' as there could not be two 'landholders' in respect of the same estate'. Now, an *agraharam* is a village granted to a community of Brahmins by former rulers or zamindars either absolutely rent-free in which case it is called *sarva agraharam* or on condition of paying annually a fixed sum which is variously called *jodi, poruppu* or *kattubadi*. At the time of permanent settlement of zamindaris in this Presidency, such villages were excluded from the assets of the zamindari for the purpose of fixing the *peishcush* or assessment payable by the zamindar to the Government, the *jodi* payable to him being alone included. The result of this was that such villages were thereafter regarded as held by the agraharamdars under the Government and subject to its right of resumption on valid grounds, and they were dealt with on that footing at the time of the subsequent Inam Settlement when they were 'enfranchised' by the Government relinquishing its right of reversion in lieu of a fixed annual payment called 'quit rent'. The *jodi*, however, continued to be payable to the zamindar as before but it was no longer indicative of the zamindar's ownership and the agraharamdars' under-tenure of the village. This was why such a village was held not to fall under Clause (e) of S. 3 (2) of the Madras Estates Land Act which included in the definition of estate villages held on a permanent under-tenure in permanently settled zamindaris—see *Virabadrayya* v. *Sonti Venkanna*[1]. This is not, however, the position in respect of

1. (1913) 24 M.L.J. 659.

Navaneetha Krishna v. Ramanujulu Chetty.

Patanjali Sastri, J.

agraharam villages in the Kalahasti zamindari. As pointed out by the Privy Council in *Secretary of State for India in Council* v. *Raja of Venkatagiri*[1], the permanent settlement of what were known as the four western zamindaris, namely, Venkatagiri, Kalahasti, Bomrauzepalem and Karvetnagar, was not made in accordance with the practice described above which was prescribed by the Permanent Settlement Regulation (XXV of 1802), but was made on quite different lines independently of the provisions of the Regulation; that is to say, the *peish-cush* was not based upon a computation of the assets of these zamindaris after excluding *lakhiraj* or revenue-free lands and other lands paying only small quit rents or *jodis* but was fixed on the basis of a commutation of the military service subject to which the zamindaris were originally held. The agraharams and other Inam villages were thus not excluded from the zamindaris by the settlement and it was for this reason that their Lordships held in the case referred to above that the Government had no right of reversion in such Inams comprised in the Venkatagiri zamindari. The position therefore is that the *agraharam* here in question which is in Kalahasti zamindari continued as before the Permanent Settlement to be held on an under-tenure under the zamindar whose right has now become vested in the petitioner. In such circumstances, we can see no reason why the petitioner should not still be regarded as the owner, and therefore the 'landholder' of the village. The fact that by virtue of the amending Act XVIII of 1936 the respondent has also to be regarded as a 'landholder' does not affect the position of the petitioner as a landholder in respect of that village. The definition of a landholder clearly contemplates a plurality of landholders by making express provision for settlement of disputes that may arise in such cases. The relation between the petitioner and the respondent is thus one of owner and an under-tenure holder, just as it would be if the zamindar had made a post-settlement grant of the village as an *agraharam*, and there is nothing incongruous in holding that both of them are 'landholders' as defined in the Madras Estates Land Act. The *jodi* payable by the respondent to the petitioner being thus payable to a landholder of an estate comes within the purview of S. 15 of the Madras Agriculturists' Relief Act.

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1. (1921) 41 M.L.J. 624: L.R. 48 I.A. 415: I.L.R. 44 Mad. 864 (P.C.).

Navaneetha Krishna v. Ramanujulu Chetty.

Patanjali Sastri, J

Our attention was drawn to the decision of Pandrang Row, J., in C. R. Ps. Nos. 205 to 209, 246 to 249, 459 and 460 of 1939 where the learned Judge held that *jodi* payable by certain Inamdars of whole Inam villages lying within the Shulagiri zamindari was not 'rent' as defined in Madras Act IV of 1938 and did not therefore attract the application of S. 15 (1) thereof. The learned Judge observed:

"It being clear that the petitioners themselves are the landholders in respect of these villages, they cannot rely on any payments made by themselves to the zamindar as payments made to the landholder. It follows, therefore, that S. 15 (1) does not apply to the petitioners."

It does not appear how the villages were dealt with at the time of the settlement and if, as in the general case, they were excluded from the assets of the zamindari, the decision would be correct. But, as already pointed out, the position in the present case is entirely different and the decision referred to does not assist the petitioner.

A recent decision of Abdur Rahman, J., reported in *Madura, etc. Devasthanam* v. *Masanam Pillai*[1], was also brought to our notice. It related to amounts payable to an Inamdar of a whole village by holders of minor inams comprised therein for water charges and land cess. The learned Judge referred to the definition of rent in the Madras Estates Land Act and held, in the light of that definition, that—

"If the jural relationship between the parties is not that of the landlord and tenant S. 15 of the Madras Agriculturists' Relief Act or r. 6 (1) would have no application".

This view overlooks the definition of rent in the Madras Agriculturists' Relief Act which plainly includes 'quit-rent, *jodi, kattubadi, poruppu* or the like payable to the landholder of an estate', which are not included in the definition in the Madras Estates Land Act and it is obvious that the scope of the relief intended to be afforded by S. 15 of the Agriculturists' Relief Act must be determined with reference to the wider definition contained therein. It was said that the reference to a 'holding' in the proviso to S. 15 (1) militated against this view. That term is no doubt defined in the Estates Land Act so as to denote lands held by a ryot under a single patta but there is no warrant for importing that definition into the Agriculturists' Relief Act which does not define that expression. If the *jodi* payable to the landholder of an 'estate' is rent, the person liable to pay it is a 'tenant', as

1. (1940) 1 M.L.J. 369.

Navaneetha Krishna *v.* Ramanujulu Chetty.

Patanjali Sastri, J.

defined by the proviso for the purposes of the section, and the property in respect of which such 'rent' has accrued must be regarded as his 'holding'. We are therefore unable to agree with the observations of the learned Judge in the case cited above confining the operation of S. 15 to cases arising between landlord and tenant under the Estates Land Act.

In the result, the civil revision petition fails and is dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Thalepaka Srinivasayya and another. *Petitioners** (*Defendants*)

v.

Nagallapati Obula Raju and another. *Respondents* (*Plaintiffs*)

Srinivasayya *v.* Obula Raju.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii) Proviso D—Debtors entitled to only a share in a shrotriam *the* jodi *payable on that share being less than Rs. 100—Whether excluded from the definition of "agriculturist".*

Where the debtors are owners of only a share of a *shrotriam* and the proportionate *jodi* payable by them is less than Rs 100 they are not excluded from the category of agriculturists, entitled to relief under Act IV of 1938, even though there may be a theoretical liability for the whole of the *jodi* laid upon each of the shares so far as the Government is concerned.

Petitions under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Nandalur in S. C. S. Nos. 11 and 12 of 1939 respectively.

Kasturi Seshagiri Rao for Petitioners.

P. Basi Reddy for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These civil revision petitions arise out of two small cause suits for recovery of debts, in which the defendants pleaded that they were entitled to relief under Madras Act IV of 1938 as agriculturists and it was objected that they were landholders of a *shrotriam* paying a *jodi* of Rs. 169-3-10 and were therefore excluded from the benefit of the Act with reference to Proviso D to S. 3 (*ii*). The defendants, while admitting that they were *shrotriamdars*, contended that they were

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* C. R. Ps. Nos. 1689 and 1690 of 1939. 28th February, 1941.

Srini-vasayya v. Obula Raju. — Wads-worth, J.

entitled to only a half share in the *shrotriam* and had alienated considerable portions of that half share and that the *jodi* payable in respect of their half share was less than Rs. 100, so that they were not excluded from the definition of 'agriculturist'. The lower Court found that the alienations by the defendants were irrelevant as they had sold only their kudivaram right and that with reference to the division of the *shrotriam* into two halves this did not affect the liability to the Government which can impose the burden of the *jodi* on any portion of the *shrotriam* and that therefore more than Rs. 100 was payable by the defendants as *jodi* and that they were disentitled to be considered as agriculturists.

The *shrotriam* in question was originally held by one Venkataramaniah who was the father of the defendants. After his death it came to be owned by the defendants and their cousins and they divided the *shrotriam* into two shares. One of the cousins who has given evidence, said that he is the proprietor of the estate. Presumably he is the person recognised by the Government, but it does appear that each of the two branches of the family owns a localised share in the village. Proviso D to S. 3 (*ii*) excludes from the definition of 'agriculturist' a person who is the holder of an estate under the Madras Estates Land Act; or of a share or portion thereof, in respect of which estate, share or portion any sum exceeding Rs. 100 is paid as *jodi*. The question is whether in interpreting these words we must have regard to the liability of the share to the Government or to its proportionate liability having regard to the rights of the sharers *inter se*. It is no doubt true that when, as in this case, the whole of the village is liable for the whole of the *jodi*, the Government can recover the full amount of the *jodi* by the sale of a portion of the village, so that in this sense there is a liability imposed on each of the shares for the whole of the *jodi*. But we doubt very much whether that fact was in the contemplation of the Legislature when they enacted this proviso. The object of the proviso is clearly to exclude from the category of agriculturists those who are big landholders and to include those who are only petty landholders. The use of the words "estate, share or portion" seems to contemplate (*a*) a whole estate (*b*) a fractional share and (*c*) a localised portion. In the ordinary case of a permanently settled estate, if part of it is alienated and the alienated portion

Srinivasayya
v
Obula Raju.
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Wadsworth, J.

is separately registered, then each of the separately registered portions becomes an estate so that there would be no point in talking of a separately registered portion of an estate as a portion. It is moreover to be noted that the words "is paid" are used, not the words "is payable." Without laying too much emphasis on this distinction, it may perhaps be said that the use of the word 'paid' instead of the word 'payable' may indicate an intention to adopt as the criterion not so much the theoretical liability to the Government, as the practical apportionment of that liability between the sharers. To interpret this proviso as saving only those whose share of the estate has been separately registered, would in fact rob the words "share or portion" of most of their practical effect. It does not seem likely that the Legislature intended, in the case of a *shrotriam* paying a *jodi* of a little over Rs. 100 but held by a large number of *shrotriamdars* in fractional shares, to determine whether or not each of these *shrotriamdars* is an agriculturist by reference to the *jodi* of the *shrotriam* as a whole and not by reference to the proportionate share of the *jodi* payable by the particular sharer. We have little doubt that the use of the words "in respect of which estate, share or portion any sum exceeding Rs. 100 is paid as *jodi*" was intended to exclude from the definition of 'agriculturist' the landholder of an estate or of a share or portion of an estate in respect of which estate a *jodi* of over Rs. 100 was paid or in respect of which share or portion the proportionate *jodi* paid was over Rs. 100, regardless of whether the revenue authorities had separately registered this share or portion or not. It is also to be remarked that to adopt the view that the share or portion of a *shrotriam* village means only the separately registered share or portion would have very little meaning in view of the fact that the Madras Land Revenue Assessment Act (I of 1876) provides only for the separate assessment of alienated portions of permanently settled estates and it is doubtful whether this Act has any application to *shrotriams* not covered by the Permanent Settlement. We are therefore of opinion that on the assumption that the defendants are owners of only a half of this *shrotriam* and that the proportionate *jodi* payable by them is less than Rs. 100, they are not excluded from the category of agriculturists, even though there may be a theoretical liability for the whole of the

jodi laid upon each of the two halves so far as the Government is concerned.

Srinivasayya *v.* Obula Raju.

Wadsworth, J.

We therefore allow the civil revision petitions with costs and remand the suits to the trial Court for fresh disposal in the light of this judgment.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Naina Muhammad Rowther ... *Appellant** (*1st Defendant*)

v.

Periappa Rowther *alias* Muhammad Abdul Khadir Rowther. *Respondent.* (*Assignee Decree-holder*).

Civil Procedure Code (V of 1908), O. 21, r. 16—Scope.

Naina Muhammad Rowther *v.* Periappa Rowther.

An assignee of a decree applied for execution after his assignment was recognised in an earlier application. The debtor contended that the assignment was effected benami for himself, that he had paid the amount to the original decree-holder, that it was arranged that the assignee should execute the decree against other defendants than himself and that whenever he required the assignee decree-holder to enter up satisfaction, he should do so. The lower Court rejected that plea *in limine* as the payment was not certified under O. 21, r. 2, Civil Procedure Code within ninety days,

Held, that such an arrangement cannot be recognised by any Court as it was opposed to the second proviso to O. 21, r. 16 of the Code of Civil Procedure.

Srirama Rao v. *Bapayya*, (1922) 18 L.W. 453 distinguished.

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated 15th April, 1939 and made in E.P. No. 85 of 1938 in O. S. No. 44 of 1929.

K. Rajah Aiyar and *R. Rangachariar* for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The Court delivered the following Judgments:—

Burn, J.

Burn, J.—This is an appeal by the first defendant from an order passed in execution by the learned Subordinate Judge of Dindigul. The appellant was the 1st defendant in O. S. No. 44 of 1929 which was a suit upon a promissory note. He was one of the executants of the promissory note. The decree in the suit was passed on the 18th March, 1930. On the 22nd December, 1935 the decree was assigned to the respondent and E. P. No. 85 of 1938 was filed by the respondent to execute the decree by arrest of the 1st defendant, the present appellant. The first defendant objected to execution against

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* A. A. O. No. 272 of 1939. 24th March, 1941.

Naina Muhammad Rowther v. Periappa Rowther.

Burn, J.

him. The learned Subordinate Judge overruled his objections and hence this appeal.

The learned Subordinate Judge has held that the defendant's plea was barred by limitation. He has taken the defendant's plea as being one of satisfaction or adjustment of the decree and since he finds that the adjustment or satisfaction had not been certified under O. 21, r. 2, Civil Procedure Code within ninety days, he has held that the plea was barred by limitation. The appeal is based upon the plea that the learned Subordinate Judge was wrong in holding that the defendant's case was merely one of adjustment of the decree and that therefore the learned Subordinate Judge was wrong in basing his decision on the question of limitation alone.

The plea of the appellant before the learned Subordinate Judge was that the assignment of the decree to the respondent on the 22nd December, 1935 was virtually an assignment to himself (the 1st defendant). He said that he had found the money to purchase the decree from the original decree-holder and that Periappa Rowther the nominal transferee was merely a benamidar for himself. He said that he had entered into an agreement with Periappa Rowther by which Periappa Rowther undertook not to execute the decree against him (the first judgment-debtor) but against the other defendants only. The respondent also agreed, he said, that whenever the 1st defendant should consider it undesirable or unsafe to keep the decree alive any longer, the respondent would put in an application to enter up satisfaction of the decree. The time had come, the appellant thought when he filed his counter-statement before the learned Subordinate Judge, for the fulfilment of this agreement and he therefore called upon the assignee decree-holder to enter up satisfaction of the decree forthwith on the ground that he (the 1st defendant) now considered it unsafe and inexpedient to keep the decree subsisting. He prayed therefore that the Court would be pleased to record satisfaction of the decree and dismiss the execution petition.

I am of opinion that the decision of the learned Subordinate Judge is correct, although I do not think it should have been based upon the question of limitation. It is quite true that the counter-statement filed by the appellant in the Sub-Court contained the allegation that he (the appellant) had paid to the original decree-holder the value of the decree. If there were a

Naina Muhammad Rowther v. Periappa Rowther.

Burn, J.

payment of which the appellant desired the executing Court to take notice, such a plea would of course have been barred by O. 21, r. 2 which says that no payment out of Court shall be recognised by the Court executing the decree unless it has been certified by the decree-holder or unless the judgment-debtor has within the proper time taken the necessary steps to have it certified. The judgment-debtor therefore could not plead that the decree had been satisfied by his payment of the money to the original decree-holder. He was therefore obliged to fall back upon his plea that he had arranged with his nominee to enter up satisfaction whenever he should think fit. Now this is an agreement which in my opinion no Court should recognise. The second proviso to O. 21, r. 16 says that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. The agreement which the appellant pleads that he made between himself and his nominee was an agreement that his decree should be executed against the remaining defendants in O. S. No. 44 of 1929. It was therefore an agreement in contravention of the express provisions of O. 21, r. 16, second proviso, and as such it was an agreement which cannot be enforced by any Court.

Learned counsel for the appellant has attempted to contend that his objection to execution was really an objection to the competence of the transferee decree-holder. He has referred to the cases in which it has been held that a judgment-debtor against whom a transferee decree-holder seeks execution is entitled in execution to show that the transferee decree-holder is a mere benamidar and even a mere benamidar for himself. He has therefore attempted to show that his objection was not that the decree had been satisfied but that the transferee decree-holder had no authority to execute it.

I have already shown however that that was not the plea which he raised in the Sub-Court where he devoted himself wholly to an attempt to show that his transferee had agreed with him, firstly, to execute the decree against the other judgment-debtors and secondly to enter up satisfaction of it whenever he should be called upon. I am therefore clearly of opinion that that agreement is one which no Court ought to be asked to recognise or to enforce, and therefore I think that the learned Subordinate Judge was right in rejecting the appel-

Naina Muhammad Rowther *v.* Periappa Rowther.

Mockett, J.

lant's objections to execution, although I think that his decision was not based upon proper grounds. I would therefore dismiss this appeal with costs.

Mockett, J.—I entirely agree. The decision in *Srirama Rao* v. *Bapayya*,[1] has been cited to us and the observations relevant to this inquiry are to be found at pages 463 and 464. In that particular case an assignment had been recognised and the learned Judges referring to the remarks of Lindley, L.J., in *Scott* v. *Brown, Doering, McNab & Co.*,[2] pointed out that when fraud was within the knowledge of the Court it should not allow a party participating in it to benefit by it. This case is wholly unlike that case. On the face of it there was nothing wrong with those proceedings but the appellant is asking us to allow the machinery of this Court to be used for the purpose of an elaborate inquiry which will enable him to establish that he has entered into a fraudulent arrangement with the decree-holder which we are to recognise and in conformity therewith to record satisfaction of the decree. It seems to me that that is in direct conflict with the principle that the Court will not allow its processes to be used for the purpose of enforcing frauds at the hands of parties who participated in them.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Kuruvella Subba Rao ... *Petitioner* (Respondent)*

v.

Kavi Satyanarayanamurthi and another. ... *Respondents (Petitioner and Nil).*

Subba Rao *v.* Satya-narayana-murthi.

Madras Debt Conciliation Act (XI of 1936), S. 10 (1)—Creditor filing statement—Board calling for accounts—Order discharging the debt for failure to produce accounts—Propriety.

A creditor while filing his statement of debt giving particulars stated that the account books were filed in Court in connection with a suit. On the adjourned date as the creditor was still unable to produce the account books and had absented himself, the Board passed an order discharging his debt though there was no dispute between the debtor and the creditor as to the amount due. In an application to quash the proceedings,

Held, that the Board had no power to declare the debt to be discharged when the creditor had complied substantially with the provisions of S. 10 (1)

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1. (1922) 18 L.W. 453. 2. (1892) 2 Q.B.D. 724.

* C.M.P. No. 7312 of 1940. 16th April, 1941.

of the Act. The failure of the creditor to produce his account books did not warrant the Board to pass such a confiscatory order. — Subba Rao v. Satyanarayanamurthi.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a *writ of certiorari* calling for the records in D. C. B. No. 25 of 1939 on the file of the Debt Conciliation Board, Rajahmundry and quash the order of the Board, dated 16th March, 1940 and direct the said Board to receive the books of account and other documents along with the statement filed on 16th March, 1940 and pass such further or other orders as the Court may deem fit.

M. S. Ramachandra Rao for Petitioner.

M. Appa Rao for 1st Respondent.

Debt Conciliation Board not represented.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This is another example of the disregard of principles of elementary justice which Debt Conciliation Boards of this Province are apt to show. The petitioner is a creditor of the first respondent for Rs. 2,871-14-9, due under a registered mortgage. The first respondent applied to the Debt Conciliation Board, Rajahmundry, on the 15th September, 1939, for a settlement of his debts. In the schedule of debts he set out the amount due to the petitioner under his mortgage. The petitioner was required to file on the 16th December 1939 the statement contemplated by S. 10 (1) of the Debt Conciliation Act. At this time the petitioner was a defendant in a partition suit in the Court of the District Munsif, Rajahmundry, and he had been compelled to produce in the Court his account books. On the 16th December, 1939, the petitioner appeared before the Board and explained the situation. He then applied for fifteen days' time to enable him to withdraw his books from the Court. This request was granted and he was given time till the 6th January, 1940, to file the statement required by S. 10 (1). He was not able to withdraw the books by the 6th January, but on the 4th January, that is, two days before his statement was due to be filed, he presented to the Board a statement of his claim against the first respondent. This statement agreed with the statement made by the first respondent in his petition. In other words, there was no dispute between the debtor and the creditor as to the amount due. Except that the statement filed by the petitioner was not signed

Subba Rao v. Satyanarayanamurthi.

Leach, C.J.

and verified in the manner prescribed by the Code of Civil Procedure it complied with the requirements of S. 10 (1). The omission to sign and verify the statement was purely a technical defect and it had no consequence as the debtor and creditor were in agreement as to the amount.

On the 6th January, 1940, the petitioner asked for a further period of 25 days to enable him to withdraw the books from the Court. Time was granted until the 29th January. The petitioner had not obtained his books by that date and should have appeared before the Board and explained his position, but as he did not do so the Board passed an order declaring the debt due to him to be discharged under sub-S. (2) of S. 10.

It is perhaps possible to imagine a more arbitrary order than we have here, but it is difficult. The respondent had acknowledged the debt and a statement had been filed by the petitioner which agreed with the respondent's figure. For the Debt Conciliation Board to pass an order of cancellation under S. 10 (2) in these circumstances we regard as being monstrous. If the order is allowed to stand the unfortunate creditor will be deprived of all that is due to him. The petitioner is blameworthy in not having appeared before the Board on the 29th January, but his failure to do so gave no warrant to the Board to pass this order of cancellation.

The order of the Board will be quashed and the Board will be directed to pay the costs which we fix at Rs. 200.

K. S. — *Order quashed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE SOMAYYA AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Narayanan Chettiar v. Commissioner of Income-tax, Madras.

A. R. A. N. T. Narayanan Chettiar ... *Petitioner**

v.

The Commissioner of Income-tax, Madras ... *Respondent.*

Income-tax Act (XI of 1922), S. 4 (2)—Scope—Money remitted from F.M.S. to a Rangoon firm in 1931 without assessee's consent and adjusted in 1932 towards dues by assessee to Rangoon firm—Objection raised by assessee and ultimate adjustment in 1935 as profits of assessee remitted to Rangoon and credited towards his dues—Assessability of the amount in respect of the year 1935-1936.

* O. P. No. 46 of 1940. 18th March, 1941.

F.B.

Narayanan Chettiar *v.* Commissioner of Income-tax, Madras.

The assessee was a partner in a firm carrying on a money-lending business at Kedah in the Federated Malay States. The senior partner of the firm was also a partner of a firm in Rangoon carrying on business under the same vilasam. The assessee had no interest in the Rangoon firm. The Kedah business resulted in considerable profits being made and in 1931 the assessee's share of these profits amounted to at least Rs. 30,000 which was remitted in that year to the Rangoon firm and placed in a suspense account. The senior partner caused the amount to be transferred on 12th April, 1932, to the credit of the assessee's account in the books of the Rangoon firm and then utilised it in discharge of the assessee's indebtedness to the Rangoon firm. The assessee objected to it and ultimately as a result of mediation in Kedah agreed to accept the Rs. 30,000 as representing a remittance of his profits from Kedah to Rangoon and to the money being utilised in discharge of his indebtedness to the firm in Rangoon. This arrangement was agreed to by the assessee some time between 14th February and 5th April, 1935.

Held, that though the money was actually brought into British India in 1931 it cannot be taken as being then a remittance of profits belonging to the assessee. Only in 1935 when the assessee agreed to the arrangement the money became in reality his money. Accordingly the amount is liable to income-tax in respect of the year 1935-1936.

Reference to this Court by the Commissioner of Income-tax, Madras, under S. 66 (3) of the Indian Income-tax Act (XI of 1922) in pursuance of the order made herein and dated the 23rd September, 1940, for decision on the following question:

"Inasmuch as the sum of Rs. 30,000 was actually remitted to Rangoon in the year 1931-1932 can it be construed in law as having been received in Rangoon in the year 1934-1935 so as to be dealt with under S. 4 (2) of the Act for the assessment year 1935-1936"?

L. S. Veeraraghava Aiyar for Petitioner.

K. V. Sesha Aiyangar for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—This reference will be answered in accordance with the opinion expressed by the Commissioner of Income-tax in his statement of the case. The assessee was a partner in a firm carrying on a money-lending business at Kedah in the Federated Malay States under the vilasam of A. K. R. M. M. K. The senior partner was one Meyappa Chettiar, who was also a partner in a firm of money-lenders doing business at Rangoon under the same vilasam, but the assessee had no interest in the Rangoon firm. The Kedah business resulted in considerable profits being made and it is accepted that in 1931 the assessee's share of these profits amounted to at least Rs. 30,000. In that year a sum of Rs. 30,000 was remitted from Kedah to Meyappa's firm in Rangoon and placed in a suspense account. On the 12th April, Leach, C.J.

F.B.

Narayanan Chettiar v. Commissioner of Income-tax Madras.

Leach, C.J.

1932, Meyappa caused the money to be transferred to the credit of the assessee's account in the books of the Rangoon firm and then utilised it in discharge of the assessee's indebtedness to the Rangoon firm. At least that is what Meyappa purported to do. The assessee strongly objected to this course, but as the result of mediation which took place in Kedah he eventually agreed to accept the Rs. 30,000 as representing a remittance of his profits from Kedah to Rangoon and to the money being utilised in discharge of his indebtedness to Meyappa's firm there. The assessee gave his consent to this arrangement some time between the 14th February and the 5th April, 1935. The Income-tax authorities say that in these circumstances the Rs. 30,000 should be taken to be a remittance made to British India in 1935, Burma being then part of British India. On this footing the assessee would be liable for income-tax on the amount in respect of the Tamil year 1935-36. The assessee contends, however, that the remittance of profits must be regarded as having been made on the 12th April, 1932, when Meyappa caused the Rs. 30,000 standing in the suspense account to be transferred to the assessee's personal account. If this were the position it would be clear that the assessee would not be liable to be taxed in respect of the Rs. 30,000 because S. 34, as it stood at the time of the assessment, did not allow action to be taken under it where income had escaped taxation for more than a year.

While it is true that the money was actually brought into British India in 1931 it cannot be taken as being then a remittance of profits belonging to the assessee. He opposed most strenuously the remittance being treated in this way. But inasmuch as in 1935 he agreed that the money should be regarded as being a remittance of his share of the profits made in Kedah and then allowed it to be used in discharge of his own indebtedness in British India the position was changed. It then became in reality his money.

The case falls within the principle stated by this Court in *Subrahmanyam Chettiar* v. *Commissioner of Income-tax, Madras*[1]. There the assessee had a money-lending business in Tinnevelly in British India and a similar business at Penang in the Federated Malay States. He drew hundis on his

1. (1935) 69 M.L.J. 844: I.L.R. 59 Mad. 171 (S.B.).

F.B.

Narayanan Chettiar v Commissioner of Income-tax, Madras.

Leach, C. J.

Penang branch for the repayment, with interest, of a sum deposited with his Tinnevelly branch by a person who also carried on a money-lending business at Penang. The assessee's Penang branch paid the amounts of the hundis and the relevant entries with regard to the discharge of the debt were made in the Penang and the Tinnevelly books. The profits of the Penang branch were sufficient to cover the remittances. It was held that the amounts of the hundis should be treated as remittances of foreign profits into British India within the meaning of S. 4 (2) of the Indian Income-tax Act, 1922. The same principle was applied by this Court in *Commissioner of Income-tax, Madras* v. *Meyyappa Chettiar*[1].

The position in this case may be stated thus. When the money was brought into British India in 1931 it was not brought in as the money of the assessee and only became his when he accepted it in 1935 and allowed his account in Kedah to be debited with the amount. In these circumstances he cannot be allowed to say that it constituted his remittance in 1931.

It follows that the reference must be answered against the assessee, who must pay the costs, Rs. 250.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Srimath Deivasikamani Ponnambala Desikar. *Petitioner** (*Trustee objector*)

v.

The Board of Commissioners for Hindu Religious Endowments, Madras. *Respondent* (*Petitioner*).

Deivasikamani Ponnambala Desikar v. Board of Commissioners for H. R. E., Madras.

Madras Hindu Religious Endowments Act (II of 1927), Chap. VI-A—Notification of temples by the Board—If amounts to an order of the Government—Court's jurisdiction to issue writ of certiorari—*Government of India Act, 1935, Ss. 49 and 306—Effect.*

Temple in respect of which scheme has been framed—If can be notified under Chap. VI-A.

If the Hindu Religious Endowments Board has abused its powers, in notifying a temple under Chap. VI-A of the Hindu Religious Endowments Act, the Court has power to quash the Board's orders on which the notification is based and if the basis of the notification is illegal the notification is

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1. (1940) 1 M.L.J. 543 (S.B.).

* C. M. P. No. 2538 of 1939. 5th December, 1939.

Deivasikamani Ponambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

illegal. Even if the notification in such circumstances remained a lawful notification, the Court would still be in a position to take effective action. The provisions of the Government of India Act, 1935, S. 306 read with S. 49 do not make the notification under the Madras Hindu Religious Endowments Act an act of the Governor which cannot be challenged in Court.

There is nothing in S. 65-A or in any other section in Chap. VI-A of the Endowments Act which exempts a temple in respect of which a scheme has been settled by the Court under S 92 of the Civil Procedure Code, and the chapter applies to a temple which is managed under such a scheme. In exercising its powers under Chap. VI-A the Board must however act judicially after a full and proper inquiry and as the provisions of Chap. VI-A with regard to appeal are illusory the need for care is all the greater.

As on the facts in this case, the Board's action in notifying the temples in question was arbitrary and in abuse of its powers the order of the Committee and that of the Board on appeal should be quashed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the papers in Notification No. 3 of 1938 on the file of the Board of Commissioners for Hindu Religious Endowments, Madras and to pass such orders as this Honourable Court may deem fit and necessary in the circumstances of the case.

T. R. Venkatarama Sastri for *V. Ramaswami Aiyar* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for *Y. Govindarajulu, K. V. L. Narasimham* and *N. Subramaniam* for Respondent.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—The petitioner is the head of an ancient and well-known math, the Tiruvannamalai Math at Kunnakudi. As head of the math he is the trustee of a group of five temples, known as the Anjukovil Devasthanams, Kunnakudi. The Madras Hindu Religious Endowments Board, the respondent (hereinafter referred to as "the Board") has notified these temples under Chap. VI-A of the Madras Hindu Religious Endowments Act, 1926, with the object of taking the management of them out of the hands of the petitioner and placing it in the hands of an officer of its own choosing. The petitioner complains that in taking action under Chap. VI-A the Board has not acted *bona fide*, but in abuse of its powers, and asks the Court in *certiorari* proceedings to quash the orders of the Board which have resulted in the notification of the temples. A rule *nisi* has been issued and the Court has now to consider whether the rule should be made absolute.

Deivasi-kamani Ponnambala Desikar *v.* Board of Commis-sioners for H. R. E., Madras.

Leach, C.J.

From time immemorial the head of the Tiruvannamalai math has been the trustee of the five temples and that the head of this math should be the trustee has been recognized by this Court. A scheme for the administration and management of the temples was framed by this Court in Civil Miscellaneous Appeals Nos. 216, 218 and 219 of 1925. The date of the judgment settling the scheme was 23rd October, 1925. The scheme provided that the then head of the Tiruvannamalai math should be the trustee of the temples and that on a vacancy occurring the head of the math for the time being should be appointed the trustee, unless the District Court of Ramnad "for any valid reason" should deem him to be unfit. By an order dated the 25th May, 1931, the Board recognized the temples as excepted temples within the meaning of the Act and the head of the math as the hereditary trustee. The petitioner became the head of the math on the 10th June, 1928, but the District Court refused to recognize him as the trustee of the temples and by an order dated 16th March, 1932, appointed a receiver to take charge of them. By an order of a Bench of this Court, dated 5th April, 1934, which was passed by consent of all parties, the District Judge's order refusing to recognize the petitioner was set aside and the petitioner was appointed the trustee. The order of appointment imposed *inter alia* the following conditions:—(1) within four months after the close of each fasli and subject to the approval of the Court the trustee should appoint a Government certified auditor to audit the accounts of the temples; (2) he should keep the accounts in such form as might be proposed by the auditor; (3) he should submit the budget within the time fixed by the scheme, and (4) he should pay on or before the 15th of the succeeding month the salaries due to the staff of the Board of supervision constituted by the scheme. It is not suggested that the petitioner has not complied with all the conditions imposed by the Court's order. The petitioner took up his duties as trustee on the 9th April, 1934.

On the 3rd May, 1938, the Board issued a notice to the petitioner calling upon him to show cause why the temple should not be notified under Chapter VI-A of the Act. The Board made the following allegations:—(1) certain clauses of the scheme framed by this Court were inconsistent with the provisions of the Act; (2) the temples required urgent

repairs; (3) the salaries of temple servants had not been paid regularly; (4) the rent collections showed heavy arrears, and (5) the register of properties which S. 38 of the Act required to be kept had not been submitted to the Board. The petitioner appeared and showed cause, but a committee of the Board, consisting of the President and two members, refused to accept the petitioner's explanations, except that given with regard to the fifth allegation and by an order dated 12th January, 1939, notified the temples. The petitioner appealed to the Board under S. 65-A of the Act, but his appeal was rejected. The Board consists of only four members including the President. Therefore the appeal had to be heard by the three members of the Board who formed the committee which considered the petitioner's objections and the fourth member. The petitioner contends that as this Court has framed a scheme for the management of the temples the Board has no power to notify them under Chapter VI-A, and says that the allegations of mismanagement are entirely baseless. The Board denies that it has acted arbitrarily and says that in any event the Court has no right to quash its orders as the notification of the temples amounts to an order of the Government which cannot be questioned by reason of S. 306 of the Government of India Act, 1935 when read with S. 49.

It will be convenient to deal first with the contention advanced on behalf of the Board that the Court is prohibited by the Government of India Act, 1935 from issuing a *writ of certiorari* in this case. S. 65-A of the Madras Hindu Religious Endowments Act provides that the Board may by notice published in the prescribed manner call upon the trustee and all other persons having interest in a temple to show cause why the temple should not be notified under the provisions of Chapter VI-A. The section says that the notice shall state the reasons for the action proposed and specify a reasonable time, not being less than one month, for showing cause against the proposed action. Where no objection has been received, the Local Government may by notification published in the Fort Saint George Gazette declare the temple to be subject to the provisions of the chapter. Where objections are received the Board shall hold an inquiry and decide whether the temple shall be notified to be subject to the provisions of Chapter VI-A or not. The inquiry

Deivasikamani Ponnambala Desikar v. Board of Commissioners for H. R. E., Madras.

Leach, C.J.

is to be held by a committee of the Board consisting of not less than three commissioners of whom the President shall be one. If the committee decides that the temple should be notified the Board is required to publish its decision in the Gazette. If there is no appeal or if there is an appeal to the full Board and the appeal is dismissed the Government may declare the temple or endowment to be subject to the provisions of the chapter. S. 306 of the Government of India Act, 1935 states that no proceedings whatsoever shall lie in and no process whatsoever shall issue from any Court in India against the Governor-General or the Governor of a province whether in a personal capacity or otherwise. S. 49 says that the executive authority of a province shall be exercised on behalf of His Majesty by the Governor. The argument is that by virtue of S. 49 the notification of a temple under Chapter VI-A of the Madras Religious Endowments Act must be deemed to be an act of the Governor and therefore it cannot be challenged.

This argument cannot be accepted. In the first place, the petitioner does not ask for the issue of a writ against the Government, but against the Board, which is no part of the Government. In the second place if the Board has abused its powers the Court has power to quash the Board's orders on which the notification is based and if the basis of the notification is illegal the notification is illegal. But even if the notification in such circumstances remained a lawful notification, the Court would still be in a position to take effective action. When a temple is notified under Chapter VI-A the duties of the trustee of the temple pass to an executive officer appointed by the Board under S. 65-C. Where the circumstances demanded it the Court could always prohibit the Board taking action under S. 65-C and if action were taken by the Board before the Court had time to interfere it could prevent the executive officer taking over charge of the trust properties, or remove them from his charge. Lord Maugham in delivering the judgment of the Privy Council in *Estate and Trust Agencies* (1927) *Limited* v. *Singapore Improvement Trust*[1], pointed out that a proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority, and quoted

1. (1937) A.C. 898.

Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

Leach, C.J.

with approval . . . . the observations of R. S. Wright, J., in re *The London Scottish Permanent Building Society*[1], where the learned Judge said "an application for prohibition is never too late so long as there is something left for it to operate upon". I have no hesitation in saying that because the Government is by the Act required to issue the notification the Court is not precluded from quashing the Board's orders if they have been improperly passed and from prohibiting the Board or any of its officers from taking any action in pursuance of the notification. Therefore the contention advanced on behalf of the Board that these proceedings do not lie by reason of the provisions of the Government of India Act must be rejected.

The contention of the petitioner that Chapter VI-A does not permit of the notification of a temple in respect of which a scheme has been framed by the Court involves an examination of Ss. 57, 62, 63, 65, 65-E and 75. It will be convenient to refer first to S. 75. This section provides that where the administration of a religious endowment is governed by any scheme settled under S. 92 of the Code of Civil Procedure the scheme shall be deemed to be a scheme settled under the Madras Hindu Religious Endowments Act and may be modified or cancelled in the manner provided by the Act. S. 57 falls in Chapter V (which relates only to non-excepted temples) and says that when the Board is satisfied that in the interests of the proper administration of the endowments of a temple, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee, the committee constituted under Chapter III of the Act, if any and the persons having interest, by order settle a scheme of administration for the endowments of the temple. Sub-S. (3) provides that the trustee or any person having interest may institute a suit to modify or set aside the order of the Board under this section. Sub-S. (4) declares that a scheme of administration which has been settled by the Court under S. 57 or which under S. 75 is deemed to be a scheme settled under the Act may at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise. S. 62 falls under Chapter VI which deals with maths and excepted temples. This section

1. (1893) 63 L.J. (Q.B.) 112.

Deivasikamani Ponnambala Desikar v. Board of Commissioners for H. R. E., Madras.

Leach, C.J.

provides that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of proper administration a scheme of administration should be settled, the Board may hold an inquiry, and if as the result of the inquiry it is satisfied that a scheme should be settled it has the power under S. 63 to settle a scheme. S. 65 says that a scheme of administration which has been settled by the Court under S. 63 or which under S. 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise. S. 65-E which is the last section in Chapter VI-A, says that Ss. 57, 62 and 63 cease to apply to temples and endowments which are notified under S. 65-A. It is argued that inasmuch as this section does not make any reference to S. 75 it must be held that the intention of the Legislature was to leave untouched temples in respect of which the Court has settled a scheme under S.92 of the Code of Civil Procedure. This argument must also be rejected. S. 65-E is obviously inserted to make it quite clear that when the Board notifies a temple or an endowment under Chapter VI-A no steps can be taken to frame a scheme for a non-excepted temple under S. 57 or for an excepted temple under Ss. 62 and 63. There is nothing in S. 65-A or in any other section in Chapter VI-A which exempts a temple in respect of which a scheme has been settled by the Court under S. 92, and this being the case the Chapter must be held to apply to a temple which is managed under such a scheme.

The powers given to the Board under Chapter VI-A are very wide and their exercise in the case of a temple managed under a scheme framed by the Court sets the scheme at nought. It could never have been intended that the power of notification should be exercised without grave reason. In exercising its powers under Chapter VI-A the Board must act judicially, after a full and proper inquiry, and as the provisions of Chapter VI-A with regard to appeal are illusory the need for care in this respect is all the greater. My reasons for describing the provisions of the chapter with regard to appeal as being illusory

Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

Leach, C.J.

are these. S. 65-A, as I have already indicated, requires the inquiry where there is objection to a proposed notification under Chapter VI-A to be held by a committee of the Board consisting of not less than three commissioners of whom the President shall be one. S. 11 limits the maximum number of commissioners to five including the President. As I have already pointed, the Board as at present constituted consists of only four members of which the President is one. Therefore the apellate tribunal is in reality the tribunal of first instance. The powers given by Chapter VI-A are so great that they cannot safely be conferred, whether on a statutory body like the Religious Endowments Board or on the Court without provision for an appeal to an independent tribunal and it is to be hoped that this case will have the effect of drawing attention to the need for an appellate tribunal, which is in reality, and not merely in name, an appellate tribunal.

In *Board of Education* v. *Rice*[1], the House of Lords affirmed a decision quashing the proceedings of a statutory Board where the Board had failed to deal fairly with the matters in issue. A local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. A complaint was made by the managers of non-provided schools and the Board of Education directed an inquiry which resulted in the report that the local education authority had failed to maintain the school and keep it efficient. The Board of Education was required to determine: (1) whether the local education authority had in fixing and paying the salaries of the teachers fulfilled its duty under S. 7, sub-Cl. (1) of the Education Act, 1902; and (2) whether the salaries inserted in the teachers' agreements were reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay. The Board of Education gave a decision in writing, but failed to deal with the matters in issue. Its decision was quashed by *certiorari* by a Divisional Court (Lord Alverstone, C. J., Darling and Lawrence, JJ.) and the decision was affirmed by the Court of Appeal and by the House of Lords. In the appeal to the House of Lords Lord Loreburn, the Lord Chancellor, said:—

"In such cases the Board of Education will have to ascertain the law

1. (1911) A.C. 179.

and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. . . . The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

Now, has the Board in this case acted in good faith? Has it listened fairly to the petitioner and acted judicially in applying Chapter VI-A? An examination of the facts and of the reasons given by the Board for its action leaves no doubt in my mind that the Board has not acted fairly, but to use the words of Cozens-Hardy, M.R. in his judgment in the case which I have just cited when it was before the Court of Appeal, the decision is "so perverse as really to amount to a non-exercise of the jurisdiction entrusted to the Board".

I will deal in the order in which they are set out the four reasons given by the Board for the notification of the temples. It was alleged by the Board that Cls. 3, 6, 7, 8, 9 and 13 of the scheme framed by this Court in 1925 were inconsistent with the provisions of the Madras Hindu Religious Endowments Act. What the Board says here is this:—

"It is not denied that the provisions of the scheme in question are inconsistent with the Act. The scheme provides for a Board of Supervision. The control is shared by the Board of Supervision and the Court. The act contemplates superintendence and control by the Board. The first reason therefore is held to be proved. What is argued, however, is that a suit might be filed for the amendment of the scheme. But, as has been pointed out, the said remedy is a tardy and ineffective one."

This is undoubtedly an incorrect statement of the position. It is in fact denied that the provisions of the scheme are inconsistent with the Act and when the scheme and the Act are examined the denial is found to be fully justified. The statement that the remedy by suit is "tardy and ineffective" is also open to grave objection. A suit, of course, must always take its turn for hearing unless there are special reasons for expediting it, but the Court for proper reasons shown will expedite the hearing and as the statement that schemes settled or amended by the Court are ineffective is not supported by reasons and is contrary to my experience of many years, I am not

Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

Leach, C.J.

prepared to accept it. A scheme framed by the Court speaks for itself. If its provisions are not followed and the trustee abuses his powers or neglects his duties the Court will take effective steps, but of course, those interested in the trust must be sufficiently interested to bring matters to the notice of the Court and this the Board can always do.

What are the provisions of the scheme which have been framed in this case? Clause (3) of the scheme provides for a Board of Supervision. Clause (6) says that the trustee shall submit to the Board of Supervision before the 30th June in each year a budget showing the probable receipts and disbursements. Clause (7) requires the accounts of the institution to be audited by a Government certified auditor and an abstract stating the result of the audit to be published in such manner as the Board of Supervision may direct. Clause (8) says that without the sanction of the Board of Supervision, the trustees shall not lease for a longer period than five years, sell or mortgage any of the properties belonging to the temples. Clause (9) provides that where there is or arises a conflict of interest between the math and the devasthanams, the trustee shall always place the matter before the Board of Supervision and it shall be jointly considered by the trustee and the Board of Supervision. In the event of their failing to agree either of them shall be at liberty to refer the matter to the District Court of Ramnad for decision. Clause (13) states that the trustee, the Board of Supervision or the Advocate-General shall have liberty to apply to the District Court of Ramnad for directions generally, including directions for the utilization of surplus moneys, if any. They shall also have liberty to apply for any modification of the scheme. None of these provisions interferes with the provisions of the Act or with the powers of the Board constituted by the Act. These provisions can only be regarded as additional safeguards. Certainly the existence of these clauses does not provide ground for notifying the temples under Chapter VI-A of the Act.

The allegation that the petitioner was not attending to urgent repairs is strenuously denied by him. That certain repairs are required is accepted, but the repairs are being executed from time to time as funds are available. The remarks of the Board on the objection indicate that the Board consider-

ed that if the petitioner had not sufficient funds available for carrying out all the repairs he was bound to appeal to the general public for donations. The learned Advocate-General very properly made no attempt to justify this ground for the Board's order.

With regard to the allegation that the salaries of the temple servants are not paid regularly, the Board says :—

"It is admitted that the trustee enters upon an elaborate defence of this on the ground that there are seasonal variations, and uncertainty of incomes which renders the regular payment impossible. It is the obvious duty of the trustee to make satisfactory financial arrangements for the payment of the salaries of temple servants. This is very essential in any administration. The plea put forward by him is untenable. This reason also is held to be proved."

There is here no examination of the facts disclosed by the petitioner and the facts as stated by him have not been challenged. They are these. All the lands belonging to the temples yield only one crop a year and the success of this crop depends upon the rainfall, as there is no system of irrigation. When the salaries can be paid depends upon the crop and the collections. In difficult times the salaries are bound to fall in arrear. It is not suggested that the temple servants have complained that they are kept waiting longer than in other institutions. In the neighbouring estate of Sivaganga, which is administered by a member of the Indian Civil Service and where there are larger resources, servants are not paid regularly. When the petitioner took over charge of the temples the salaries were nine months in arrear, but at the time he was called upon to show cause why the temples should not be notified the arrears had been reduced to three months. It is not disputed that the position with regard to salaries is far better than when the temples were in the hands of the receiver appointed by the Court and there is no reason to think that the trustee has not done all that was reasonably possible for him to do in the matter of the regular payment of salaries.

The Board's rejection of the petitioner's explanation with regard to the collection of arrears is also open to grave objection. Here again no attempt was made to examine the evidence. When the petitioner took over charge of the temples the arrears of rent amounted to Rs. 1,39,291-2-11, a considerable portion of which was irrecoverable as the result of the law of

Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

Leach, C.J.

limitation. By the year 1937-38 the arrears had been reduced to Rs. 83,781-11-5. If the sums which had become time-barred had been written off when the petitioner took over charge, the arrears would have been very small, but it has never been the practice to write off amounts which have become time-barred, because many tenants do pay if they can, notwithstanding that the law of limitation has operated in their favour. Of the arrears of Rs. 83,781-11-5, Rs. 20,000 represent debts below Rs. 4 and the cost of filing and conducting suits for the recovery of these sums would be prohibitive. The statements which the petitioner has filed showing the collections have also not been challenged and not only do they show that he has not allowed the arrears to increase, but they show that he has greatly improved the position. Mr. E. V. Sundara Reddi, one of the commissioners forming the committee of the Board which rejected the petitioner's representations, visited the temples in April, 1936. The visit was without notice and had not been included in the commissioner's programme. As the result of this surprise inspection he certified that the temple was well kept, clean and tidy. He added that the trustee and treasurer, assisted by the staff, had been evincing keen interest in the upkeep of the institution. It is impossible to reconcile the order of the Board notifying these temples with this certificate.

Further indication of the improper attitude of the Board is to be gathered from what happened when the petitioner appealed. Mr. V. Ramaswami Aiyar who was engaged to support the appeal could not attend at the precise hour fixed for the hearing. The reason was that a Division Bench of this Court composed of Venkataramana Rao and Newsam, JJ., had intimated that they wished him to be present personally in Court at that hour to speak to a certain matter. On receiving this information he wrote to the Secretary of the Board explaining his position, adding that he would attend at the office of the Board as soon as he was able to do so. The delay was only a matter of fifteen minutes, but the Board would not wait for him and when he got there he found that the appeal had been dismissed. It is obvious from the course of events that even if Mr. Ramswami Aiyar had appeared before the Board the result would have been the same, but in refusing to wait

for a short time under the circumstances the Board has only emphasised the arbitrary nature of its action.

Entirely without reason the Board has taken away from the petitioner the management of the temples of which he was given charge by an order of this Court, passed with the consent of all parties. I consider that the only conclusion which can reasonably be drawn after the examination of the record is that the Board has acted in abuse of its powers. The order of the Committee and that of the Board on appeal will be quashed and the Board prohibited from taking steps to appoint an officer under S. 65-C of the Act.

Deivasikamani Ponnambala Desikar *v.* Board of Commissioners for H. R. E., Madras.

Leach, C.J.

The petitioner is entitled to his costs and we fix the advocate's fee at Rs. 250.

Krishnaswami Aiyangar, J.—I agree.

Krishnaswami Aiyangar, J.

K. S. *Orders quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

S. Ramachandra Aiyar .. *Petitioner** (*Respondent*)

Ramachandra Aiyar, *In re.*

Civil Procedure Code (*V of* 1908), O. 44, *r.* 1—*Applicability to memorandum of cross-objections in* forma pauperis.

There is no provision in the C. P. Code relating to the filing of cross-objections in *forma pauperis* but when a respondent files cross-objections he is in fact filing a cross-appeal and the same principle as in O. 44, r. 1, must be applied. That order does not allow an appeal in *forma pauperis*, unless upon a perusal of the application and of the judgment and decree appealed from, the Court sees reason to think that the decree is contrary to law or is otherwise erroneous or unjust.

Secretary of State v. *Maurice*, A.I.R. 1937 Rang. 81 not followed.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to grant leave to file in *forma pauperis* S. R. No. 27662—Memorandum of cross-objections in O. S. A. No. 41 of 1940 preferred to the High Court against the judgment and decree of the Hon'ble Mr. Justice Somayya passed in the exercise of the Ordinary Original Civil Jurisdiction dated 16th February, 1940 and 2nd May, 1940, respectively and passed in C. S. No. 146 of 1937.

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* C. M. P. No. 5985 of 1940. 5th December, 1940.

Rama-chandra Aiyar, *In re.*

Leach, C.J.

T. S. Ramaswami Aiyar for Petitioner.

The order of the Court was made by

The Chief Justice.—This is an application by the respondent in the appeal to be allowed to file a memorandum of cross-objections in *forma pauperis.* The respondent was the plaintiff in the Court below and succeeded in part. The defendants have appealed and the respondent wishes to challenge that portion of the judgment which refused him his full claim. O. 44, r. 1 of the Code of Civil Procedure does not allow an appeal in *forma pauperis* unless the Court, upon a perusal of the application and of the judgment and decree appealed from, sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. There is no special provision in the Code relating to the filing of cross-objections in *forma pauperis,* but when a respondent files cross-objections he is in fact filing a cross-appeal and the same principle must be applied.

The learned advocate for the respondent has quoted to us the decision of the Rangoon High Court in *Secretary of State* v. *Maurice*[1], in which it was said:

> " We think it our duty to look carefully at the circumstances and see the judgment having been impugned by one party, whether the other party would not also be in a position to attack it from another angle".

The question whether the Court had reason to believe that the judgment was contrary to law or usage or unjust or erroneous apparently did not matter. We have no hesitation in refusing to follow this decision. In our opinion it neglects an express provision of the Code of Civil Procedure which has application. If it is a question of meeting an attack on a judgment a respondent is not confined to the grounds given by the Judge for his decision.

The petition must be rejected as he has not shown that he is within the rule but we will give the respondent time until the 9th December, in which to pay the court-fee.

K. S. *Petition rejected.*

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1. A.I.R. 1937 Rang. 81.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE SOMAYYA.

The Madras and Southern Maharatta Railway Company Limited, by its Agent. *Appellant** (*Plaintiff*)

v.

The Municipal Council, Bezwada by its Chairman. *Respondent* (*Defendant*).

M. & S.M. Ry., Co., Ltd. *v.* Municipal Council, Bezwada.

Madras District Municipalities Act (V of 1920), Ss. 81 and 82—Vacant lands and buildings in possession of railway company—Assessment to property tax—Omission by Government to frame rules for computation—Effect on right of Municipality to levy the tax—Annual value—Computation based on capital value—Legality—Committee formed to fix capital value—Validity.

The Government of India under S. 135 of the Indian Railways Act having by notification on 14—2—1929 declared the M. & S. M. Railway Company liable to pay property tax etc., to the respondent herein—the Bezwada Municipality—that body sought to levy property tax on the vacant lands owned by appellant railway company within the limits of the Municipality in accordance with S. 81 of the District Municipalities Act. At the instance of the company a committee was constituted to fix the capital value of the vacant lands and buildings and on the basis of the value so fixed the chairman of the municipality levied and collected nearly a lakh of rupees as tax on the annual value for the quinquennium beginning with 1931—1932 from the railway company. In suits questioning the legality of the procedure and the assessment,

Held, that (*i*) when there was no basis for fixing the annual value of vacant lands, it was permissible on the analogy of decisions interpreting English rating statutes, to adopt the capital value basis for determining the annual value; (*ii*) though there was no statutory provision for resort to a committee to fix the annual value, the levy of the tax was ultimately by the chairman in this case who adopted the valuation as his own and was therefore not illegal; (*iii*) the omission of the rule-making authority to frame rules prescribing the method of determining the capital value cannot take away the right of the Municipal Council to levy tax on the capital value basis; (*iv*) the levy of the tax under S. 82 (2) was perfectly justified and in substantial compliance with the provisions of the Act; and (*v*) (*Obiter*) even if the levy was not justified under S. 82 (2) the municipality can seek to justify it under S. 81 (3).

Appeals against the decrees of the Court of the Subordinate Judge of Bezwada dated the 31st March, 1937, and passed in O. S. Nos. 61 and 41 of 1935 respectively.

T. R. Venkatarama Sastri instructed by *Messrs. King and Partridge* for Appellant.

The Advocate-General (*Sir Alladi Krishnaswamy Aiyar*) and *P. Satyanarayana Rao* for Respondent.

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* Appeals Nos. 240 and 297 of 1937. 29th January, 1941.

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

The judgment of the Court was delivered by

Somayya, J.—These are two appeals filed against the decrees of the Court of the Subordinate Judge, Bezwada, in two suits filed by the appellant against the respondent for refund of certain taxes which were alleged to have been illegally levied under the Madras District Municipalities Act (Madras Act V of 1920) on the vacant lands belonging to the appellant.

The appellant is the Madras and Southern Maharatta Railway Company owning several buildings and vacant sites within the limits of Bezwada Municipality and the Municipal Council of Bezwada is the respondent. The respondent Council levied certain taxes under the Madras District Municipalities Act on the appellant's vacant lands from 1929 to 1935. The plaint in O. S. No. 41 of 1935 was filed for recovery of Rs. 22,092-13-0 which was the tax levied for the year 1931-32. The other suit O. S. No. 61 of 1935 was filed for recovery of a sum of Rs. 76,706-10-4 made up of various sums which were levied for the years 1929-30, 1930-31, 1932-33, 1933-34 and 1934-35, that is, for five years. The Subordinate Judge tried the two suits together, dismissed O. S. No. 41 of 1935 and decreed O. S. No. 61 of 1935 in part ordering a refund of the sums claimed in respect of 1929-30 and 1930-31 and dismissing the rest of the claim. The plaintiff appeals. A. S. No. 297 of 1937 is the appeal against the decree in O. S. No. 41 of 1935 and A. S No. 240 of 1937 is the appeal against the decree in O. S. No. 61 of 1935. The main judgment was delivered in O. S. No. 61 of 1935 and the relevant papers are printed in the appeal against that decree. In both the suits substantially the same question arises for consideration, namely, whether the levy of the tax is legal.

To understand the questions raised in these suits, certain provisions of the Indian Railways Act and of the Madras District Municipalities Act have to be referred to. Under the Indian Law, railway companies are not liable to pay any tax to any local authority unless the Governor-General in Council notifies under S. 135 of the Indian Railways Act that the railway company is liable to pay and the railway company is then bound to pay the taxes mentioned in the notification. In this case a notification was issued on 14th February, 1929, under the above section by which the appellant company was declared liable to pay in aid of the funds of the respondent Municipality, the general property tax, and a water

and drainage tax. There were prior notifications with which we are not concerned as the notification of 14th February, 1929, was in supersession of all prior notifications. Under S. 78 of the District Municipalities Act every Municipal Council may levy among other things a property tax. Under S. 81 (1) of the said Act the Municipal Council may by a resolution levy property tax on all buildings and lands situated within the Municipality subject to certain exceptions and the property tax may comprise among other things (1) a tax for general purposes and (2) a water and drainage tax. S. 81 (2) provides that these taxes shall be levied at such percentages of the annual value of the lands or buildings or both as may be fixed by the Municipal Council. Under S. 81, Cl. (3) the Municipal Council may in the case of lands which are not used exclusively for agricultural purposes and which are not occupied by or adjacent and appurtenant to buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands as it may fix. This power is subject to a certain proviso which will be mentioned later on. S. 82 provides for the method of assessment. Under Cl. (2) of this section the annual value of the lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year subject to certain deductions. The proviso to this sub-section says that in the case of Government or railway buildings or buildings which are of a class not ordinarily let, the gross annual rent of which cannot in the opinion of the executive authority be estimated, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present costs of erecting the building subject to certain deductions for depreciation. The taxing authority under this Act is the executive authority and in the years with which we are concerned, the Chairman of the Municipality was the executive authority empowered to levy the tax. One other section of the Indian Railways Act must be referred to and that is S. 135 (2) which runs thus:

"While a notification of the general controlling authority under Cl. (1) of this section is in force the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any, as an officer appointed in this behalf by the general controlling authority may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable."

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada. — Somayya, J.

The Collector of the District has been appointed by the Governor-General in Council as the officer authorised to act under this sub-section. For the years 1929-30 and 1930-31 the Collector of Kistna district fixed a particular amount as payable to the Municipality and the Municipal Council levied a sum in excess of the amount fixed by the District Collector. The lower Court held that this was illegal and decreed a refund of the sums collected for the years 1929-30 and 1930-31 and there is no appeal by the Municipal Council.

As regards the other four years the railway company challenges the levy chiefly on the ground that in making the assessment, the provisions of S. 82 (2) proviso were applied and they point out that those provisions apply to certain cases of buildings only. They also say that the Municipal Chairman did not determine the assessment but that a certain committee of three did it. Next it is said that owing to certain rules not being framed, they are not assessable at all.

The defendant repelled the contentions of the plaintiff and stated that the tax was properly levied, that the Municipal Chairman actually levied the tax and that the committee referred to in the plaint was only an advisory body. It was also stated that the provisions of the Act were in substance and in effect complied with and that therefore under S. 354 (2) of the Act, no suit can be brought to recover any sum of money collected under the authority of the Act on account of assessment.

The question for decision is whether the provisions of the District Municipalities Act have been in effect complied with by the respondent in levying the tax in question.

It is common ground that under S. 81 (1) the respondent Council passed a resolution that a property tax for general purposes and a water and drainage tax shall be levied for all the years in question on all buildings and lands within the Municipal limits except those which are exempted. The lands in question are not claimed to come under this exemption and therefore became liable to pay a tax for general purposes and a water and drainage tax. Under Cl. (2) of the said section which provides that these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, it is agreed that the Council fixed 16½ per cent. of the annual value as the tax payable. It is also agreed that under S. 81 (3) of the Act which applies to

vacant lands which are not agricultural lands and which are not adjacent and appurtenant to buildings, the Municipal Council passed a resolution that on such lands the tax should be levied at the rate of one per cent. on their capital value. There is a proviso to sub-S. (3) of S. 81 which runs thus:

"Provided that such percentages or rates shall not exceed the maximum, if any, fixed by the Local Government and that the capital value of such lands shall be fixed in such manner as may be prescribed."

And the word 'prescribed' is defined under S. 3 Cl. (19) as meaning 'prescribed by the Local Government by rules made under this Act.'

It appears that when framing rules under this proviso for the manner in which the capital value is to be fixed by the Municipal authorities, the Local Government confined their operation to vacant lands not belonging to a railway company and expressed the view that in the case of vacant lands belonging to a railway company, the assessment should be made on the annual value basis and not on the capital value basis. The procedure adopted by the respondent Council in fixing the tax was this. A Committee was convened in accordance with the instructions given by the Local Government on the 15th March, 1929, which is Ex. A-6 printed on page 21 of the Exhibits Book. The relevant portion of Ex. A-6 runs as follows:

" With the concurrence of the Government of India the Local Government are pleased to issue the following instructions for the assessment of railway buildings and lands to property tax in Municipalities. Chairmen of Municipal Councils and the Commissioner of the Madras Corporation are requested to follow the instructions with effect from 1929-30. . . . . . (1) the 'annual' value of buildings of a class not ordinarily let shall be deemed to be 6 per cent. of their book value for a period of five years after their first constructions. (*ii*) In the case of other buildings and lands after a period of five years after construction in the case of buildings mentioned in sub-paragraph (1) above, the 'annual value' shall be fixed once in five years in accordance with S. 82 of the Madras District Municipalities Act 1920, by a committee consisting of (*a*) the Chairman of the Municipal Council in the case of mofussil Municipalities and the Commissioner in the case of the Madras City Municipality; (*b*) the Executive Engineer of the division; and (*c*) one representative of the railway administration concerned to be chosen by its Agent."

A Committee was formed which fixed the capital value and the annual value of the lands and the Municipal Chairman adopted it and levied the tax on the annual value so arrived at. This procedure is now attacked by the appellant as illegal and it is also said that in taking the capital value as the basis of assessment, the assessing authority followed a provision enacted

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J

for a different class of properties. It is now conceded that this Committee has no legal status under the Act to make any assessment. It can only be taken to be an advisory body to help the authority empowered under the Act to fix the tax. However, all the parties proceeded upon the footing that a Committee should be convened in accordance with this notification. It appears that the appellant company was very anxious that the committee procedure should be followed and notified the Municipality to convene a Committee. On 8th February, 1930, the Municipal Council sent Ex. B-2 (page 55) calling upon the railway company to pay a sum of Rs. 17,558-6-0 as the tax for the vacant lands of the railway company for the year 1929-30. Thereupon the railway company replied by Ex. B-4, dated 19th February, 1930, (pages 59 and 60) objecting to the assessment of the vacant lands at Rs. 17,558-6-0. The letter winds up by saying:

"I also beg to refer you to G. O. No. 4894 *L* and *M*, dated 29th October, 1929, issuing instructions to the Municipal Councils that railway lands should be assessed on their annual value and that the Chairman, should, in fixing the annual value of the properties of the railway administration, follow strictly the procedure laid down in paragraph 2 of G. O. No. 1258, *L* and *M*, dated 15th March, 1929."

Thus the railway company asked the Municipality to follow the committee procedure laid down in Ex. A-6. The Municipal Council replied by Ex. C-3 dated 20th August, 1930, and said that the Municipal Council resolved by its resolution dated 5th August, 1930, that a Committee referred to in Ex. A-6 should be called for revision of taxes on vacant lands belonging to the company and asked for the name of the official who would attend the meeting on behalf of the railway company. The third member under Ex. A-6 is the Executive Engineer of the division who is a Government official. The Municipal Chairman, the Executive Engineer of the division and the official nominated by the railway company are the three persons to constitute the Committee and by Ex. C-3 the Municipal Council asked the railway company to mention the name of the official to represent the company. The District Engineer, Bezwada, was chosen by the railway company and the same was communicated by Ex. C-4 dated 6th September, 1930. The Committee so constituted met on 15th December, 1930, and a copy of the proceedings of the Committee is Ex. C-9

(page 65). In this document the Committee says:

"It is agreed that there has been an exceptional rise in land values during the last few years in Bezwada, anything from three to six times."

The Executive Engineer of Kistna district suggested in view of the exceptional rise in land values that Rs. 150 an acre should be taken to be the annual rental value and that that rate should prevail until 31st March, 1931. The Municipal Chairman and the railway representative agreed subject to the approval of the Municipal Council and the railway Agent. According to the annual rental value fixed in this document the railway company had to pay a sum of Rs. 2,154-15-6 for each year. The assessment for the prior years was Rs. 887-12-0. For the years 1929-30 and 1930-31 the Municipal Council demanded Rs. 2,154-15-6 a year in accordance with the decision of the Committee dated 15th December, 1930. The railway company objected to this valuation and addressed Ex. D-1 to the District Collector of Kistna asking that Rs. 50 per acre should be fixed as the annual rental value of these lands. This was evidently a request for action being taken under S. 135 (2) of the Indian Railways Act. The Collector by his proceedings dated 30th June, 1931, (Ex. D-11) said as follows:

"As observed by the Collector, Mr. Stewart, while fixing the assessment in the year 1925, it is very difficult to determine the annual value of railway lands especially of those occupied by embankments, cuttings, sidings, level-crossings, culverts, etc., and I therefore direct that the method and rate of assessment adopted by the Collector in 1926, namely, the levy on the basis of extent at one-third of the tax payable by an ordinary tax payer for general purposes as well as water and drainage purposes should continue."

This order was varied by that of another District Collector who restored the value suggested by the Committee's resolution of 15th December, 1930. So, the Municipal Council collected from the railway company taxes at the rate of Rs. 2,154-15-6 a year for the years 1929-30 and 1930-31. It was held by the Court below that once action was taken by a Collector under S. 135 (2) it was not open to revision and on this ground a decree has been passed by the lower Court for refund of the excess levy in respect of 1929-30 and 1930-31, and as mentioned before there is no appeal by the Municipal Council in respect of that amount. For years 1931-32 onwards, another valuation Committee was convened by the Municipal Council by its letter dated 12th March, 1932, (Ex. D-12). The Railway District Engineer, Bezwada division was deputed by the railway company by its letter dated 16th March, 1932,

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

(Ex. D-13). The Committee met on the 19th March, 1932 and the proceedings of the Committee are evidenced by Ex. D-15 (pages 81 and 82). The Committee took the capital value of the vacant lands and fixed six per cent. of the capital value as the gross annual rental value. It winds up by the note on page 82:

"The anuual value will be calculated at six per cent. of the capital value as arrived at by the Committee."

All the three agreed and signed this document. In accordance with this valuation, the tax payable by the railway company was levied by the Municipal Chairman. Ex. D-14 dated 21st March, 1932, is a letter calling upon the railway company to pay the tax for the year 1931-32. 46 demand notices, evidently one for each separate plot, were enclosed and a statement showing the particulars was also enclosed. This statement is Ex. D-16 and it was sent as an enclosure to Ex. D-14. The validity of Exs. D-16 and D-14 is a point to be determined in these appeals. Similar demand notices were issued for the successive years and they all proceeded upon the same valuation which was adopted for the year 1931-32 and in fact as would be noticed from Ex. A-6 set out already, the value of buildings and lands should be fixed once in five years by the Committee mentioned therein. So for the quinquennium beginning with 1931-32 the Municipal Council levied tax on the annual value fixed in Ex. D-15.

The railway company made various attempts to get this amount reduced. They approached the Collector of the district but the Collector declined, stating that what he considered to be an appeal in the ordinary course was not filed before him. The Municipal Council was asked to revise the tax and they pointed out by Ex. E-3 dated 25th March, 1932 that it was open to the railway company to appeal to the Collector under S. 135 (2) of the Indian Railways Act. Representations to the Local Government and the Railway Board proved infructuous and these suits were then filed objecting to the levy of the tax on the basis of Ex. D-15. Thus, the questions that arise are whether the procedure followed by the Municipal Council is a substantial compliance with the provisions of the Act within the meaning of S. 354 (2) which says that if the provisions of the Act have been in substance and in effect complied with, no suit can be brought to recover any sum

of money collected under the authority of this Act on account of any assessment.

The chief contention of the appellant is that the Municipal Council followed the procedure fixed in S. 82 (2) proviso which is enacted for quite a different class of property and that in doing so the Council violated the express provisions of S. 82 (2) which says that the annual value should be fixed by taking the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. It is said that no attempt at all was made by the Municipal Council to find out the gross annual rent at which these lands may reasonably be expected to let and that instead of doing so, they followed the procedure which is fixed for another class of property namely buildings belonging to Government or a railway company or of a class not ordinarily let. It is urged that by enacting the capital value method in the case of buildings covered by the proviso, the Legislature has, by implication, prohibited the use of that method for the lands in question. It is said that the annual value should be fixed by taking only the gross annual rent, whatever might be the difficulties in arriving at that rent and that in so doing the capital value procedure is by implication excluded by the proviso to S. 82 (2). It is then said that even apart from the implied prohibition of the capital value method, the Committee in this case made no attempt whatever to get at the gross annual rent and that it is clear from Ex. D-15 that they simply followed the capital value method provided for a particular class of buildings. The next objection advanced is that if the levy is taken to have been made under S. 81 (3), the Local Government expressly declined to make any rules for fixing the capital value of the vacant lands belonging to a railway company and directed that such lands should be assessed on the annual value basis and not on the capital value basis. It is said that even if this view of the Government is wrong, inasmuch as no rules have been framed under the proviso to Cl. (3) of S. 81, the power given to the Municipal Council in Cl. (3) to levy the taxes at a percentage on the capital value cannot be exercised in the case of railway vacant lands. It is also said that the valuation Committee did not adopt a percentage on the capital value which in this case has been fixed by the Municipal Council at one per cent. of the capital value but as Ex. D-15 shows they followed the procedure

M. & S. M. Ry., Co., Ltd. Municipal Council, Bezwada.

Somayya, J.

under the proviso to S. 82 (2), that is, after taking the capital value they took six per cent. of the capital value as the annual rental value and fixed 16½ per cent. thereon as the tax. The tax actually levied does not come to one per cent. of the capital value but amounts to a sum which is slightly less than one per cent. And the last objection is that the valuation Committee determined the capital value and the annual value, that the Committee has no legal existence, and that the Chairman who is the only authority to fix the tax has not done so and that therefore the levy is illegal as made by a person who had no authority to do so.

These contentions are met by the learned Advocate-General who appears for the respondent by pointing out that in the case of lands with which we are now concerned, it is not possible, as the Kistna Collector observed, to find the annual rental value, that they cannot, as they are, be let to any one and that it is practically impossible to fix with any degree of accuracy the gross annual rent at which they may reasonably be expected to let. He urges that in such cases the gross annual rent at which the property may reasonably be expected to let may be fixed by what is known as the capital value method by taking the value of the land and by fixing a percentage of that value as the rental value. Reference is made to the analogous provisions of the English rating statutes and the decisions thereunder which, it is said, establish that a resort to the capital value method is not absolutely ruled out when the gross annual rental value has to be fixed. He says that in this case Ex. D-15 contains only the final conclusion of the Committee, that it is a fair and reasonable inference to draw that as gentlemen having wide experience in such matters and having presumably known prior proceedings, the committee members all felt that they could not with any fairness to either party fix any sum as the rent at which these lands could be expected to let and that therefore they resorted to the capital value method. If this is correct, there is no doubt that the provisions of the Act would have been substantially complied with and that the appellant would have no case.

It is then urged that the levy can be justified even under S. 81 (3). In this case the Municipal Council has issued notifications under S. 81 (3) and the notifications say that on vacant lands of the kind coming under S. 81 (3) the tax would

M. & S. M. Ry. Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

be levied at one per cent. of the capital value. It is urged that by its omission or refusal to frame rules for the determination of the capital value of the railway vacant lands, the Local Government cannot deprive the Municipal Council of its power to levy a tax under S. 81 (3). He says that if the Local Government does not choose or refuses to make the necessary rules, the Municipal Council may levy it in such manner as it thinks fit. As regards the objection that Ex. D-15 shows that it was not on the basis of one per cent. of the capital value that the tax was fixed but that 6 per cent. of the capital value was first taken as the annual value and that 16½ per cent. thereon was fixed as the tax, the answer is that the amount which is so levied is less than what would have been leviable under S. 81 (3) and that therefore the railway company has no grievance. And lastly it was said that it was the Municipal Chairman who levied the tax, that the committee procedure was followed in accordance with the rules issued by the Local Government, that the Chairman did not surrender his judgment to the Committee, and that by adopting the conclusions of the Committee finally the levy is his and not that of the Committee. He also says that it was the railway company that wanted the committee procedure to be followed.

No authorities of the Indian High Courts have been brought to our notice by either side. The learned Advocate-General relies on certain decisions on the construction of the term 'gross value' as defined in the English rating statutes and urges that the language of the English Act and of the Act under consideration is similar and that therefore, the decisions of the English Courts would be helpful. Before referring to the decisions, we may refer to the statutes mentioned. There are certain rating statutes in England under which rates and taxes are fixed on the gross value of hereditaments, and the 'gross value' is defined to be the gross annual rent. The term 'gross value' is defined in the Valuation (Metropolis) Act, 1869. (32 and 33 Vict. Ch. 67) thus:

"The term 'gross value' means the annual rent which a tenant might reasonably be expected taking one year with another to pay . . . . for a hereditament . . . . . ".

The Rating and Valuation Act, 1925 defines the term 'gross value' thus:

" 'Gross value' means the rent at which a hereditament might reasonably be expected to let from year to year."

M. & S. M. Ry. Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

The latter definition approximates very nearly to the language used in S. 82 (2) of the Indian Act. The definition in the Act of 1925 is practically equivalent to that contained in the Act of 1869. See Halsbury's Complete Statutes of England, Volume 14, pages 553 and 554.

In *London County Council* v. *Erith*[1], the definition as given in the 1869 Act is set out on page 587. Then they say at the top of page 588:

" 'The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament' is the same thing as 'the rent at which the same might reasonably be expected to let from year to year.' "

Then on page 600, the Lord Chancellor says this:

"Lush J., stated that the rateable quality of land was not to be determined by what it once was, or by what it might thereafter become, but by what it was at the time the rate was made. I quite agree with this."

So we have to decide the rateable quality of the vacant lands in question as they stand at present. As pointed out in *Railway Assessment Authority* v. *Southern Railway Co.*[2]

"'The foundation of our rating law is the Poor Relief Act of 1601. . . . . In 1836 the Parochial Assessment Act of that year provided, by S. 1 that the rate was to be based 'upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year. . . . . . . Substantially the same language is used in the Parochial Assessment Act, 1862 and in the Valuation of Property Metropolis Act, 1869 with regard to London. My Lords, this method of assessing liability for rates was no doubt very suitable for the simple conditions which prevailed in the reign of Queen Elizabeth; but when it was sought to apply it to modern conditions, and especially to the assessment of great public utility undertakings, such as railways, waterworks, gasworks and the like, whose operations might easily extend over great areas, stretching far beyond the limits of any individual parish, the greatest difficulty was found in adopting the statutory provisions to the facts of such a case. . . . . Unfortunately, the Legislature did not see its way to intervene and the Courts were compelled to evolve a system of calculation, with the assistance of the expert advisers to the rating authorities and to the undertakings, which involved a number of very difficult assumptions, but which received the approval of your Lordships' House on a number of occasions, and which became recognised as the standard method of assessing the rateable value of hereditaments in these cases. . . . ."

As pointed out herein owing to frequent changes in the conditions of modern life, great public utility undertakings such as railways, waterworks and gasworks and the like have come into existence in several places. On some of the lands

1. (1893) A.C. 562 at 600.

2. (1936) A.C. 266.

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

acquired by these concerns, buildings are erected and the rest are kept vacant. In the cases of both the buildings and the vacant sites great difficulty arose as to how the gross value or the annual rental value was to be arrived at. In solving the difficulty, English Courts took two alternative methods of arriving at the gross value or the annual rental value; (1) capital value basis or contractor's method, (2) profit basis. Two classes of cases frequently arose for consideration: (*a*) lands occupied by profit earning concerns, and (*b*) those occupied by concerns which were not of a profit earning character. Under the latter category come school buildings, water works and sewage farms and under the former come railways etc. The law is well discussed in *Liverpool Corporation* v. *Llanfyllin Assessment Committee*[1]. It was a case of a water works concern. The following passage occurs on pp. 20 and 21:

"It is familiar law that, where a hereditament can be compared with other hereditaments of a like nature which are the subject of letting, its rateable value may be arrived at by shewing what rent tenants from year to year will in fact give for such hereditaments; but a difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore, inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognised position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. In a case like the present, where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value by rule of thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as representing the rent which a tenant would give."

In the case of *Liverpool Corporation* v. *Chorley Assessment Committee*[2], the Liverpool Corporation who were owners and occupiers of a system of reservoirs and waterworks purchased 1165 acres of land to serve as a gathering ground for the water flowing into the reservoirs. The Corporation raised plantations on 306 acres of the said land and the remaining 859 acres were kept as moorland. The question was whether the Corporation could be rated in respect of the said land. The Court of Appeal held it was. On p. 293 of the report, Kennedy L. J., observes:

"The only other question, therefore, ... is whether or not evidence of the price paid by the Corporation is admissible as a basis for calculating

1. (1899) 2 Q.B. 14 at 20. 2. (1912) 1 K.B. 270 (C.A.)

M. & S. M. Ry., Co., Ltd. *v.* Municipal Council, Bezwada.

Somayya, J.

the assessment for rating purposes, or, in other words, whether the interest upon that price is some evidence of the rent which an occupying tenant of the gathering ground would pay. I think it is. The law appears to me to be correctly stated by Mr. Ryde at p. 176 of the second edition of his work on Rating. He says: 'The measure of rateable value is defined by statute as the rent which may reasonably be expected; interest on cost or on capital value cannot be substituted for the statutory measure, but can be looked at as *prima facie* evidence in order to answer the question of fact what rent a tenant may reasonably be expected to pay.'"

This decision was taken up in appeal on another point and the House of Lords confirmed the decision in *Liverpool Corporation* v. *Chorley Union Assessment Committee*[1].

Lastly in the case of *Railway Assessment Authority* v. *The Southern Railway Co*[2]., both the contractor's method and profit basis are referred to. On p. 274, Viscount Hailsham, Lord Chancellor points out that so far as the railways are concerned, the method adopted was to divide the undertaking into those portions which were regarded as directly productive of profit such as permanent way and those portions which were regarded as only indirectly productive such as stations and other hereditaments of that kind. Then the Lord Chancellor points out that in the latter case, what he refers to as 'contractor's basis' was applied. Next as regards directly productive portions, he points out on p. 275 that:

" . . . . . the method of assessment of the rateable value which was in fact adopted was the method which was commonly described as the 'profit basis' . . . . . . It is not known who first applied this system, but it certainly was in common use by the middle of last century, and it was the system invariably adopted from that time until the outbreak of the Great War."

Lands covered by culverts, embankments etc., cannot be compared with other similar hereditaments because there are none such in the neighbourhood. As pointed out in *London County Council* v. *Erith*[3], to which reference has been made already, it is not the property as it was or the property as it might become hereafter, but it is the property as it is in its present state, that has to be considered in fixing the rateable value. Then as pointed out in *Liverpool Corporation* v. *Llanfyllin Assessment Committee*[4], inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be recognised position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way.

1. (1913) A.C. 197.
2. (1936) A.C. 266.
3. (1893) A.C. 587.
4. (1899) 2 Q.B. 14.

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya J.

As pointed out in all these cases, where no profits are earned by the use of the hereditament, a rough way of arriving at the rateable value is to see what the site and the construction of the works cost, and take a percentage thereof as representing the rent which a tenant would give.

Mr. Venkatarama Sastri urges that these decisions deal with buildings and lands occupied by buildings and lands which are appurtenant to them. But even in the case of such buildings and sites there was only one rule enacted in the Act of 1869, namely, that the gross or annual value, that is, the annual rent which a tenant might be expected to pay for it should be taken as the basis of assessment. And when determining the 'gross value' in the cases of buildings belonging to such concerns it is pointed out that the rule of thumb as they call it of taking the capital value and then fixing a percentage thereon is not unwarranted. We may also point out that in the case that went up to the House of Lords in *London County Council* v. *Erith*[1], some of the lands with which they were concerned consisted of outfall works, sewage works and appurtenances thereto and that on 34 acres of land there were no buildings. In *Liverpool Corporation* v. *Chorley Assessment Committee*[2], the land consisted of 1165 acres of moorland and plantations. In these cases also the same rule was applied.

Therefore if under the Valuation (Metropolis) Act resort to the method of capital value or the contractor's method as it is called is permissible in a case where there are no similar hereditaments with which to compare that which has to be taxed, then the same conclusion ought to follow in considering the construction of S. 82 (2) of our Act, which says that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let.

It is no doubt true that this rule has been statutorily recognised in the case of railway and Government buildings and buildings of a class not ordinarily let and in these cases the statute provides that six per cent. of the capital value less certain deductions must be taken as the annual value. Even here it will be seen that the amount arrived at in the way indicated by the proviso is stated to be the annual value of the premises.

1. (1893) A.C. 587. 2. (1912) 1 K.B. 270 (C.A.)

M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada.

Somayya, J.

This only means that in certain specified cases six per cent. of the capital value less certain deductions is the exclusive method of arriving at the annual value and it does not mean, as Mr. Venkatarama Sastri asks us to say, that in no other case the capital value method is to be resorted to. It would have been easy for the Legislature to say so if that is what it meant. In S. 82 (2) the language is general and approximates very nearly to the language used in the English Act of 1869. In the case of lands which cannot ordinarily be let, the Legislature does not evidently wish to confine the rating authority to the one method namely of taking six per cent. of the capital value as the rental value but it leaves it to the rating authority to find the rental value by any of the methods known to law and apply that test which is applicable to the facts of a particular case. The rating authority may take the capital value basis or it may take the profit basis or it may find the rental value by some other method. It is left free to adopt that method which is suitable to the facts of each case. We must take it that as business-men, the members of the Committee were satisfied that resort to the capital value method was the appropriate method in this case. We are therefore of opinion that the rating authority did not act *ultra vires* its powers.

We find no substance in the argument that the Municipal Chairman abdicated his functions and that the tax was fixed by the valuation Committee. It is urged on behalf of the respondent that originally it was the railway company that invited a resort to the committee procedure, but this cannot prevent the appellant company from urging the objection that if really the tax was levied not by the Chairman but by someone else, the levy is illegal. But in this case we find that it was the Chairman who levied the tax ultimately. No doubt as directed by the Local Government and as requested by the railway company he convened a meeting and took the sense of the Committee, but ultimately he adopted it as his own when issuing the demand notices evidenced by the covering letter Ex. D-14.

As the Railway Board has recognised in Ex. VI (*c*) this Committee has no legal existence. Resort to the committee procedure gives rise to arguments that the levy itself is illegal. The learned Advocate-General does not say that there is any foundation in the Act for resort to this procedure. Where the Chairman differs and is in a minority, it might well be urged

that the levy was made by the Committee and not by the Chairman. Seeing that it can only lead to complications, the Local Government might well withdraw Ex. A-6 or put it on a statutory basis.

The next argument is that the vacant lands in question can only be assessed under S. 81 (3) and that the Local Government not having framed any rules, the railway company escapes altogether.

We cannot accept the contention of the appellant that merely because the Local Government has not prescribed the manner in which the capital value should be determined, the Municipal Council is deprived of the power of levying the tax under S. 81 (3). There is in this case a notification under S. 81 (3) by the respondent Council by which the Council notified that the lands of the category falling under Cl. (3) would be assessed at one per cent. of the capital value. The Local Government refused to frame rules for the vacant lands belonging to railways and they purport to confine the rules which they did prescribe to other vacant lands coming under Cl. (3). We doubt very much whether the Local Government can restrict the rules which they frame in the manner in which they have done. It is open to them not to frame any rules relating to the manner in which the capital value of lands falling under S. 81 (3) should be determined; but once they prescribe the manner in which the capital value of the lands coming under Cl. (3) should be determined, it is doubtful whether they have the power to restrict the application of those rules to vacant lands other than railway lands.

Even otherwise, the omission of the rule-making authority to frame rules cannot take away the right of the Municipal Council to levy tax at the rate mentioned in the notification issued under Cl. (3). If for instance the Local Government refrained from prescribing the manner in which the value of such lands should be determined, it cannot, we think, be said that the Municipal Council have no power at all to levy the tax at a percentage of the capital value merely because the method of determining the capital value has not been prescribed by the Local Government. If the Local Government does not prescribe it, then the Municipal authority is free in our opinion to fix it in any manner it chooses. We have not been referred to any decision on this point except that of the Judicial Committee in

M. & S. M. Ry., Co. Ltd. v. Municipal Council, Bezwada.

Somayya, J.

Wigg v. *Attorney-General for Irish Free State*[1], but it is doubtful how far that decision applies to the circumstances of this case. We therefore do not propose to rely upon that decision. No other authority has been brought to our notice by either side. We think it is not correct to say that the omission by the Local Government to prescribe the manner in which the capital value is to be determined deprives the Municipal Council of the power of levying the tax on the capital value basis.

Lastly, it was urged that the Municipal Council cannot seek to justify the levy under S. 81 (3) if really the levy was not justified under S. 82 (2). Our attention was called to the decisions in *Foulsham* v. *Pickles*[2], a decision under the Income-tax Act. We do not think it profitable to go into these cases because in our opinion the levy under S. 82 (2) is perfectly justified. But we may point out that there seems to be a vast difference between the provisions of the Income-tax Act and the provisions of the Act under consideration. Here it is the levy of the property tax that is objected to. Even if resort to S. 81 (3) is necessary, it might well be said that the Municipal Council is not seeking to justify the levy of the tax under a different schedule or different category but that justification is sought by relying on another rule under the same class of property tax. In the Municipalities Act there are various categories of taxes: property tax, profession tax, tax on companies, tax on animals, etc., and they are set out in S. 78 (1). If a particular amount is levied from an individual as property tax and if his property is not taxable, then the Municipal Council cannot justify it on the ground that he is following a profession for which he would be liable to pay the same amount as and by way of profession tax. It looks to us that the decisions relied on by the learned advocate for the appellant would apply to such cases and not to a case like the present where the same amount of property tax is leviable under one rule or the other. Whether S. 81 (2) read with S. 82 (2) is adopted or whether S. 81 (3) is adopted, in either case it is property tax that is levied and we think, though we do not wish to express a final opinion on it, that resort to S. 81 (3) would be justified by way of supporting the levy that has been made in this case.

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1. (1927) A.C. 674.

2. (1925) A.C. 458.

In the view we take, we do not think it necessary to deal with the applicability of O. 2, r. 2 to the claim made in O.S. No. 61 of 1935. M. & S. M. Ry., Co., Ltd. v. Municipal Council, Bezwada. — Somayya. J.

Both the appeals are therefore dismissed with costs.

K. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE HAPPELL.

Chitravelu Thevar and others .. *Accused.**

Chitravelu Thevar, *In re.*

Criminal Procedure Code (V of 1898), S. 307—Reference by Sessions Judge—Charge against accused of dacoity—Evidence recorded—Charge to the jury—Sessions Judge not clearly asking the jury to return a verdict of not guilty—Verdict of 'guilty' by jury—Circumstances showing no offence in the accused—Duty of Court and the jury in such circumstances.

Eight persons were charged with the offence of dacoity under S. 395, Indian Penal Code. Two of them were alleged to be pattadars in a Zamindari, holding ryoti lands and to be in arrears of rent, and that when the estate authorities distrained their cattle, the two with the other six accused forcibly rescued the cattle, inflicting injuries upon the estate officials. The accused were therefore supposed to have stolen their own cattle and because hurt was caused it was said that the theft became a robbery, and that as there were more than five persons the offence was further converted into a case of dacoity. The lower Court recorded evidence at length and charged the jury and endeavoured to persuade it to acquit all the accused but it returned a verdict of guilty. Thereupon the Judge referred the case under S. 307 of the Criminal Procedure Code, to the High Court.

Held, that although the reference should be accepted, it was quite clear that it need never have been made. On the evidence the lower Court should have directed the jury under S. 289 (2) of the Code to return a verdict of not guilty. It was the duty of the Court, and not of the jury, to find whether there had been a valid distraint or not, whether the cattle were taken away illegally and whether the accused acted dishonestly. When the evidence showed the accused were not acting illegally in trying to recover the cattle distrained, the Court should have told the jury that the accused were not guilty of the offence of dacoity even if they believed every word of the prosecution evidence.

Reference under S. 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Court of Session of the Ramnad Division at Devakottai in C.C.No. 130 of 1940.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Burn, J.—This is a reference by the learned Assistant Sessions Judge of Devakottai against the verdict of the jury in Burn, J.

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* Reference No. 18 of 1940. 18th February, 1941.

Chitravelu Thevar, *In re.*

Burn, J.

Sessions Case No. 130 of 1940. The charge against the accused was for an offence of dacoity under S. 395, Indian Penal Code, but the dacoity was one in a very technical sense. There were eight persons put up for trial before the learned Assistant Sessions Judge. Two of them accused 1 and 3 were alleged to be pattadars holding ryoti lands in the Zamindari of Ramnad. It was alleged that they were in arrears with their rent, that when the estate authorities went and distrained their cattle, they and the other six accused came and forcibly rescued the cattle inflicting injuries upon the estate servants for that end. The accused were therefore supposed to have stolen their own cattle. The theft became an offence of robbery because they were said to have caused hurt to some of the prosecution witnesses in order to the commission of the theft, and since there were more than five jointly concerned the offence became one of dacoity.

The learned Assistant Sessions Judge recorded all the evidence at great length and then charged the jury. He endeavoured to persuade the jury to acquit all the accused persons, but the jury returned a unanimous verdict of guilty. The learned Assistant Sessions Judge disagrees with that verdict and considers that it is grossly unjust and perverse and he has therefore made this reference under S. 307 of the Code of Criminal Procedure.

Although the reference must be accepted, it is quite clear that it need never have been made. On the evidence recorded and the facts stated by the learned Assistant Sessions Judge, he ought to have directed the jury under S. 289 (2) of the Criminal Procedure Code, to return a verdict of not guilty. As the learned Assistant Sessions Judge states, the distraint of the cattle of the first and the third accused would be illegal if it were made by a person unauthorised to make it, if it were made without the prior exchange of patta and muchilika, or if it were made to recover the arrears of more than twelve months. In this case the Inspector P. W. 1 who wrote out the distraint notices was not proved to have had any authority to make the distraint. There was also no proof of the exchange of patta and muchilika between the Zamindar and accused 1 and 3, or of the continuance in existence of a valid patta; and it was also clear that the estate officials were attempting to recover arrears of more than one fasli by means of a single distraint. In these

circumstances it is clear that the distraint was wholly illegal, and the first and third accused could not be said to be acting dishonestly when they went to recover their cattle from the possession of the estate officials, who were taking them away. Nor could the other accused who were helping them to recover their own property illegally distrained be considered to be acting dishonestly. It is clear therefore that the essential elements of the offence of theft were wanting in this case. Without theft there can be no robbery and of course no dacoity. The learned Assistant Sessions Judge ought to have told the jury that, even if they believed every word that the prosecution witnesses said, the accused were not guilty of any offence and therefore they must return a verdict of not guilty. Instead of doing that, he charged them at great length discussing before them all the legal elements of a lawful distraint. This must have been extremely confusing to the jury, and it was very unfair on the part of the learned Assistant Sessions Judge. It was his duty, not that of the jury to find whether there had been a valid distraint or not, whether the cattle had been illegally taken away and whether the accused acted dishonestly.

Chitravelu Thevar, *In re.*

Burn, J.

The verdict of the jury clearly cannot be allowed to stand. We set it aside and direct that the accused in this case be acquitted. They must also be set at liberty forthwith. The learned Assistant Sessions Judge in this matter also has not apparently had the courage to act up to his own convictions. He has said that the verdict of the jury was perverse and unjust and his opinion clearly is that the accused ought not to have been convicted; nevertheless he has kept them in custody ever since the date of the trial, 14th December, 1940. They had also been in jail for a considerable period before the trial took place. The learned Assistant Sessions Judge ought to have released them on bail immediately.

K. C. *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE SOMAYYA.

Guruswami Gounder, *In re.*

Peria Guruswami Gounder and another ... *Prisoners* (Accused 1 and 2).*

* R. T. No. 55 of 1941, and C. A. No. 324 of 1941. 2nd June, 1941.

Guruswami Gounder, *In re.*

Indian Evidence Act (I of 1872), S. 27—Practice—Hostile eye witness not examined by prosecution—Duty of Court.

It is the duty of the Court, when there is a really important eye witness whom the Public Prosecutor does not wish to examine, because he has been treated as hostile in the committal enquiry, to record the evidence of such witness and the accused should not be forced to examine him as a defence witness.

S. 27 of the Indian Evidence Act has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer.

A report by a constable containing what is alleged to be a summary of a joint statement by two accused persons to some extent implicating them in the crime—it being impossible to say how much of the statement was made by one of them and how much by the other—can properly be used by the constable only to refresh his memory as to the date and time when the accused appeared before him and handed over the weapons, but should be excluded from evidence.

Trial referred by the Court of Session of the Tinnevelly division for confirmation of the sentences of death passed upon the said Prisoners in C.C. No. 156 of 1940 on 8th March, 1941, and appeal by the prisoners against the said sentences.

K. S. Jayaram for the Prisoners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The accused in this case have been convicted by the learned Sessions Judge of Tinnevelly of an offence under S. 302, Indian Penal Code. It is alleged that they on the 23rd March, 1940, at Ottudanpatti, a village in the Koilpatti Taluk, murdered one Sangili Thevar. Prosecution evidence is that the deceased was attacked in the street at about 3 P.M., by the two accused, the first accused holding him while the second accused cut him, and that this was done in the presence of three eye witnesses—P. W. 3 a man of the village, one Sanga Reddiar who has not been examined by the Sessions Judge and is also a man of the village, and P. W. 4 a man who lives some four miles away and happened to be present. The deceased received a large number of injuries and died before the arrival of the Village Munsif. The Village Munsif heard of the occurrence when in a hamlet a mile and a half away and he is said to have been there by 4 P.M., and hearing that P.W. 3 was a witness he sent for him and took a complaint from him which is alleged to have been despatched at 6 P.M., and to have reached the police station, which we are told is 8 miles away, at 9-30 P.M. The two accused are alleged to have appeared

before a constable at a police out-post a mile away at 4-30 P.M., and to have handed over two weapons, an aruval and a knife, neither of which was found by the Chemical Examiner to be stained with blood. As we think it desirable to send this case back for retrial we do not propose to say anything which will affect the merits of the case. We will deal only with the two main criticisms of the trial by the learned Sessions Judge.

Guruswami Gounder, *In re.*

Wadsworth, J.

Firstly there is the fact that Sanga Reddiar, who was undoubtedly one of the three eye-witnesses, was not examined in the Sessions Court on the ground that he was treated as hostile by the Prosecution with the permission of the committing Magistrate. It is undoubtedly difficult to lay down any rule of universal application in such cases. It may be said that the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evidence hostile to the prosecution in the lower Court. At the same time it does seem to us to be the duty of the Court, when there is an important eye witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal enquiry, to record the evidence of this witness and that the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances seems to us to be for the Public Prosecutor to see that the witness is present in Court and for the Court, if the witness is really important, to examine that witness as a Court witness and allow both sides to cross examine the witness. We do feel in the present case, which depends on the evidence of the three eye witnesses, that those three eye witnesses should have been examined in the Sessions Court and, if the Public Prosecutor is reluctant in the circumstances of the case to put forward Sanga Reddiar as a witness on behalf of the prosecution, there seems to be no reason why he should not have been examined as a Court witness.

The other criticism relates to Ex. E. Ex. E purports to be a report by the constable on duty at the out-post at which the accused are alleged to have presented themselves shortly after the occurrence and handed over two weapons. This report contains what is alleged to be a summary of a joint statement made by both the accused to some extent implicating them in the crime. A portion of this statement has been treated as

Guruswami Gounder, *In re*: — Wadsworth, J.

admissible by the Sub-Magistrate apparently under the impression that it falls under S. 27 of the Indian Evidence Act. So far as one can gather, the Sessions Judge has marked the whole of the report including this joint statement. It appears to us that S. 27 of the Indian Evidence Act has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. Moreover it seems to us improper to treat as the individual statements of two different persons a composite statement of this kind, which appears to have been made up of information gathered from the two persons it being impossible to say how much of the statement was made by one of them and how much was made by the other. No doubt Ex. E could properly have been used by the constable to refresh his memory as to the date and time when the two accused appeared before him and handed over the two weapons. We do not consider that it should have been used for any other purpose. In fact it has been mainly used by the learned Sessions Judge to throw light on the motive for this crime. In our opinion, it should have been excluded from evidence.

In view of these two defects in the trial, namely, the failure to examine Sanga Reddiar and the inclusion of this inadmissible document, Ex. E, we think it desirable to order a fresh trial. The convictions and sentences are therefore set aside and the case will be remanded for retrial by the Additional Sessions Judge of Tinnevelly.

K. S. *Case remanded for retrial.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE HAPPELL.

Subramanian Chettiar *v.* Official Receiver, West Tanjore.

R. M. P. R. M. M. Subramanian Chettiar by his Power-of-Attorney agent M. S. Ramanathan Chettiar ... *Petitioner* (Respondent)*.

v.

The Official Receiver, West Tanjore ... *Respondent (Petitioner)*.

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* C. R. P. No. 977 of 1938. 27th November, 1940.

Subramanian Chettiar *v.* Official Receiver, West Tanjore.

Provincial Insolvency Act (V of 1920), S. 53—Transfer within two years of petition—Application to set aside—Principles.

The fact that an insolvent and his fellow conspirators may not have had in mind that a transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the insolvent's son for the benefit of the insolvent's mistress does not make the transaction any the less a fraud on the creditors. In transferring the property the insolvent was really defeating his creditors.

Where there is want of good faith the fact that valuable consideration has passed will not save the transaction. Such a transaction by an insolvent made within two years of the presentation of the petition for adjudication is voidable as against the Receiver and may be annulled by the Court.

Petition under S. 75 of the Provincial Insolvency Act praying that the High will be pleased Court to revise the order of the District Court, West Tanjore dated 14th April, 1938 and made in C. M. A. No. 43 of 1936 (O. P. No. 261 of 1933, Sub-Court, Tanjore).

T. K. Sundararaman for Petitioner.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This application arises out of insolvency proceedings in the Court of the Subordinate Judge of Tanjore. On the 27th October, 1931 V. Ry. Badranandaji *alias* Vasudeva Sahib, was adjudicated an insolvent on his own petition, which had been filed on the 11th March, 1930. The insolvent is a son of an illegitimate son of the late Rajah of Tanjore, and as the result of the suit which came up on appeal to this Court in *Maharaja of Kolhapur* v. *Sundaram Ayyar*[1], and eventually went to the Privy Council, he became entitled to a considerable share in what is known as the Tanjore Palace Estate. So far as the insolvent is concerned, his share was finally decided by the judgment of this Court, which was delivered on the 21st January, 1924. According to the District Judge of West Tanjore whose order is the subject matter of this application for revision, the insolvent is a man of depraved tastes and has merely led a life of pleasure. It has been established in the present proceedings that in 1928, he was living with a mistress named Ammanna. Ammanna had a daughter, who was the mistress of the petitioner, a Nattukottai Chettiar. On the 12th March, 1928 the insolvent conveyed the whole of

1. (1924) I.L.R. 48 Mad. 1.

Subramanian Chettiar v. Official Receiver, West Tanjore.

Leach, C.J.

his interest in the Palace Estate to the petitioner. By the same deed he purported to convey to the petitioner the interest of his son, who is a minor. This transfer took place within two years of the petition for adjudication. The first respondent, who is the Official Receiver, applied to the Subordinate Judge of Tanjore for an order setting aside the transaction under the provisions of S. 53 of the Provincial Insolvency Act. The application was allowed and on appeal to the District Judge the Subordinate Judge's decision was confirmed. It has been found that the transfer of the insolvent's interest in the Palace estate to the petitioner was the result of a conspiracy between the insolvent, his mistress and the petitioner to defeat the insolvent's son for the benefit of the insolvent's mistress, and the petition falls to be dealt with on that basis. The Subordinate Judge set aside the transaction of the 12th March, 1928 in its entirety and his order was in no way limited by the District Judge. The petitioner has asked this Court to set aside the District Judge's order under the revisional powers conferred upon the Court by S. 75 of the Provincial Insolvency Act.

The petitioner has raised three contentions. In the first place he says that, although the transaction was *mala fide* so far as the son was concerned, that does not make it void as against the creditors and that the parties had no intention of defeating the creditors. In these circumstances it is said that an application will not lie under S. 53 of the Provincial Insolvency Act. In the second place the petitioner says that assuming the transaction falls within S. 53 it can only be set aside when the annulment will bring relief to the creditors. The third contention is that the Court has no power to set aside the transaction so far as it concerns the minor's share in the property.

The first contention is really answered by the reading S. 53. That section says that any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the Receiver and may be annulled by the Court. Therefore, there must be both good faith, and valuable consideration. If there is want of good faith the fact that valuable consideration has passed will not save the transaction. The lack of good faith has been proved

and this was sufficient to enable the Court to pass the order annulling the transaction. It may be mentioned, however, that only part of the consideration passed. The fact that the insolvent and his fellow conspirators may not have had in mind that the transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the son for the benefit of his father's mistress does not make the transaction any the less a fraud on the creditors. The insolvent admittedly owed large sums of money and was unable to pay his debts. In transferring the property he was defeating his creditors. But what the Court has to consider is whether the transaction comes within the four corners of S. 53, and if it does the Court has the power to set it aside.

There is no substance in the second contention and it was not pressed below. The transaction is clearly one which can be set aside under S. 53 and in setting it aside the Court is giving relief to the insolvent's creditors. The Court is placing the property at the disposal of the Official Receiver for the benefit of the creditors.

We are not prepared to allow the petitioner to raise the third contention. It was mentioned in the petitioner's affidavit in the trial Court and in the memorandum of appeal to the District Court, but it is obvious that it was dropped in the Courts below because their judgments are silent on the question. The minor has not been a party to this petition and as the point was not taken below we cannot allow the petitioner to ask that the position should be altered to the minor's disadvantage in his absence. In a proper case the Court may allow a point of law not taken below to be raised under S. 75 of the Provincial Insolvency Act, but this is not a case in which we consider the discretion should be exercised in favour of the petitioner. He has been a party to a conspiracy to defraud the insolvent's son and as he did not press this point either before the Subordinate Judge or the District Judge he will not be allowed to take it here in an application for revision.

The result is that the petition fails and will be dismissed with costs in favour of the Official Receiver.

K. S. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Kovvuri Subba Rao .. *Petitioner* (Plaintiff)*

v.

Venkatapuram Panchayat Board represented by its President Gudipati Venkatappayya. *Respondent (Defendant).*

Subba-Rao *v.* Venkatapuram Panchayat Board.

Local Authorities Loans Act (IX of 1914), S. 4—Panchayat Board taking a loan without sanction of Local Government as required by the rules—Effect on contract—Right of creditor to recover the amount lent under S. 65, Contract Act.

A loan was contracted by a Panchayat Board without obtaining the sanction of the Local Government required under the rules framed under S. 4 of the Local Authorities Loans Act.

Held, that though the contract of loan was void and no suit to enforce it would lie, the creditor may in proper cases be entitled to the restoration of his money under S. 65 of the Contract Act.

Case-law discussed.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Masulipatam in S. C. S. No. 36 of 1936.

V. Viyyanna for Petitioner.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner brought the present suit in 1936 against the Panchayat Board of Venkatapuram to recover from it the balance said to be due upon an alleged loan of Rs. 400 made by him to the Board in March, 1933, which was to carry interest at Re. 1-9-0 per cent. per mensem. It is admitted by the petitioner that the Board has not obtained any sanction from the Local Government to borrow the money, as it was bound to do under the rules framed by the Government under S. 4 of the Local Authorities Loans Act. The Board accordingly contended that the contract was void and no suit to enforce it would lie. Petitioner accepted this proposition of law, but pleaded that though he could not enforce the contract as such, he was entitled to the restoration of his money under S. 65 of the Contract Act.

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*C. R. P. No. 482 of 1938. 11th October, 1940.

Subba Rao v. Venkatapuram Panchayat Board.

The learned Subordinate Judge of Masulipatam refused to allow petitioner to amend his plaint so as to found his claim upon S. 65, and also held that, even if the plaint were so amended such a claim was unsustainable. Whether that view of the law is right or wrong is the question which I have now to decide.

There is nothing in the language of S. 65 which prevents the petitioner from arguing that his claim falls within it, as that language is very wide and general, and the burden, it seems to me, is upon the respondent to show that S. 65 does not apply. That burden cannot be discharged by a mere reference to S. 7 of the Local Authorities Loans Act which prohibits the present loan, as S. 65 deals necessarily with contracts that are void, and it is this very prohibition which makes the present contract void. Respondent has therefore fallen back upon the argument that the Board in the matter of this contract occupies the same position in law as a minor or a lunatic; or in other words that it was 'disqualified from contracting' in the words of S. 11. In *Motilal Mansukram* v. *Maneklal Dayabhai*[1], it has been held that S. 65 cannot be invoked in the case of a contract which was void because one of the contracting parties was a minor; and in *Punjabhai* v. *Bhagwandas Kisandas*[2], the same principle has been followed in the case of a contract with a lunatic. To extend this principle to the case of a local body which enters into a contract which the law forbids would appear to be at first sight a simple and logical solution of the problem, but the current of authority in this country is against it. There are three cases in Madras in which municipalities have entered into contracts which infringe positive provisions of law—*Arunachala Nadar* v. *Srivilliputhur Municipal Council*[3], *Mohammad Rowther* v. *Tinnevelly Municipal Council*[4] and *Ramakrishna Ranga Rao Bahadur Garu* v. *Vanguri Suryaprakasa Rao Garu*[5] and in all these cases S. 65 has been applied. And there is also one case in Calcutta, *Mohammad Ebrahim Molla* v. *Commissioners for the Port of Chittagong*[6], in which the section has been applied to a contract entered into by the Port Commissioners of Chittagong in contravention of the requirements of law.

1. (1920) I.L.R. 45 Bom. 225.
2. (1928) I.L.R. 53 Bom. 309.
3. (1934) 67 M.L.J. 38: I.L.R. 58 Mad. 65.
4. (1938) 47 L.W. 668.
5. I.L.R. (1940) Mad. 149.
6. (1926) I.L.R. 54 Cal. 189.

Subba Rao *v.* Venkatapuram Panchayat Board.

It is argued for the respondent that these cases deal with mere formalities. For instance the only defect in the contracts in *Mohammad Rowther* v. *Tinnevelly Municipal Council*[1] and *Ramakrishna Ranga Rao Bahadur Garu* v. *Vanguri Suryaprakasa Rao Garu*[2] was the failure by the Committee to whom the power to contract had been delegated by S. 68 (1) of the Madras District Municipalities Act to obtain the previous sanction of the Council under S. 68 (2). In those cases there could never be any doubt as to the competency of the Council to contract. Here the defect is more serious as the Panchayat Board cannot borrow any money at all without the previous sanction of the Local Government. But if I am to hold that this is a contract void under S. 11 of the Contract Act as one which the Board was disqualified by law from entering into, it is clear that the Municipalities were equally disqualified in *Mohammad Rowther* v. *Tinnevelly Municipal Council*[1] and *Ramakrishna Ranga Rao Bahadur Garu* v. *Vanguri Suryaprakasa Rao Garu*[2] from entering into the contracts there dealt with. I can see no difference in principle between those cases and this case. In all the cases the *power* to make the contract exists (as S. 3 of the Local Authorities Loans Act gives power to borrow subject to the prescribed conditions), and all that has been done is failure to comply with the conditions laid down by the Act or rules. It is significant that in the judgment of the learned Subordinate Judge the word 'formalities' is used more than once to describe the rule which the Board has in this case infringed. I am of opinion therefore that I am bound by the decisions above referred, to hold that the petitioner in this case can be permitted to sue under S. 65 of the Contract Act.

My attention has been called to a number of very interesting cases decided in England in which the powers of a company or a Corporation to borrow money have been very closely scrutinized and strictly construed. But there is no case in which it has been held that there is no right of recovery of money lent *merely* because some previous necessary sanction has not been obtained. In *The Queen* v. *Sir Charles Reed*[3] and *Attorney-General* v. *West Ham Corporation*[4], the cases which come nearest in subject-matter to the case now before me, most stress was laid upon the fact that money was borrowed for

1. (1938) 47 L.W. 668.
2. I.L.R. (1940) Mad. 149.
3. (1880) 5 Q.B.D. 483.
4. (1910) 2 Ch. 560.

Subba Rao v. Venkatapuram Panchayat Board.

purposes not sanctioned by law and that, as I shall show, is a matter concerned not with the exclusion of S. 65, but with the way in which it is to be interpreted.

I have now given reasons for holding that petitioner's suit cannot be dismissed out of hand on the ground that S. 65 can in no circumstances apply. The suit will therefore have to be remanded for disposal under S. 65 after a full consideration of all the facts. The Court below must find (*i*) whether the Board has received any advantage or not under the contract and (*ii*) whether the petitioner has in any way disqualified himself from applying to the Court for the equitable remedy which S. 65 affords. In deciding both these issues the consideration of the purpose for which the money was borrowed and applied will be of considerable importance. If such purpose does not fall within the purposes enumerated in S. 3 of the Local Authorities Loans Act it is difficult to argue that the Board has received any advantage; and if petitioner intended that the money should be used for a purpose not so enumerated he has deliberately lent the money in order to break the law and is entitled to no equitable relief.

There was no serious objection before me to the amendment of petitioner's plaint on any other ground than those discussed. He will be permitted to amend it so as to claim relief under S. 65. The respondent will be permitted to file an additional written statement and the learned Subordinate Judge will then proceed to dispose of the suit in the light of this judgment. The question of what interest, if any, is to be allowed to the petitioner will of course be dealt with under S. 65 as there can be no question of enforcing the terms of the agreement as such. Costs of this revision will be costs in the cause.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Venkatachellam v. Subrahmanyam.

Kunchaparti Venkatachellam .. *Petitioner** (*Petitioner*)

v.

Vemuri Subrahmanyam and another. *Respondents* (*Respondent and nil*).

* C. R. P. No. 820 of 1937. 31st July, 1940.

Venkatachellam v. Subrahmanyam.

Civil Procedure Code (V of 1908), S. 73—Execution of decree—Application by transferee from rival decree-holder claiming rateable distribution—Recognition of transfer only after receipt of assets by executing Court—Sufficiency to entitle the transferee decree-holder to receive his rateable share.

In execution of a decree properties of a judgment-debtor were sold on 20th July, 1936, and a transferee from a rival decree-holder alleging that he had applied on 14th July, 1936, to execute his decree, claimed a rateable share of the proceeds of the sale realised in execution of the other decree. Objection was raised that as the transfer of the decree had not been recognised by the Court before the date of the realisation of the assets the transferee could not claim rateable distribution.

Held, that S. 73, C. P. Code, did not require that the transfer should have been recognised before the receipt of the assets. It is sufficient if the person who claims rateable distribution has applied before the receipt of assets by the Court for execution of his own money decree.

The words "holders of decrees for the payment of money" in S. 73 (1) (*c*) in their natural sense are of sufficient amplitude to include transferees of such decrees and their ordinary meaning cannot be cut down with reference to the definition of "decree-holder" in S. 2 (3) of the Code. Nor can the use of the expression "decree-holders" in the marginal note to the section be regarded as controlling and restricting the plain language of the provision itself.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Gudivada dated 12th March, 1937 and made in E. A. No. 1369 of 1936 in O. S. No. 38 of 1930.

V. Govindarajachari for Petitioner.

Ch. Raghava Rao and *K. Kuttikrishna Menon* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition arises out of the refusal of the Court below to allow the petitioner a share of the realised assets of his judgment-debtor in a rateable distribution thereof under S. 73 of the Code of Civil Procedure. The petitioner obtained a transfer of the decree in O. S. No. 216 of 1929 on the file of the lower Court passed against one Nageswaram, and the respondent obtained a decree against the same person and his brothers in O. S. No. 38 of 1930 in the same Court. In execution of the latter decree, properties of the brothers were sold on 20th July, 1936, and the petitioner who is said to have applied on 14th July, 1936, to execute his decree claimed a rateable share of the proceeds of such sale. The Court below rejected the claim on the ground that the transfer of the decree in favour of the petitioner had not been recognised

Venkatachellam v. Subrahmanyam.

by the Court before the date of the realisation of the assets, and the correctness of this view is challenged by the petitioner before me.

I am of opinion that the decision of the lower Court is not warranted by the terms of S. 73. All that the section requires is that the person who claims rateable distribution should have applied before the receipt of assets by the Court, for execution of a decree for payment of moneys passed against the same judgment-debtor whose assets have been realised. The section says nothing about the Court recognising the transfer when the transferee of a decree applies for rateable distribution, and there can be no justification for reading into the provision a condition which is not to be found there. A transfer of a decree by an instrument in writing takes effect from the date of such transfer (see *Sadagopachariar* v. *Ragunathachariar*[1]) and the transferee is entitled to apply for executing the decree under O. 21, r. 16 of the Code. The Court, before ordering execution has, no doubt, to issue notice of such application to the transferor and the judgment-debtor and hear their objections, if any, but it is plain that S. 73 does not require that the objections of the transferor should also have been enquired into and overruled before the receipt of such assets by the executing Court. As a matter of fact it is said that the Court has since recognised the transfer of the decree to the petitioner.

The respondents' learned counsel has argued that a transferee of a decree is not a 'decree-holder' within the meaning of that expression as defined in S. 2 (3) of the Civil Procedure Code of 1908 and that therefore he is not entitled to apply for a rateable distribution under S. 73 until the Court has adjudged the validity of his transfer. He drew attention to the fact that the definition of decree-holder in the old Code included the transferee of a decree and that those words have been omitted from the definition in the present Code. I am unable to appreciate the relevancy of this argument. S. 73 which regulates rateable distribution of a judgment-debtor's assets received by the executing Court does not use the expression 'decree-holder' but refers only to persons who have applied for the execution of decrees for the payment of money passed against the same judgment-debtor before the receipt of assets by the Court and directs the rateable distribution of such assets among all such

1. (1909) I.L.R. 33 Mad. 62.

Venkatachellam v. Subrahmanyam.

persons. Its language is certainly wide enough to cover transferees of decrees and it is difficult to see how the definition of 'decree-holder' is relevant in interpreting the scope of this section. The respondents' counsel pointed out that cl. (*c*) of S. 73 (1) uses the expression "holders of decrees for the payment of money" but it is an obvious fallacy to apply the definition to these words though they may be but an amplification of the expression defined in the statute. These words in their natural sense are of sufficient amplitute to include transferees of such decrees and their ordinary meaning cannot be cut down with reference to the definition of decree-holder. Nor can the use of this expression in the marginal note to the section be regarded as controlling and restricting the plain language of the provision itself. I have therefore no hesitation in rejecting this argument, and holding that the petitioner is entitled to receive a rateable share of the assets held by the lower Court so far as they represent Nageswaram's share of the properties brought to sale.

The respondents' learned counsel has however pointed out that it does not clearly appear from the record that the petitioner did in fact apply on 14th July, 1936, to execute his decree as alleged by him in his affidavit filed in this Court, and suggested that the matter should be enquired into. I order accordingly.

In the result, the civil revision petition is allowed and the case will be remitted to the lower Court for disposal according to law in the light of this judgment. Costs will abide and follow the result.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Devarajulu Naidu (died) and another. *Appellants* (Plaintiff and nil)*

v.

Jayalakshmi Ammal and another ... *Respondents (Defendants 2 and 3).*

Devarajulu Naidu v. Jayalakshmi Ammal.

Limitation Act (IX of 1908), Arts. 62 and 120—Applicability.

On 9th January, 1931, two brothers *A* and *B* sold certain immovable properties to one *K* for Rs. 3,000 and in part discharge of the purchase consi-

* C. C. C. A. No. 79 of 1939. 18th March, 1941.

Devarajulu Naidu v. Jayalakshmi Ammal.

deration *K* executed a promissory note for Rs. 1,560 in favour of *C* the wife of *A*. *C* quarrelled with *A* whom she eventually left. On 5th November, 1931, *C* fraudulently endorsed the promissory note to one *D* without consideration with the object of defeating *A* and *B*. In 1932, *D* filed a suit against *K* on the promissory note and on 19th July, 1933, he obtained a decree for Rs. 1,653-8-0. The decree was set aside on appeal and the suit was remanded for taking evidence on 9th August, 1934. A new decree for Rs. 1,653-8-0 after further hearing was passed on the 26th November, 1934.

A and *B* filed the present suit on 26th November, 1937, to recover from *C* and *D* the Rs. 1,653-8-0 which *D* had recovered from *K*. On the question of limitation,

Held, that the real claim was against *D* in whose hands were the moneys paid by *K* in discharge of the promissory note. In endorsing the note *C* wrongly converted it and as *D* took it with full knowledge of the facts he acquired no title to it. The suit was in time as there was an equitable claim which came within Art. 120, and Art. 62 of the Limitation Act was not applicable. *C* was a trustee for *A* and *B* who were entitled to trace the proceeds of the properties in the hands of *D*.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 1066 of 1937.

V. T. Rangaswami Aiyangar and *P. Krishnamachari* for Appellants.

Srinivasaraghavan for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the appellants in the City Civil Court to recover a sum of Rs. 2,200 from the first and second respondents. A decree was passed for Rs. 187-12-0 only, the balance of the claim being dismissed on the ground that the suit to that extent was barred by the law of limitation. The question is whether Art. 62 or Art. 120 of the Limitation Act applies to the case.

On the 9th January, 1931, the appellants, who are brothers, sold certain immovable properties to one Krishnaswami Naidu for Rs. 3,000 and in part discharge of the purchase consideration Krishnaswami Naidu executed a promissory note for Rs. 1,560 in favour of the first respondent, who is the wife of the first appellant. The husband and the wife quarrelled and she eventually left him. On the 5th November, 1931, the first respondent fraudulently endorsed the promissory note to Doraiswami Naidu, the father of the second respondent, who was said to have been a friend of the family. Doraiswami Naidu sympathised with the wife in her quarrel with the husband, and it has been established that the promissory note was endorsed to him without consideration and with the object of defeating

Devarajulu Naidu v. Jayalakshmi Ammal.

the husband and his brother. In 1932 Doraiswami Naidu filed a suit against Krishnaswami Naidu in the City Civil Court to recover the amount due on the promissory note and on the 19th July, 1933, he obtained a decree for Rs. 1,653-8-0. As the result of an appeal to this Court the decree was set aside and the case remanded to the City Civil Court for the taking of evidence. The judgment of this Court remanding the case was delivered on the 9th August, 1934. As the result of the further hearing a new decree for Rs. 1,653-8-0 was passed on the 26th November, 1934.

The present suit was filed by the appellants on the 26th November, 1937, to recover from the first respondent and Doraiswami Naidu with interest the Rs. 1,653-8-0 which Doraiswami Naidu had recovered from Krishnaswami Naidu. The decision that the appellants were only entitled to Rs. 187-12-0 was based on a finding that the rest of the money had been paid to Doraiswami Naidu before the 26th November, 1934. The principal Judge of the City Civil Court who tried the case, was of the opinion that this was a suit for money had and received and accordingly held that Art. 62 applied.

If the suit is to be regarded as a suit for money had and received, as known to the English common law, the Court below was right in limiting the decree to the Rs. 187-12-0, which was paid after the 26th November, 1934, but we consider that the suit cannot be so regarded. The case is not one which falls within the decisions in *Mahabala Bhatta* v. *Kunhanna Bhatta*[1], *Subbanna Bhatta* v. *Kunhanna Bhatta*[2] and *Shanmugha Pillai* v. *Minor Govindasami*[3], where Art. 62 of the Limitation Act was applied to claims against benamidars and therefore it is not necessary to consider whether those cases were rightly decided, but in passing, it may be mentioned that in the unreported case of *Narayana Bhatta* v. *Mahabala Bhatta*[4], Benson and Bhashyam Aiyangar, JJ., held that a suit against a benamidar was governed by Art. 120, and not by Art. 62.

The relationship between a benamidar and the real owner is a relationship of trust. In *Gur Narayan* v. *Sheolal Singh*[5],

1. (1898) 8 M.L.J. 139: I.L.R. 21 Mad. 373.
2. (1907) 17 M.L.J. 224: I.L.R. 30 Mad. 298.
3. (1907) 17 M.L.J. 452: I.L.R. 30 Mad. 459.
4. S. A. No. 1469 of 1901.
5. (1918) 36 M.L.J. 68 : L.R. 46 I.A. 1: I.L.R. 46 Cal. 566 (P.C.).

Devarajulu Naidu *v.* Jayalakshmi Ammal.

the Privy Council held that although he has no beneficial interest in the property or business standing in his name the benamidar represents the real owner and is in the position of a trustee. A trust of this nature is not an express trust within the meaning of S. 10 of the Limitation Act, as the Privy Council pointed out in *Annamalai Chettiar* v. *Muthukaruppan Chettiar*[1]. It cannot be, as S. 2 (11) expressly states that the word 'trustee' as used in the Act does not include a benamidar. Although there is no express trust in a benami transaction there is a trust and a person receiving the property with the knowledge of the true position will take it subject to the trust.

The appeal in *Annamalai Chettiar* v. *Muthukaruppan Chettiar*[1] arose out of a suit for an account against the representative of a benamidar and the appellants contended that Art. 62 applied to the case, but in delivering the judgment of the Judicial Committee Lord Thankerton said that Art. 62 did not apply to an equitable claim against a trustee, liable to account, for an account and ascertainment of what might be due. The Board held that the proper article was Art. 120 and referred to an earlier decision, that in *Gurudoss Pyne* v. *Ram Narain Sahu*[2].

We consider that the judgment in *Gurudoss Pyne* v. *Ram Narain Sahu*[2] really governs the present case. There certain timber had been entrusted by the plaintiffs to one Modhoosoodan who wrongly converted it to his own use. As the result the plaintiffs brought an action against him and obtained a decree for Rs. 25,200. Modhoosoodan died without satisfying the decree and the plaintiffs instituted against the agent of his widow the suit out of which the appeal to the Privy Council arose. The widow had sold through the defendant certain timber which Modhoosoodan had not disposed of and the proceeds of this sale were in the hands of the defendant. It was contended that the suit was barred by the law of limitation because it was a suit for money had and received and had been instituted more than three years after the defendant had obtained the money. The Limitation Act of 1871 was then in force, but the only difference so far as this case is concerned is in the numbering of the articles. Art. 62 of the present Act

1. (1930) 60 M.L.J. 1: L.R. 58 I.A. 1: I.L.R. 8 Rang. 645 (P.C.).
2. (1884) L.R. 11 I.A. 59: I.L.R. 10 Cal. 860 (P.C.).

Devarajulu Naidu v. Jayalakshmi Ammal.

corresponds to Art. 60 of the old Act and Art. 120 to Art. 118. The Privy Council rejected the contention and the reason is to be gathered from the following passage in the judgment:

"The suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. That does not fall either within Article No. 60 or No. 48; but comes within Art. 118, as 'a suit for which no period of limitation is provided elsewhere in the schedule', and for suits of that nature a period of six years is the limitation."

In the present case the real claim is against the second respondent in whose hands are the moneys paid by Krishnaswami Naidu in discharge of the promissory note. In endorsing the promissory note over to Doraiswami Naidu the first respondent wrongly converted it and as Doraiswami Naidu took it with full knowledge of the facts he acquired no title to it. Therefore he had no right to the moneys paid by Krishnaswami Naidu in respect of it. As the legal title to the promissory note was in the first respondent, Doraiswami Naidu must, if legal fiction is to be recognised, be deemed to have received the moneys for her use, not for the use of the appellants. The position is analogous to the position in *Gurudoss Pyne* v. *Ram Narain Sahu*[1]. There is here, as there was in that case, an equitable claim and the Privy Council has held that equitable claims do not come within Art. 62, but within Art. 120. The first respondent is a trustee for the appellants and she has converted the trust property. Therefore the appellants are entitled to trace the proceeds of the property in the hands of the second respondent. The second respondent represents Doraiswami Naidu who realised the promissory note with full knowledge of the facts.

As the suit falls within Art. 120 it is in time. Consequenly the appeal succeeds and the suit will be decreed with costs here and below. The appeal was filed in *forma pauperis* and the second respondent will be directed to pay the court-fee to Government.

K.S. *Appeal allowed.*

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1. (1884) L.R. 11 I.A. 59: I.L.R. 10 Cal. 860 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

Jagat Narayan Singh ... *Appellant**

v.

Khartar Sah and another ... *Respondents.*

P.C.

Jagat Narayan Singh *v.* Khartar Sah.

Code of Civil Procedure (V of 1908), O. 21, rr. 58, 90—Assignment of immovables by judgment-debtor—Attachment of property in execution—Sale —Application by assignee to set aside sale—Application on grounds both of irregularities in and lack of jurisdiction for sale—Application to be under r. 58 and not r. 90.

S. L. being in debt assigned his immovables to his brother *M*, by deed reserving only a maintenance allowance to himself, and *M* became recorded proprietor of the estate. In 1928 an execution application was made in respect of a money decree passed in 1926 in favour of *S.B.*, against *S.L.* *M* was added to the application as a "judgment-debtor" although no judgment had ever been obtained against him. Part of the estate having been attached in execution of *S. B's.* decree, *M* applied for release of the attached properties under C. P. Code, O. 21, r. 58 on the ground that he was no party to the decree. The Subordinate Judge held *M* to be a representative of the judgment-debtor, *S.L.*, and dismissed the application. On the day of the Judge's order a compromise petition was filed in the Court, *M* undertaking to pay *S.B.*, the sum due by way of an immediate cash payment and the balance by fixed annual instalments. The instalments not having been paid as agreed, the decree-holders applied for execution, *M*, again being cited as judgment-debtor. Part of the estate was again attached and then sold. *M* then applied under O. 21, r. 90 to have the sale set aside on eleven grounds nine of which were allegations of various irregularities in and about the sale, the tenth and eleventh alleging absence of jurisdiction to hold the sale. The Subordinate Judge found against *M* on the first nine grounds, but held that the sale was without jurisdiction because the compromise deed was unenforceable in execution against *M* in the absence of any decree against him. The High Court allowed an appeal holding that the Subordinate Judge's decision on the first execution application that *M* was a representative of *S.L.*, the judgment-debtor concluded the case against *M* on the principle of *res judicata.* On appeal to His Majesty,

Held, (without deciding whether *M* had been rightly or wrongly held to be a representative of the judgment-debtor), that the application under O.21, r. 90, Civil Procedure Code, was misconceived, since an application based on the allegation that the properties of *M* had been wrongfully sold in execution for *S. L.'s* debt must be made under r. 58 and not r. 90 of the Civil Procedure Code, which was concerned with irregularities in publishing and conducting the sale.

Quaere, whether in any Court an application under r. 58 made one month after the sale would have been in time.

Decision of the High Court affirmed on different grounds.

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* P. C. A. No. 53 of 1939. 3rd April, 1941.

P.C.

Jagat Narayan Singh *v.* Khartar Sah.

Appeal from a decision of the High Court, Patna (Wort, A.C.J., and Dhavle, J.) dated 14th April, 1936, reversing a decision of the Subordinate Judge, Jamtara, dated 12th November, 1932.

The facts are fully stated in the judgment.

C. Sidney Smith for Appellant.

Respondents not represented.

3rd April, 1941. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The appellant is the legal representative of one Madhusudan Singh, deceased. The appeal, which is brought in *forma pauperis,* arises out of proceedings to enforce a money decree dated 23rd March, 1926, obtained against Madhusudan's brother Shyam Lal by one Soshi Bhusan in the Court of the Subordinate Judge at Jamtara in the Sontal Parganas. The execution case which has given rise to this appeal was brought in the same Court on the 15th September, 1930, by the first and second respondents who had in 1929 purchased the rights of Soshi Bhusan in the decree. It is numbered Money Execution Case No. 14 of 1930. It was the second case brought to enforce the judgment of 1926, the first (Money Execution Case No. 12 of 1928) having been brought in the same Court by the original decree-holder Soshi Bhusan on 22nd May, 1928. The main question raised before the Board is as to the effect to be given in the second case to certain orders passed against Madhusudan in the first.

Shyam Lal was the owner of an impartible estate known as the Jamtara estate and being involved in debt, he assigned his immovables to Madhusudan by deed dated 10th January, 1923, reserving only a maintenance allowance to himself.

The deed recited Shyam Lal's indebtedness and that he was ill and made it clear enough that the purpose of the assignment was to enable the debts to be paid off by proper management of the estate. Shyam Lal having failed to give Madhusudan possession according to the deed, Madhusudan in 1924 sued Shyam Lal in the Court of the Subordinate Judge at Asansol to enforce the deed. This suit was compromised in 1927. By the compromise decree dated 17th March, 1927, Madhusudan was declared to be the owner of the estate and a receiver was appointed to manage it, Shyam Lal being declared entitled to a

P.C.

Jagat Narayan Singh *v.* Khartar Sah.

Sir George Rankin.

monthly maintenance allowance. Madhusudan got himself recorded as proprietor. A considerable fortification was thus erected against any attack by Shyam Lal's creditors upon the Jamtara properties. Though the exact position of Madhusudan in relation to his brother is not quite clear their Lordships will not assume that he was a mere agent trustee or *benamidar.*

When the first execution application was made on 22nd March, 1928, the names of Madhusudan and the receiver were added thereto as "judgment-debtors", though it does not appear from anything on the record submitted to the Board that Soshi Bhusan had at any time obtained judgment against Madhusudan. Certain portions of the Jamtara estate having been attached in execution Madhusudan on 18th September, 1928, applied under r. 58 of O. 21 of the Code that they be released from attachment. Not content, however, with this step he followed it up on the 8th October, 1928, with an application to the like effect made under S. 47 of the Code. In both proceedings his objections were that he was not a party to the decree and that there was no charge upon the Jamtara estate for the decretal debt of Shyam Lal. The learned Subordinate Judge having correctly observed that the two applications were inconsistent—the first being upon the footing that Madhusudan was a stranger to the suit in which the decree had been passed and the second on the footing that he was a "representative" of the judgment-debtor—dismissed both of them. By his order dated 29th November, 1928, he held that Madhusudan was a "representative" of Shyam Lal within the meaning of S. 47 of the Code and that by virtue of S. 146 the decree could be executed against him and against the receiver as representing him. The terms of S. 146 are as follows:—

"Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Whether as a result of this decision or in anticipation of it or independently of it, a compromise petition was on the same day (29th November, 1928) filed in Court with the result that on the next day (30th November,) the sale which had been fixed for that day was not held. Madhusudan was a party to the compromise as one of "the judgment-debtors". The terms of compromise were that Soshi Bhusan received Rs. 3,000 in

P.C.

Jagat Narayan Singh *v.* Khartar Sah.

Sir George Rankin.

cash and agreed to take the balance in annual instalments of Rs. 1,393-12-3. There was a further provision:—

"If any third person as decree-holder executes his decree, then this decree-holder will be competent to execute his decree without waiting for payment of instalment and will be able to arrange for realisation of the entire amount due from the estate. To that the judgment-debtors will not have the right to raise any objection."

On the 30th November an order on this petition was made: "Case struck out partly satisfied on the joint petition of the decree-holder and the three judgment-debtors". The attachment of the Jamtara estate properties thus came to an end.

The balance of the debt was not paid as agreed and the first and second respondents, having bought the decree, applied for execution on 15th September, 1930. Madhusudan and the receiver were again cited as judgment-debtors in addition to Shyam Lal. Properties of the Jamtara estate were again attached and were sold on the 6th June, 1931. Madhusudan took no steps in the meanwhile, but on 6th July, 1931, he applied to have the sale set aside under r. 90 of O. 21 of the Code which provides that at the instance of any person whose interests are affected by the sale such an order may be made "on the ground of a material irregularity or fraud in publishing or conducting" the sale. He set out in his application eleven grounds of which the first nine alleged various irregularities as to notice and otherwise in connection with this sale. As his tenth and eleventh grounds he said that the sale was without jurisdiction and was in any view of the case liable to be set aside. After hearing a number of witnesses, the learned Subordinate Judge by his order of 12th November, 1932, held that Madhusudan's case failed on the facts as regards all the irregularities alleged and this finding is not now disputed. He further held, however, that the sale should be set aside on the question of jurisdiction. He rejected the view that Madhusudan was the "representative" of Shyam Lal, and he did not consider that the compromise which had ended the previous execution case could be enforced in execution against Madhusudan without any decree against him having been obtained.

The High Court at Patna by the Order of 14th April, 1936, which is now under appeal have reversed this decision. The learned judges (Wort, A.C.J., and Dhavle, J.) do not appear

P.C.

Jagat Narayan Singh *v.* Khartar Sah.

Sir George Rankin.

to have proceeded upon the ground that a third party objecting to the sale of his property for the judgment debt of another person cannot disregard r. 58 of O. 21 and apply after the sale under r. 90 of that Order treating the case as one of irregularity in publishing or conducting the sale. They held that in the previous case the Subordinate Judge had decided that Madhusudan was the representative of the judgment-debtor, and though one if not both of the learned judges considered this decision to be wrong, they held that the case before them was concluded by that decision on the principle of *res judicata.*

Their Lordships have not had the advantage of hearing any argument on the part of the respondents to this appeal, no appearance having been made on their behalf. They are somewhat unwilling in the circumstances to go beyond what is required for the proper disposal of the appeal in discussing the technical details of procedure in execution. It appears to them, however, that Madhusudan on his own case ought in the later execution proceeding as in the earlier to have made a claim under r. 58 of O. 21 if he desired to take up the attitude of a third party whose property was being wrongfully taken for another's debt. To treat this objection to the sale as a matter of irregularity in publishing or conducting the sale was not open to him, and the application under r. 90 was altogether misconceived. The only way in which any order in his favour could have been rendered competent, assuming his own case to be well founded, was by treating his application as one under r. 58. While their Lordships appreciate the force of the observation made by Dhavle, J., with reference to the first execution case, that "too much importance ought not to be attached to the particular labels attached to his applications", they cannot think it right to hold that the Court should have allowed any such indulgence to Madhusudan having regard in particular to the compromise petition whereby he plainly undertook that the decretal sum should be paid and that the properties now in question should be answerable for it in his hands. It is not clear that on 6th July, 1931, a month after the sale, an application under r. 58 would have been in time. Different opinions appear to have been expressed by High Courts in India upon the question. He had, moreover, called a number of witnesses as to the publication and conduct of the

P.C.
Jagat Narayan Singh v. Khartar Sah.
Sir George Rankin.

sale—an inquiry which was futile on the footing that the property was not liable to be sold. He does not appear to have made any application to the High Court for leave to make a case under r. 58. But whether or not by taking appropriate steps he could have succeeded in defeating the promises made by him in the compromise petition, he was not, in their Lordships' opinion, entitled to the assistance of the Court in that behalf, and the order of the High Court confirming the sale must be maintained.

Their Lordships are not to be taken as accepting the view that Madhusudan was a "representative" of the judgment-debtor, or indeed that any person bringing under r. 58 a claim to attached property as property to which he is entitled as against the judgment-debtor can be refused the benefit of the procedure laid down for investigation of claims or the right to question the summary decision by a suit. Nor do their Lordships profess to have ascertained what bearing S. 146 of the Code has upon such a case as the present or how it comes to be considered that the property of a "representative" of a living person against whom a money decree has been passed is answerable for the decretal debt. Further, assuming that Madhusudan in the first execution case was wrongly held to be his brother's "representative" within the meaning of S. 47, their Lordships see difficulty in the view that such a decision on a question of procedure gave the decree-holder a vested right to the misapplication of the Code in all future execution cases between the parties in respect of the same decree. Upon these and other matters their Lordships would have desired to hear argument for the respondents and they make every reserve as to the correctness of the views expressed in the Indian Courts upon these questions and other questions involved therewith.

They will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellants: *Hy. S. L. Polak & Co.*

Respondents not represented.

Appeal dismissed

R.C.C.
K.S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

Maung Sin .. *Appellant**

v.

Maung Byaung and others .. *Respondents.*

P.C. — Maung Sin *v.* Maung Byaung.

Partition—Widow—Suit by her for share in properties of late husband —Children made formal defendants—Decree determining children's shares although suit not framed as administration suit—Validity.

The plaintiff was the widow of *K. P. C.*, the younger son of a Burman Buddhist *U.B.*, who had died intestate, and she had three children by her deceased husband. She brought an action against *K. P. C.'s* elder brother *K. S.* and his sister claiming a share not in the whole estate of *K. P. C.* but in properties movable and immovable standing (*a*) in the joint names of *K. P. C.* and *K. S.*; (*b*) in the joint names of *K. P. C.*, *K. S.*, and *U. B.* The plaintiff's children were added as defendants in her suit. The District Judge having determined the share to which the widow was entitled refused to do so in respect of the children's shares on the ground that the action was a partition and not an administration suit. The High Court on appeal made an order fixing the children's shares and decreeing the shares to them.

On appeal held that, although the suit was not one for the administration of *K. P. C.'s* estate there being no claim for administration in the plaint nor any claim for usual direction for accounts and enquiries, and the subject-matter of the suit being only a part of the deceased's estate, yet, as the pleadings raised a distinct question between the plaintiff and her children as to their respective shares in the properties in question and an issue had been framed for the purpose of deciding that question, it was not only competent for the Court to ascertain and declare the children's shares, but its duty to do so.

Appeal from the decree of the High Court, Rangoon (Mya Bu and Braund, JJ.) dated 22nd March, 5th April, 1937, reversing a decree of the District Court of Hantharaddy dated 14th November, 1930 and 7th May, 1931.

The facts are stated in the judgment of the Board.

Pennell for the Appellant.—It is submitted that it was not competent for the High Court to declare the shares of the three children in their father's estate in this action which was in no sense an administration action, but in fact was no more than a partition suit by their mother. Ma Shwe Yu was in any case no person to bring an administration action in respect of Ko Po Cho's estate because by marrying again in 1910 she forfeited all interest in Ko Po Cho's share in the joint property of herself and him. But the action when brought had not the elements of an administration action. It was brought for the determination of her interest and those of

* P. C. A. No. 57 of 1939. 3rd April, 1941.

P.C.

Maung Sin *v.* Maung Byaung.

the children. Her claim was actually adverse to their interests. They figured in the suit as formal defendants only, substantially interested though they were. The fact that the claim in the action was adverse to their interests is fatal to the contention that this can be regarded as an administration suit, and it is immaterial for this purpose that she was compelled to pay court-fees on the value of the property in which she was jointly interested with Ko Po Cho. No court-fees were paid by the children in respect of any claim by them, which was surely essential if the action was to be regarded as one to determine their interests. It is submitted on all these grounds that the action was not one in which the High Court could properly determine the interests of Ko Po Cho's children in his estate and that it is for them to establish those interests by a separate suit brought for the purpose.

The respondents did not appear, and were not represented.

3rd April, 1941. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—This is an appeal from a decree of the High Court of Judicature at Rangoon made in a suit that was begun as long ago as the 20th December, 1912. A complete history of the proceedings in the suit and the events that led up to it would occupy many hundreds of pages of printed matter. But the question to be decided on this appeal is a short one, and the facts material to its decision can be stated with comparative brevity. They are as follows:

One U Baw, a Burman Buddhist, died intestate on the 28th December, 1907, leaving surviving him a son (the appellant Ko Sin), two daughters, and the widow (the fourth respondent) and three children (the first, second, and third respondents) of a son, Ko Po Cho, who had predeceased him intestate by only 15 days. After some dispute letters of administration to the estate of U Baw were granted to his son Ko Sin on the 14th January, 1910.

At the time of U Baw's death there were properties both movable and immovable standing in the joint names of U Baw, Ko Po Cho, and Ko Sin. There were others that stood in the joint names of Ko Po Cho and Ko Sin. But there appear to have been serious disputes between the members of U Baw's family as to the beneficial ownership of these various properties.

On the 20th February, 1910, with a view apparently of settling these disputes, an agreement was entered into referring

P.C.
Maung Sin
v.
Maung
Byaung.
Lord
Romer.

them and some other matters to an arbitrator for decision. The parties to the agreement were Ko Sin, his two sisters, Ko Po Cho's widow, Ma Shwe Yu, and two persons purporting to act as guardians of the three children of Ko Po Cho, who at that time were minors.

Disputes arose at a later date as to the extent of the duties and powers of the arbitrator under this agreement and under a supplemental agreement of the 12th April, 1910, between the same parties. Their Lordships are not however concerned with these matters on this appeal and it is not therefore necessary to consider the precise terms of the agreements. It is sufficient for the present purpose to state that it was provided in effect by Cl. 5 of the principal agreement that out of the share in the two before mentioned categories of property found to belong to Ma Shwe Yu and her three children, Ma Shwe Yu was to take one-third and the children were to take two-thirds.

On the 10th June, 1910, the arbitrator made his award. He did not deal with all the items of property included in the two categories; in particular he excluded from his award such of the items as consisted of mortgages. But he purported to ascertain the shares of the several parties in the remaining items, including the shares in such items of Ma Shwe Yu and her children. It is unnecessary to state in detail the effects of his findings about the several shares. All that need be said about them is that out of the properties in the two categories with which he dealt in his award he found that a very large proportion belonged to U Baw alone, and that the beneficial interest therein of Ko Po Cho was quite small in comparison.

On the 9th December, 1910, Ko Sin applied to have the award filed in Court. This application was opposed on various grounds by Ma Shwe Yu and her three children, the principal ground of their opposition being that the whole award was invalid owing to the minority of the three children. In the end the application was dismissed by the District Judge by order dated the 4th October, 1912. He was not, he said, prepared to say that the award was invalid or that no suit could be filed to enforce it on the major parties thereto; but it certainly appeared to him that the award was not one which should be filed. No suit was in fact ever filed to enforce it.

Nor for the moment did Ma Shwe Yu take any steps to have the award declared invalid. She merely ignored it, and

P.C.
Maung Sin
v.
Maung
Byaung.
Lord
Romer.

on 20th December, 1912, she instituted the present suit with the object (amongst others) of obtaining by a decision of the Court a larger share of the properties contained in the two categories of properties mentioned above than had been given her by the award.

By her plaint she accordingly set out in Sch. A thereto various properties movable and immovable standing in the joint names of Ko Po Cho and Ko Sin, and in Sch. B similar properties standing in the joint names of U Baw, Ko Po Cho, and Ko Sin. It should be mentioned that in the schedules are to be found not only properties that had been dealt with by the arbitrator in his award, but also properties that had not been so dealt with by him. The original defendants to the suit were her three children and Ko Sin, but U Baw's daughter Ma Nge Ma who had by this time acquired her sister's interest in the said properties was added as a defendant shortly after the institution of the suit.

Now the question to be determined upon this appeal is whether, as held by the High Court overruling the District Judge in this respect, the three children although defendants are entitled to have their interests in the properties, the subject-matter of the suit, determined by the Court, or whether they are to be forced into bringing a separate suit for the purpose, a suit in which Ko Sin states that he would rely on the Limitation Act as affording him a complete defence. This attitude of his is dictated by the fact that, as will presently appear, the award has been decided to be a nullity so far as the children are concerned. In these circumstances it is necessary to examine carefully the plaint and the subsequent proceedings in the suit. Ma Shwe Yu alleged in her plaint that all the properties set forth in the two schedules had been acquired by moneys advanced by Ko Po Cho during her coverture, as to the properties in Sch. A jointly with Ko Sin, and, as to the properties in Sch. B, jointly with Ko Sin and U Baw. She then claimed that under Burmese Buddhist Law all the assets and estate acquired during her coverture with Ko Po Cho were the joint acquired property of herself and Ko Po Cho and that she was entitled to an undivided half share therein in her own right and to a life estate in the remainder until partition. The plaintiff consequently—so she alleged—joined her three children as *pro forma* parties and "for the better representation of the

P.C.

Maung Sin *v.* Maung Byaung.

Lord Romer.

estate of Ko Cho." But the children were by no means merely formal defendants. She was claiming an interest in the subject-matter of the suit adversely to them, and, as it turned out, quite wrongly. For she had remarried on the 27th January, 1910, and had thereby forfeited al interest in Ko Po Cho's share in the joint property of the two—an interest which as a matter of fact would seem but for her remarriage to have been a larger one than the one she claimed. But apart altogether from this the children were necessary parties to the suit as is made clear in the next allegation in the plaint. For in that allegation she claimed that the joint estate of herself and Ko Cho or in the alternative the estate of Ko Cho was entitled to a half and third shares respectively in the properties specified in Schs. A and B; and the children were certainly interested in the question whether it was the joint estate of the widow and Ko Po Cho or the estate of Ko Po Cho alone that was entitled to share in the scheduled properties. The plaintiff prayed for declarations in accordance with these several allegations, and a partition of the properties. There is no mention of the award in the plaint from beginning to end.

In due course written statements were filed on behalf of two of the children disputing their mother's claim to be interested in more than one-half of the joint estate of herself and Ko Po Cho. Written statements were also filed by Ko Sin and Ma Nge Ma pleading the award as a defence to the action. The plaintiff thereupon filed a reply alleging that the award was invalid. It was subsequently held, however, by the District Judge, on an issue framed with a view of having the point decided, that the award must be treated as valid unless and until the plaintiff filed a suit to set it aside and succeeded in so doing. The plaintiff appealed from this decision but her appeal was dismissed. In the meantime one of her sons had instituted a suit against Ko Sin and Ma Nge Ma for the purpose of setting aside the award, and subsequently Ma Shwe Yu and her other two children, who had in the first place been added as defendants, were struck out as defendants and added as plaintiffs. It is unnecessary to trace the history of this suit which ultimately came up for decision by this Board. It is sufficient to say that in the end it was decided that the award was not binding upon any of the three children as they were minors at the date of the reference. But the question whether it ought on that account to be treated as a nullity as regards the

P.C.

Maung Sin *v.* Maung Byaung.

Lord Romer.

other parties to the reference was expressly left open by the Board. This was on the 5th May, 1925.

In the meantime the suit the subject-matter of the present appeal had not been entirely at a standstill in the District Court. Issues had been framed including one as follows:

"What is the extent of Ma Shwe Yu's interest in the property inherited from Ko Cho as against the children of Ko Cho in regard (A) sole property of Ko Cho (B) jointly acquired property of Ko Cho and herself?"

Their Lordships fail to understand why this issue should have been framed if, as is now contended by the appellant, the shares of the children cannot be determined in the suit. The whole object of the issue must have been to enable the Court to effect a partition between the widow and her children of the properties referred to.

No judicial determination of the issue, however, became requisite inasmuch as on the 1st August, 1918, Ma Shwe Yu and her three children, all of whom had by that time reached majority, arrived at an agreement that the estate of Ko Po Cho should be divided between them in equal fourth shares.

On the 15th August, 1918, a preliminary decree was passed ordering (amongst other things) that enquiries be made (*a*) as to the property belonging to the estate of Ko Po Cho; (*b*) as to the liabilities of that estate. It seems reasonably clear that these enquiries were not intended to apply to the whole estate of Ko Po Cho but only to the interest of his estate in the properties included in Schs. A and B to the plaint. There is nothing, however, to indicate that the enquiries were to be limited to ascertaining the share of Ma Shwe Yu in that part of his estate or the liabilities attaching to that share. It was the whole of that part of his estate that was the subject-matter of the enquiries. Directions were subsequently given to the Commissioner entrusted with the enquiries that he was to distinguish between the properties that had and those that had not been adjudicated upon by the award and that as regards the latter the Commissioner was to come to his own findings in respect of them.

The Commissioner having made enquiries pursuant to the preliminary decree and to the subsequent directions, which enquiries took about 8 years to complete, submitted his report to the District Court in 1929. Various objections to the report were filed by the parties, and the matter eventually came before

P.C.
Maung Sin
v.
Maung
Byaung.
Lord
Romer.

the District Court for the purpose of having a final decree pronounced. On the 7th May, 1931, the District Judge pronounced judgment. For reasons that need not be set out here he thought it advisable not to come to any conclusion upon the question whether the award was binding upon Ma Shwe Yu: he left that to the Appellate Court. But he held that the shares of the three children of Ko Po Cho were not to be determined in the present suit. It was he said a partition suit pure and simple and not a suit for administration. Accordingly, after an exhaustive examination of the Commissioner's report, the parties' objections to it, and a mass of evidence, he contented himself with finding the share in the estate of Ko Po Cho to which Ma Shwe Yu was entitled. He first found what she was entitled to in the items of property numbered 1 to 19 in the schedules to the plaint, which items were the only ones included in the award. As to these items the Commissioner's report had apparently merely followed the award under which Ma Shwe Yu had got, (*a*) one-eighteenth share in items Nos. 1 to 5, (*b*) one-twelfth share in items Nos. 6 to 17, and (*c*) one-ninth share in items Nos. 18 and 19. Now these shares represented the one-third share to which Ma Shwe Yu was entitled by reason of Cl. 5 of the agreement of reference of the 20th February, 1910, in the interest in these various items found to belong to the estate of Ko Po Cho; so that the shares to which his estate was entitled in the items under the above headings were (*a*) one-sixth, (*b*) one-fourth, and (*c*) one-third respectively. But before the learned District Judge, Ko Sin and Ma Nge Ma through their advocates had stated that they were willing that there should be given to Ma Shwe Yu not only her own interest in these items but also the two-thirds interest therein to which her three children would have been entitled if the award had been binding upon them. And this the learned Judge strangely enough proceeded to do. Having held that the children could not have their proper shares in Ko Po Cho's estate ascertained in the present suit (and they would of course have had to be ascertained upon the footing that they were not bound by the award) he nevertheless treats them as though they had been so bound; decreed that their mother was entitled to the shares in the 19 items which they had been awarded; ordered that the properties should be partitioned on that footing; and that the mother should be given possession of the share so decreed to her. The learned Judge apparently also dealt with the pro-

P.C.
Maung Sin v. Maung Byaung.
Lord Romer.

perties that were not covered by the award in the same way, decreeing the whole share of Ko Po Cho in these properties to Ma Shwe Yu, differentiating in no way between her and her children. This was of no great moment to the children as they were willing to trust their mother to carry out the agreement that they had made with her in August, 1918. But it was a very different matter as regards the properties dealt with by the award, inasmuch as if the decree of the District Judge were allowed to stand they would be for ever debarred from establishing their right to a larger share in such properties than the Arbitrator had given them. Ma Shwe Yu was also desirous of disputing the validity of the award as regards herself. Accordingly she and her three children jointly presented an appeal to the High Court at Rangoon from the decree of the District Judge.

The High Court gave judgment on the 22nd March, 1937. They dismissed the appeal so far as Ma Shwe Yu was concerned. They held that the award was binding upon her. From this decision no appeal has been brought by Ma Shwe Yu, and their Lordships are not asked to express any opinion about it. But the appeal of her three children was allowed. Mya Bu, J., in whose judgment Braund, J., concurred, said this:

"Whether the suit is to be described technically as a suit for partition or as a suit for administration, it is a clear duty of the Court to declare not only what properties or shares therein formed the estate of Ko Po Cho but also to declare the rights of Ma Shwe Yu and of her children in such properties."

He accordingly held that the final decree passed by the trial Court ought to be set aside and the case remanded to the trial Court for the purpose of enabling the three children to prosecute their claims and of having a proper final decree drawn up after necessary enquiries had been made. As regards such of the properties set out in the schedules to the plaint as were not dealt with by the award, he said that all that would be necessary for the District Court after the remand was to divide the interest of Ko Po Cho therein among the widow and children in accordance with the terms of the agreement of the 1st August, 1918. But as regards the properties disposed of by the award (namely the items 1 to 19 hereinbefore mentioned) he held (*a*) that the three children must be given an opportunity of claiming which items or shares in items belonged to Ko Po Cho's estate, and that, after Ko Po

P.C.
Maung Sin *v.* Maung Byaung.
Lord. Romer.

Cho's interest in such properties had been ascertained, the three children must be declared to be entitled to half that interest upon the footing that they were entitled to that half as against their mother on her remarriage (*b*) that the shares to which Ma Shwe Yu was personally entitled must be declared to be one-third of one-sixth in items 1 to 5, one-third of one-fourth in items 6 to 17, and one-third of one-third in items 18 and 19 in accordance with clause 5 of the directions in the award (*c*) that whatever Ma Shwe Yu was declared entitled to under the head (*b*) and whatever the three children were entitled to under the head (*a*) must then be divided in equal fourth shares among them in accordance with the terms of the agreement of the 1st August, 1918.

A formal decree was drawn up giving effect to this decision of the High Court, and it is from that decree that an appeal has been brought by Ko Sin (both in his personal capacity and as legal representative of Ma Nge Ma who has died) to His Majesty in Council.

It was urged before their Lordships upon the hearing of the appeal (and this was substantially the only point relied on by the appellant) that the suit was not one for the administration of the estate of Ko Po Cho, and that it was not therefore permissible for his three children, who were merely defendants in the suit, to have their shares in the estate ascertained and decreed to them, more especially in view of the fact that the subject matter of the claim of the plaintiff in the suit was not even the whole estate of Ko Po Cho but merely her share in so much of the scheduled properties as belonged to his estate. It was, the appellant contended, merely a partition suit for the recovery by the plaintiff of that share in severalty.

Their Lordships agree that the suit is not a suit for the administration of Ko Po Cho's estate. There is no claim for administration in the plaint, nor is there any claim for the accounts and enquiries usually directed in such a suit. Its subject matter moreover is not the whole of the dead man's estate but only a portion of it. But this in no way concludes the matter. The pleadings raised a distinct question between the plaintiff and her children as to their respective shares in the subject matter of the suit, and an issue was framed for the purpose of deciding that question. The preliminary decree, moreover, directed an enquiry not merely as to the plaintiff's

P.C.

Maung Sin v. Maung Byaung

Lord. Romer.

share, but as to the entire share of Ko Po Cho in the subject matter of the suit. In these circumstances it was in their Lordships' opinion not only competent for the Court to ascertain and declare the shares of the three children of Ko Po Cho; it was their plain duty so to do. In their Lordships' opinion the decree of the High Court should be affirmed and this appeal dismissed.

They will humbly advise His Majesty accordingly.

As the respondents have not appeared there will be no order respecting costs.

Solicitor for Appellants: *Lambert & White.*

R.C.C. / K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Bembiri Kothanath Devaki Kutti Amma's son Padmanabha Nayar. *Petitioner* (Defendant)*

v.

Chali Parambil Ezhuvan Vellappan's son Appu *alias* Theyyan. *Respondent (Plaintiff).*

Padmanabha Nayar *v.* Appu *alias* Theyyan.

Civil Procedure Code (V of 1908), S. 80—Acting adhikari *attaching crops—Suit for recovery of excess amount collected by him as* adhikari *but filed after he ceased to be such public officer—Notice under S. 80—Whether necessary.*

The notice contemplated by S. 80, Civil Procedure Code for a suit against a 'public officer' is unnecessary in the case of a suit against a person who on the date of the suit had ceased to be such officer. Accordingly for a suit for recovery of excess amounts collected against a person who as an acting *adhikari* had attached certain properties of the plaintiff for arrears of revenue and realised the amount, brought after he had ceased to be such officer, notice under S. 80 Civil Procedure Code is not necessary.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decreee of the Court of the District Munsif of Alathur in S. C. S. No. 30 of 1937.

S. R. Subramanian for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

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* C. R. P. No. 1157 of 1937 7th August, 1940.

Padmanabha Nayar *v.* Appu *alias* Theyyan.

The Court delivered the following

JUDGMENT.—This revision petition raises the question whether notice under S. 80 of the Civil Procedure Code is necessary in a suit instituted against a person who was at the time of the cause of action a public officer and is sued in respect of his act as such public officer, but has ceased to be a public officer by the time the suit was instituted.

The petitioner was an acting *adhikari* in which capacity he attached the respondent's land for arrears of revenue. To raise the attachment, the respondent paid a sum of money. The present suit is to recover an amount alleged to be in the hands of the petitioner in excess of the amount due towards revenue. There is no doubt that the petitioner at the time of the receipt of this money came within the definition of a public officer and that his act in receiving the money from the plaintiff was one which he purported to do in his official capacity. If, therefore, he is to be made to refund an excess collection, the suit is one which would require notice under S. 80 of the Civil Procedure Code if the petitioner was at the time of the suit a public officer. It is however contended that under S. 80, notice is required of a suit against a person who was a public officer at the time of the official act which gave rise to the claim even though he is no longer a public officer when the suit is filed. No authority has been quoted for or against this contention; but I am of opinion that on the plain words of the section, the contention must fail. Granted that the section contemplates an act done by a public officer in his official capacity as forming the basis of a suit for which notice is required, one must remember that the opening words of the section are,

"No suit shall be instituted against. . . . . . . a public officer"

and to read those words as including a suit against a person who is not a public officer, but was a public officer at the time of the cause of action would be to extend the section beyond its apparent purport. The object of this section is to give time for a public officer threatened with a suit in respect of his official acts to take the orders of his superiors on the question whether the suit shall or shall not be defended and to get permission to use the services of the law officers of the Crown, if necessary. Such considerations would not ordinarily arise in the case of a person who has ceased to be in the employ of the Government at the time of the suit. There is nothing in the definition of a 'public officer' in S. 2 (17) of the Civil Procedure

Padmanabha Nayar *v.* Appu *alias* Theyyan.

Code to justify the inference that it includes a person who was once in the employ of Government but is so no longer.

I am of opinion that the learned District Munsif was right in holding that notice under S. 80, was not necessary in this case. The revision petition is therefore dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Gonuguntla Maha Latchayya ... *Petitioner* (Defendant and Plaintiff)*

v.

Tadepalli Adi Seshayya and others .. *Respondents (Plaintiff and Defendants).*

Maha Latchayya *v.* Adi Seshayya.

Limitation Act (IX of 1908), *Ss. 3 and 4—Two contracts between same parties—Breach—Cause of action separately maintainable in Munsif's Court which re-opened earlier—Single suit filed on the different causes of action in the Subordinate Judge's Court on re-opening date under Civil Procedure Code (V of 1908), O. 2, r. 3—Effect on limitation as to claim based on earliest breach of contract which could have been filed in the Munsif's Court.*

In the place where the causes of action arose there was a District Munsif's Court whose small cause jurisdiction was limited to Rs. 300 and a Subordinate Judge's Court, having small cause jurisdiction up to Rs. 1000. The Sub-Court was closed for the summer vacation from 1st May, 1936, to 1st July, 1936 and the District Munsif's Court was closed from 1st May 1936, to 11th June 1936. The defendant by two contracts contracted to deliver 1000 tins of oil under each contract before 31st May, 1933, and 30th July, 1933 respectively. On a breach of contract the plaintiff filed a suit in the Sub-Court on 2nd July, 1936, (the re-opening date) for damages, joining under O. 2, r. 3, Civil Procedure Code, the causes of action in respect of the breach of the first and second contracts. The claim in respect of the first contract was for Rs. 240 and that under the second was for Rs. 609. On objection being raised, that as the cause of action relating to the breach of the first contract was one within the jurisdiction of the Munsif's Court, a suit not having been filed there on the re-opening date of that Court, the claim was barred by limitation,

Held, that where the plaintiff has united several causes of action against the same defendant before a Court competent to try, not necessarily those causes of action separately but the suit as a whole, when those causes of action are combined under O. 2, r. 3 of the Code of Civil Procedure, the question of limitation under Ss. 3 and 4 of the Limitation Act is to be regarded with special reference to the jurisdiction of that Court to try the suit and not with reference to the jurisdiction of the other Courts which might have been able to try those suits when split up had they been brought before them. There is no reason to imply any restrictions on the facilities given by

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* C. R. P. Nos. 17 and 566 of 1939. 4th February, 1941.

O. 2, r. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on.

Petitions under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decrees of the Court of the Subordinate Judge of Bezwada in S. C. S. No. 180 of 1936 and 370 of 1936 respectively.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioner.

P. Satyanarayana Rao and *P. Sivaramakrishnayya* for Respondents.

C. R. P. No. 17 of 1939.

The Court delivered the following

JUDGMENT.—This is a petition under S. 25 of Act IX of 1887 to revise the decree of the Subordinate Judge of Bezwada in S. C. S. No. 180 of 1936. The main point on which I have listened to the interesting arguments of Mr. V. Govindarajachari and Mr. P. Satyanarayana Rao concerns limitation. It is a point on which I should have expected to find a wealth of authority but on which I find in fact there is no authority directly in point. The defendant is alleged to have sold to the respondent (plaintiff) large quantities of oil and the suit was concerned with two contracts—a contract dated the 17th March, 1933, in respect of 1000 tins which were to be delivered before the 31st May, 1933 and another contract dated the 25th May, 1933, for 1000 tins, delivery in this case to be before the 30th July, 1933. I am concerned only with the first contract so far as limitation is concerned. The relevant facts are as follows: The breach alleged in respect of the first contract was on the 31st May, 1933 and on that day the cause of action may be said to have arisen. Three years from that day would be the 31st May, 1936. In Bezwada there is a District Munsif's Court and a Subordinate Judge's Court both having small cause jurisdiction. The District Munsif Court's jurisdiction is limited to Rs. 300 and the Sub-Court's jurisdiction is limited to Rs. 1,000. The Sub-Court was closed for the summer vacation from the 1st May, 1936, to the 1st July, 1936. The District Munsif's Court was closed from the 1st May, 1936, to the 11th June, 1936. Under S. 4 of the Limitation Act it will be seen therefore that in the case of these two Courts, where the period of limitation prescribed for any suit expired during their respective vacations, the suit should be instituted in the case of the

Maha Latchayya *v.* Adi Seshayya.

Sub-Court on the 2nd July, and in the case of the District Munsif's Court on the 12th June, 1936. Actually in this case the alleged breach being on the 31st May, 1933, three years expired on the 31st May, 1936, when both the Courts were in vacation. A suit with regard to the first contract which amounted to a claim for Rs. 240 could have been filed in the Munsif's Court on the 12th June, but that is not what happened. The plaintiff preferred to avail himself of the option given to him under O. 2, r. 3 of the Code of Civil Procedure and he united in one suit the causes of action which he alleged he had against the defendant in respect of the breach of the first contract and also in respect of the breach of the second contract. The amount of the second contract was Rs. 609 and that suit could not have been filed in the District Munsif's Court. The suit was in fact filed on the 2nd July, 1936, the day the Court of the Subordinate Judge re-opened. It was objected in the lower Court that the suit was barred by limitation. The objection was overruled and Mr. Govindarajachari has argued that the lower Court was wrong and that in fact the claim so far as the first suit was concerned should have been dismissed as time-barred. The argument put before me is as follows. S. 15 of the Code of Civil Procedure says that every suit shall be instituted in the Court of the lowest grade competent to try it. The suit for Rs. 240 could have been filed under S. 4 of the Limitation Act in the Court of the District Munsif, although by actual process of time it was barred by limitation. But owing to the provisions of S. 4, the period of the vacation being excluded, the suit should have been filed on the 12th June. If it was not filed on the 12th June, it became barred and no other Court could take cognisance of it. It has been strongly urged that in S. 4 the word 'Court' must mean 'the proper Court'. It has further been urged that when in that section mention is made of the period of limitation prescribed for any suit it cannot be one period of limitation especially in view of O. 2, r. 3 but that limitation must be examined in each particular case with regard to each particular cause of action. Now, I do not understand that either of these positions is contrary to the argument of Mr. P. Satyanarayana Rao. If authority is required for the position that in considering limitation more than one period of limitation may be applied to different claims in one suit, it is to be found in a Full Bench decision of the Lahore High Court

Maha Latchayya v. Adi Seshayya.

reported in *Mahomed Ghasita* v. *Siraj-ud-din*[1]. (*See* the observations of Shadilal, C.J., at page 378.) The respondent's argument is put in this way. O. 2, r. 3 is a provision which gives facilities to the plaintiff to unite in one suit several causes of action and it has to be applied to any suit in which the provisions of that order have been called in aid to consider whether such uniting has been properly done and no question of limitation is relevant to a consideration of the rule by itself. It is Ss. 3 and 4 of the Limitation Act which deal with limitation and it is with regard to one suit—it is conceded that the suit may be divided into various causes of action—that those sections begin to operate. Now, in the absence of any direct authority to assist me, I take the view that if the plaintiff has united several causes of action against the same defendant before a Court competent to try not necessarily these causes of action separately but the suit as a whole when those causes of action are combined—when that has been done, the question of limitation under Ss. 3 and 4 is to be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of the other Courts which might have been able to try those suits when split up had they been brought before them. That in my view is the test. I cannot see why I should imply any restriction on the facilities given by O. 2, r. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on. I think that in arriving at this conclusion there is at least behind it the general spirit which should influence these matters—the desire of the Legislature to avoid multiplicity of suits—moreover I do not consider that the law of limitation should be unduly strained to bar a suit any more than it should be strained to allow it to be tried. It seems to me that the result that this suit should proceed is a reasonable one and is in accordance with the spirit of the Code and of the Act. So far as the order of the Subordinate Judge is concerned, I think it was right.

I do not think that there is any substance in the contention as regards interest which does not appear to have been seriously advanced in the lower Court.

The civil revision petition is dismissed with costs.

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1. (1921) I.L.R. 2 Lah. 376.

Maha Latchayya v. Adi Seshayya.

C. R. P. No. 566 of 1939.

I see no reason to interfere with the decision of the lower Court. The revision petition is dismissed with costs.

K. S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VENKATARAMANA RAO.

Pakshi Ramaswami Chettiar and another .. *Appellants** (*Respondents*)

v.

Kesavan Chettiar and others .. *Respondents* (*Respondents 3 to 6*).

Ramaswami Chettiar v. Kesavan Chettiar.

Limitation Act (IX of 1908), S. 20—Usufructuary mortgagee continuing in possession after final decree on mortgage—Receipt of profits—Sufficiency to start a fresh period of limitation for an application for execution of the decree.

When a usufructuary mortgagee remains in possession after a final decree on the mortgage has been passed, receipts by him of the profits must be treated as receipts by way of interest and each receipt starts a fresh period of limitation for an application for execution of the decree.

Sundar Koer v. *Rai Sham Krishen*, (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 (P.C.), explained.

Vaidhianadasami Aiyar v. *Somasundram Pillai*, (1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473, *obiter dictum* approved.

(1941) 1 M.L.J. 116, reversed.

Appeal under Cl. 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice King dated the 26th August, 1940 and made in C. M. S. A. No. 118 of 1939 [reported in (1941) 1 M. L. J. 116] preferred to the High Court against the order of the Court of the Subordinate Judge of Mayavaram dated the 19th December, 1938 and made in A. S. No. 76 of 1938 preferred against the order dated the 8th August, 1938 (in E. P. No. 149 of 1938 in O. S. No. 181 of 1931, District Munsif's Court, Mayavaram).

K. S. Sankara Aiyar and *M. S. Venkatarama Aiyar* for Appellants.

K. Bhashyam Aiyangar for Respondents.

The Court delivered the following Judgments:

Leach, C.J. *The Chief Justice.*—There is only one question in this appeal, a question of limitation. The suit out of which the

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* L. P. A. No. 30 of 1940. 21st April, 1941.

Ramaswami Chettiar
v.
Kesavan Chettiar
——
Leach, C. J.

appeal arises was filed by the appellants in the Court of the District Munsif of Mayavaram to enforce payment of two mortgages, one dated the 1st November, 1921, for Rs. 1,000 and the other dated the 8th November, 1921, for Rs. 100. The first one was a usufructuary mortgage. The appellant obtained a preliminary mortgage decree on the 10th March, 1932, and a final decree on the 18th September, 1933, but did not apply for the sale of the mortgaged property until the 17th March, 1938. Throughout he had remained in possession of the property as a usufructuary mortgagee. The mortgagors contended that as more than three years had elapsed from the date of the final decree an application in execution was barred by the law of limitation. The District Munsif decided the question against the mortgagors and allowed the application for execution to proceed. His decision was affirmed on appeal by the Subordinate Judge of Mayavaram. The mortgagors then appealed to this Court and the appeal was allowed by King, J., who gave a certificate which has permitted the appellant to file this appeal under Cl. 15 of the Letters Patent.

The decision turns on the interpretation to be placed upon S. 20 of the Limitation Act. Sub-S. (1) of that section states that where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Sub-S. (2) says that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of the land shall be deemed to be a payment for the purpose of sub-S. (1). There is added to the section an explanation which states that the word 'debt' includes money payable under a decree or order of Court. Therefore when a usufructuary mortgagee is in possession, what he receives by way of rent or produce from the mortgaged property shall be taken to represent interest on the mortgage-debt, and each receipt starts a fresh period of limitation. The explanation makes it quite clear that the provisions of sub-S. (2) apply even when a decree has been passed in favour of the mortgagee.

The appeal was allowed by King, J., because he was of opinion that once the final decree had been passed in the mortgage suit, the appellant could not be regarded as being in possession as a mortgagee, and he relied on the decision of the

Ramaswami Chettiar *v.* Kesavan Chettiar.

Leach, C. J.

Privy Council in *Sundar Koer* v. *Rai Sham Krishen*[1], where Lord Davey in delivering the judgment of the Board said that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. In *Sundar Koer* v. *Rai Sham Krishen*[1], the Privy Council did not hold that a usufructuary mortgagee ceases to be in possession of the mortgaged property as mortgagee simply because a final decree for sale is passed in his favour. Nothwithstanding that the matter is taken from the domain of contract and the rights of the parties fall to be regulated by the decree, the mortgagee may nevertheless still retain his character of mortgagee until the property is sold. His security for the loan made by him is the property which has been mortgaged to him. The final decree has decided what is due by the mortgagor to him and settles the question of interest. It also gives the mortgagee the right to sell, but the mortgagor in law has the right to redeem his property until the sale held in pursuance of the mortgage decree has been confirmed. The provisions of O. 34, Civil Procedure Code, make this quite clear.

Our attention has been drawn to an observation of Wallace, J., in *Ellarayyan* v. *Nagaswami Aiyar*[2], to the effect that after the preliminary decree for sale has been passed the right to redeem is extinguished, but I do not regard that case as having any bearing in the present case. There was no question of limitation. The Court was considering the question whether, after a preliminary decree for sale on a mortgage has been passed, the mortgagor can institute a suit for redemption when the mortgagee has failed to execute the final decree and has remained in possession. A more apposite judgment is that in *Vaidhinadasami Aiyar* v. *Somasundram Pillai*[3]. In the judgment in that case, it was expressly stated that where a usu-

1. (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 (P.C.).
2. (1926) 50 M.L.J. 612: I.L.R. 49 Mad. 691.
3. (1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473 (F.B.).

fructuary mortgagee remains in possession after the mortgage decree has been passed, receipts by him of the profits must be treated under S. 20 of the Limitation Act as receipts by a mortgagee. King, J., did not accept this statement as he regarded it as a mere *obiter dictum.* He was right in describing the statement as *obiter dictum,* but I consider that he should have accepted it as embodying a correct statement of the law. The observation appears to me to be fully justified on the wording of the section. A usufructuary mortgagee goes into possession under the contract of mortgage and the decree does not change the character of his possession. His possession is in no way dependent on the decree. He was in possession *qua* mortgagee before the decree and he continues in possession *qua* mortgagee. As the appellant was *qua* mortgagee in receipt of the income of the property within three years from the date of the application, I consider that he is entitled to the benefit of the section.

Ramaswami Chettiar *v.* Kesavan Chettiar — Leach, C.J.

For the reasons stated I would allow the appeal with costs here and below.

Venkataramana Rao, J.—I agree. S. 20 of the Limitation Act would certainly apply to this case. Sub-S. (2) to that section states that the receipt of rent or produce by a mortgagee shall be deemed to be payment within sub-S. (1) of that section. The explanation to S. 20 enacts that debt includes a decree debt. Therefore, under S. 20 (1), a debt would include a decree debt and therefore money payable under a mortgage decree. What is contended by Mr. Bhashyam in this case is, the moment a decree for sale has been passed on a mortgage, the mortgagee ceases to be a mortgagee and assumes the character of a decree-holder and therefore the possession of the mortgaged property would be held by him not in the character of mortgagee. This is the contention which prevailed with my learned brother, King, J. I am not able to agree with him in this contention. When the plaintiff filed the suit, he was in possession of the mortgaged land as mortgagee, and the decree for sale does not divest his possession. When the property is sold under the decree, what would be sold is the interest of the mortgagee as well as the interest of the judgment-debtor. Therefore, till the property is sold, he does not cease to be a mortgagee, though he also becomes a decree-holder by virtue of the debt having been merged in the decree and the amount payable under the mort-

Venkataramana Rao, J.

Ramaswami Chettiar v. Kesavan Chettiar. —— Venkataramana Rao, J.

gage having been precisely defined. It is not denied that the property in the possession of the decree-holder is mortgaged land, because until the property is sold it will be mortgaged land. Considerable reliance was placed by Mr. Bhashyam on O. 34, r. 5, Civil Procedure Code, under which the moneys due and payable under a final decree for sale must be paid into Court before a mortgagor can be allowed to redeem the property. Under the Transfer of Property Act, before the repeal of S. 89, it was held that once a decree for sale had been passed the security became extinct and when the day fixed for redemption has passed, the property is no longer liable to be redeemed. That was the view held by the Privy Council in more cases than one, but after the repeal of that section, the security is no longer extinct. So long as it is not extinct, the mortgage is liable to be redeemed and until redemption it cannot be said the mortgagee loses the character of the mortgagee. *Sundar Koer* v. *Rai Sham Krishen*[1], only stated that the interest payable after a mortgage decree for sale will be the interest as defined in the decree and not under the contract, but that would not prevent the application of S. 20 (2) of the Limitation Act, because what is received by the mortgagee after the decree will be payment towards the decree and therefore towards interest due and payable under the decree debt. Again, considerable reliance was placed by Mr. Bhashyam on the decision in *Ellarayyan* v. *Nagaswami Aiyar*[2]. What was decided in that case was that after the final decree, the right to redeem is lost. The learned Judges were not dealing with any question of limitation. No doubt there are certain *obiter dicta* on which Mr. Bhashyam relied, but if I may say so with respect, the learned Judges have not given due weight to the repeal of S. 89 of the Transfer of Property Act. O. 34, r. 5 gives not only a power of redemption after the final decree but even after confirmation of sale. Therefore until confirmation of sale, it cannot be said that the character of mortgagee is lost. It seems to me, and I agree with my Lord, the Chief Justice, that the view of the learned Judges in *Vaidhinadasami Aiyar* v. *Somasundram Pillai*[3], that even after the mortgage decree the

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1. (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 (P.C.).
2. (1926) 50 M.L.J. 612: I.L.R. 49 Mad. 691.
(1905) 15 M.L.J. 126: I.L.R. 28 Mad. 473 (F.B.).

Ramaswami Chettiar v. Kesavan Chettiar.

Venkataramana Rao, J.

payments received by the mortgagee would be payments within the meaning of S. 20 of the Limitation Act, is correct. I would therefore agree with my Lord, the Chief Justice, in allowing the appeal.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Thotabalija Puchala Somanna and another. *Appellants** (*Accused—Prisoners*)

Somanna, *In re.*

Penal Code (XLV of 1860), S. 411—Offence under—Sentence—Accused being member of criminal tribe—Whether makes any difference.

The fact that one of the accused is a member of the criminal tribe is no ground for differentiation of sentence so far as he is concerned, for an offence under S. 411, Indian Penal Code.

Appeal against the order of the Court of the Session of the Kurnool Division in C. C. No. 33 of 1940.

Appellants not represented.

K. Venkataraghavachari for the *Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—The appellants have been convicted under S. 411, Indian Penal Code and sentenced, the first appellant to rigorous imprisonment for two years and the second appellant to rigorous imprisonment for three years.

There was house breaking by night and theft in P.W. 1's building on the night of 27th February, and stolen properties were recovered on the information of each of the appellants from the place shown by him on 1st March. So the appellants were charged in the alternative under Ss. 457 and 380 of the Indian Penal Code or S. 411 of the Indian Penal Code and they denied the alleged recovery. The trial was by jury and the verdict was unanimous. There was no misdirection and on the evidence the jury could reasonably have convicted the appellants under S. 411 of the Indian Penal Code. There is therefore no ground for interference with the conviction and the sentence of the first appellant cannot be said to be excessive. That the second appellant is a member of the criminal tribe is no ground

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* Cr. A. No. 756 of 1940. 17th December, 1940

Somanna, *In re.*

for differentiation of sentence for an offence under S. 411 of the Indian Penal Code and his sentence is reduced to rigorous imprisonment for two years. Otherwise the appeal is dismissed.

B.V.V. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Machinari Lakshmi Amma .. *Petitioner* (Petitioner)*

v.

Thundikandiyil Parkum Natukandiyil Koyithatta Krishnakurup. *Respondent (Counter-Petitioners).*

Lakshmi Amma *v.* Krishnakurup.

Criminal Procedure Code (V of 1898), S. 488—Marumakkathayam Act, 1932—Infant son of married woman—Whether entitled to maintenance.

Where there is a legal marriage which was not dissolved before the Madras Marumakkathayam Act, 1932 came into force and the income of the *tavazhi* properties is very little, the infant son of the married woman is also entitled to maintenance under S. 488 Cr. P. Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Calicut dated 20th December, 1939 and passed in M. C. No. 248 of 1939.

T. R. Ramachandran for Petitioner.

P. Govinda Menon for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The marriage was not disputed and the evidence does not warrant the conclusion that it was dissolved before the Madras Marumakkathayam Act of 1932 came into force. The marriage has therefore to be deemed to be a legal marriage and on the finding of the Sub-Divisional Magistrate that the income of the *tavazhi* properties of the petitioner is very little, the infant son is also entitled to maintenance. The order of the Sub-Divisional Magistrate is therefore set aside and the petition is remanded to him for fixing the appropriate rate of maintenance for the petitioner and her infant son and passing the order under S. 488, Criminal Procedure Code.

B. V. V. *Case remanded.*

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* Cr. R. Case No. 203 of 1940
(Cr. R. P. No. 195 of 1940). 26th September, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Kuppuswami Naidu and others ... *Appellants** *(Plaintiffs)*

v.

Kuppuswami Naidu and others ... *Respondents* *(Defendants).*

Kuppuswami Naidu *v.* Kuppuswami Naidu.

Adverse possession—Actual knowledge of person excluded if necessary—Forced absence from India—Whether good ground of exemption—Commencement of adverse possession.

Where a person sues for recovery of possession of certain properties and the defendants set up a plea of adverse possession it is not necessary for the latter to show that such possession was actually known to the plaintiff so long as such possession was open and capable of being known by the parties who were interested in the property. It cannot be said that adverse possession did not start because the plaintiff was not in India, and his absence was enforced and not voluntary.

Secretary of State for India in Council v. *Debendralal Khan,* (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.) relied on.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 54 of 1936 (A. S. No. 10 of 1936 on the file of the District Court, North Arcot) preferred against the decree of the Court of the District Munsif of Ranipet in O. S. No. 185 of 1934.

C. R. Rajagopalachari for Appellants.

N. Gopala Menon and *V. M. Ramaswami Mudaliar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for possession of two items of property which were sold by the plaintiff's step-mother in April, 1915 to the 1st defendant while the plaintiff was undergoing imprisonment in Andamans under a sentence of transportation for life. The plaintiff came back in 1926 and brought the present suit in 1934. The properties changed hands in the meantime—the 1st defendant having sold one item to the 2nd defendant on the 27th April, 1928 and the second item to the 3rd defendant on the 27th June, 1928. The present suit was brought in January, 1934. It was decreed in the first instance by the District Munsif of Ranipet. On appeal, however, the learned Subordinate Judge of Vellore dismissed it on the ground of limitation.

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* S. A. No. 92 of 1938. 17th January, 1941.

Kuppuswami Naidu *v.* Kuppuswami Naidu.

The question to decide in this appeal is whether the decision of the learned Subordinate Judge on that question is right. After hearing learned counsel for the plaintiff, I have no hesitation in coming to the conclusion that it is so. It was contended on behalf of the plaintiff that adverse possession should not be held to start against him when he was not in India and his absence was not voluntary but enforced. This is not, however, a ground of exemption under the Limitation Act. Whether the plaintiff was voluntarily out of India or involuntarily so is entirely immaterial. The fact that he was not actually aware of the fact that other persons were in adverse possession of the property left by his father is also irrelevant. As pointed out by the learned Subordinate Judge, possession need not be known by the plaintiff to be adverse as long as it is open and capable of being known by the parties who are interested in the property. It was so held by their Lordships of the Privy Council in the *Secretary of State for India in Council* v. *Debendralal Khan*[1]. It must, therefore, be held that the decision of the lower appellate Court was correct. The appeal, therefore, fails and is dismissed with costs.

B.VV. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

S. Yegnanarayaniah .. *Petitioner* (Accused.)*

Yegnanarayaniah, *In re.*

Madras Local Boards Act (XIV of 1920), Sch. IV, r. 24—Enhancement of tax—Notice if necessary.

R. 24 of Sch. IV of the Madras Local Bcards Act does not require any notice before the tax is enhanced.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Magistrate of First Class Bench, Ambasamudram dated 27th May, 1940 in S. C. No. 401 of 1940.

K. R. Rama Aiyar for Petitioner.

The Public Prosecutor (V.L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The tax was enhanced by the Special Officer under r. 24 of Sch. IV of the Madras Local Boards Act and

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* Cr. R. C. No. 504 of 1940
(Cr. R. P. No. 479 of 1940). 22nd November, 1940.

1. (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.).

the rule does not require any notice before the tax is enhanced. The notice of demand was duly served and the evidence shows that the son of the petitioner prevented the distraint of his properties. There is therefore no ground for interference with the conviction and the revision petition is dismissed.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

P. L. P. Devarayan Chettiar .. *Petitioner** (*Plaintiff*)

v.

Sp. Subramania Iyer and another .. *Respondents* (*Defendants*).

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—S. (3) (ii)—Renewals by two out of three original debtors—Effect—Crucial date for determining whether debtor is 'agriculturist'.

A promissory note of 1929 executed by *R*, *S* and *T* was discharged by another note of 1932 executed by them. On 29th July, 1935 the suit note was executed by *R* and *S* alone discharging the note of 1932. It was not a case of joint family debt. It was proved that in May, 1937 *R* had purchased lands and hence would be an 'agriculturist' under Madras Act IV of 1938. *S* was an agriculturist throughout. It was not known whether *T* was or was not an agriculturist. On an application for scaling down the debt as against *R* and *S*,

Held, that the debt of 1932 was apparently due jointly and severally from *R*, *S* and *T* and it was discharged by another debt due from *R* and *S*, which was sufficient to make the latter debt an inclusion in a fresh document, of the former debt. *Doraikannu Odayar* v. *Veerasami Padayachi*, (1940) 2 M.L.J. 651 and *Peria Karuppan Chettiar* v. *Appaji Naidu*, (1940) 2 M.L.J. 786, followed.

The liability under the 1932 note being joint and several the subsequent note by *R* and *S* is a renewal of the entire debt binding *R* and *S* by reason of the earlier note.

The relevant period apart from the date of the suit when a debtor has to be an agriculturist to claim the benefit of the explanation to S. 8 is the period from and after 1st October, 1937 having regard to the proviso to S. 3 (*ii*) of the Act. The purchase of land in May, 1937 was sufficient to qualify *R* to claim the benefits of the Act as an agriculturist.

Palani Goundan v. *Peria Goundan*, (1940) 2 M.L.J. 887 applied.

Krishnaswami Aiyar v. *Nagalinga Mudaliar*, (1940) 2 M.L.J. 174 referred to.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Erode in S. C. S. No. 736 of 1938.

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* C. R. P. No. 597 of 1939. 20th February, 1941.

Devarayan Chettiar v. Subramania Iyer.

Wadsworth, J.

K. S. Ramabhadra Aiyer and *N. G. Krishnamachari* for Petitioner.

V. S. Narasimhachar and *N. Appu Rao* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.:—This civil revision petition is preferred by the plaintiff in a small cause suit and it raises a question as to the interpretation of the explanation to S. 8 of Act IV of 1938. The debt in question starts with a promissory note executed by defendants 1 and 2 and one Toongan. This was discharged by another note of 1932 executed by the same three persons. On the 29th July, 1935 the suit note was executed by defendants 1 and 2 alone discharging the earlier note of 1932. It is not a case of a joint family debt, the 1st and 2nd defendants being of different castes. We have no information whether Toongan was or was not an agriculturist. It was proved that in May, 1937 the 1st defendant purchased lands which qualify him as an agriculturist under the Act. The 2nd defendant appears to have been an agriculturist throughout. Three contentions have been placed before us on behalf of the petitioner to show that the lower Court was wrong in scaling down the debt as against both the defendants.

Firstly it is contended that it is not the same debt as that incurred in 1932, the debtors being different. It seems to us that this contention must be negatived on the authority of the decisions in *Doraikannu Odayar* v. *Veerasami Padayachi*[1], and *Peria Karuppan Chettiar* v. *Appaji Naidu*[2]. The debt of 1932 was apparently due jointly and severally from the defendants and Toongan and it is discharged by another debt due from the defendants. This, according to our rulings is sufficient to make the latter debt an inclusion in a fresh document of the former debt.

A further contention is that even if the suit debt is deemed to be a renewal of the debt of 1932, it cannot be a renewal so far as Toongan's share in the debt is concerned, he not being shown to be an agriculturist, and that at the most the debt is to be scaled down only as to two-thirds of this amount. This contention is apparently based on an assumption that the three debtors under the 1932 document were each liable only for one-third of the debt which does not appear to be the case. It seems

1. (1940) 2 M.L.J. 651. 2. (1940) 2 M.L.J. 786.

Devarayan Chettiar *v.* Subramania Iyer.

Wadsworth, J.

to be an ordinary case of a joint and several promissory note, each of the debtors being liable for the whole debt. There is therefore no basis for assuming that as to one-third of the amount the new note is a renewal of Toongan's debt and not a renewal of the liability binding the defendants by reason of the earlier note.

A more serious contention is based on the assumption that the 1st defendant was not an agriculturist before he purchased the property in May, 1937. There is no finding by the trial Court that he was not possessed of any interest in agricultural land before May, 1937; but assuming this to be the case, can it be said that the 1st defendant is not entitled to claim the benefit of the explanation to S. 8 by reason of the fact that at the time when his prior debt was discharged he had not got the qualifications laid down for an agriculturist? We held in *Krishnaswami Aiyar* v. *Nagalinga Mudaliar*[1], that the explanation to S. 8 postulated that the earlier debt of which the suit debt was a renewal must itself have been a debt due from an agriculturist. In that case there was no question as to the point of time at which the debtor under the prior debt had to possess the qualifications of an agriculturist. It is, however, argued that in order that the antecedent debt should be due from an agriculturist, it must have been due from an agriculturist, at least at the time of its discharge and there is a certain *prima facie* plausibility about this argument. It might be contended that if the antecedent debtor only acquired the status of an agriculturist at some later point of time, the antecedent debt was not due from an agriculturist at all. There are, however, very serious difficulties in the way of adopting this view. In the case reported in *Palani Goundan* v. *Peria Goundan*[2], which was a case under S. 19 and raised no question of renewals, we pointed out that the essential points of time under the Act at which the person claiming benefits had to prove that he was an agriculturist were 1st October, 1937, 22nd March, 1938 and the date on which the actual matter in question came before the Court. We are asked to add to these points a still earlier point of time namely, the date on which the prior document of which the suit document is alleged to be a renewal came to be discharged. The acceptance of this view involves an inquiry into the property of

1. (1940) 2 M.L.J. 174. 2. (1940) 2 M.L.J. 887.

Devarayan Chettiar *v.* Subramania Iyer.

Wadsworth, J.

the debtor at the time when the earlier debt was discharged which may be many years ago. It also involves the application of the definition of an 'agriculturist' to a state of affairs which cannot possibly have been contemplated by the Legislature when this definition was framed. The provisos to S. 3 (*ii*) of the Act are based on the state of affairs existing during the period immediately anterior to 1st October, 1937. If during this period the alleged agriculturist was assessed to income-tax or to profession-tax for more than a certain amount or to property-tax above a certain rate, he becomes disqualified from claiming to be an agriculturist. It is impossible to apply this definition to a state of affairs existing before the period contemplated in the proviso had begun. The result of attempting to do so would be to treat as an agriculturist in 1932 a person who, had he paid the same taxes some five years later, would not have been an agriculturist at all. That is to say, it involves the application of a different criterion for the status of an agriculturist to that contemplated in the Act by rendering inoperative the taxation provisos. It seems to us that this cannot be correct and it follows that when we say that the debt which is renewed under the explanation to S. 8 must be a debt due from an agriculturist we must necessarily mean that it must be due from a person who is an agriculturist during the period contemplated in the definition, that is to say, the period after 1st October, 1937, having regard to the provisos to S. 3 (*ii*) of the Act.

Applying this criterion to the present facts, the 1st defendant has been proved to have been an agriculturist at the time of the suit and also to have had the necessary qualifications ever since May, 1937. His debt which was discharged by the suit debt was discharged at a time when he may not have had any saleable interest in land or other qualification; but seeing that on the relevant dates he had the qualifications of an agriculturist, we are of opinion that the debt now being scaled down must be treated as a renewal of a previous debt due from an agriculturist.

In the result, therefore, we dismiss the revision petition with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Koti Nagabhushanam ... *Petitioner* (Defendant)*

v.

Chukkapalli Venkayya ... *Respondent (Plaintiff).*

Nagabhushanam *v.* Venkayya.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iii), *Proviso and S. 8, Explanation—Sole legatee under will executing in 1936 a promissory note in discharge of earlier pronotes executed by the testator who died in 1935—Scaling down.*

The sole legatee under a will executed in 1936 a consolidated promissory note in discharge of earlier promissory notes executed by the testator who died in 1935. In a suit on that promissory note, the legatee being himself an agriculturist applied for scaling down the debt.

Held, that to treat the suit note as a renewal of the prior notes the debtor must show that the debts under the prior notes were debts due by an agriculturist and that the maker of the notes, the testator, was an agriculturist on and after 1st October, 1937. The testator having died in 1935 cannot be treated as an agriculturist on 1st October, 1937 and the Court cannot go behind the suit note in scaling down.

Quaere, whether the legatee could claim that his note was in renewal of the testator's debt in case the testator had lived long enough to make the definition of 'agriculturist' applicable to him.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Tenali in S. C. S. No. 10 of 1939.

K. Bhimasankaram for Petitioner.

K. Kotayyah for Respondent.

The Court delivered the following

JUDGMENT.—This case raises a question under the explanation to S. 8 of Act IV of 1938. The defendant was the sole legatee under the will of one Pitchayya who appears to have died about the end of 1935. Pitchayya shortly before his death had executed to the plaintiff a promissory note (Ex. V) dated the 17th August, 1935, which was itself a renewal of an earlier promissory note and he was also indebted to the plaintiff under a separate promissory note (Ex. IV) of 13th September, 1933. After Pitchayya's death, the defendant under the will became entitled to his estate and also liable to discharge the debts and on 13th January 1936, he executed a consolidated promissory note (Ex. A) in favour of the plaintiff discharging Pitchayya's notes (Exs. IV and V). In the suit on Ex. A, the question was raised whether the debt had to be scaled down under S. 9 as one

* C.R.P. No. 1451 of 1939. 26th February, 1941.

Nagabhushanam v. Venkayya.

arising in 1936 or whether the defendant by virtue of the proviso to S. 9 could treat the debt as a renewal of the earlier indebtedness of Pitchayya, calling in aid the explanation to S. 8.

There is, I think, no Bench decision as yet on the question whether the legatee can be deemed to be the same debtor as the testator whose estate the legatee has taken. But assuming for the moment that he can, the question arises whether Pitchayya's debt was a debt within the definition in S. 3 (*iii*) of Act IV of 1938. A Bench of which I was a member held vide *Krishnaswami Aiyar* v. *Nagalinga Mudaliar*[1], that in order to take advantage of the explanation to S. 8, the debtor must show that the antecedent debt of which the suit debt is alleged to be a renewal was a debt within the definition of the Act, that is, a debt due from an agriculturist. In a more recent case (C. R. P. No. 597 of 1939 *Devarayan Chettiar* v. *Subramania Aiyar*[2],) the same Bench had to consider the effect of that decision with particular reference to the point of time at which the antecedent debtor must have been an agriculturist. That was a case in which the debtor at the time of the proceedings before the Court was an agriculturist, but was alleged to have acquired that status by a purchase of land in May, 1937 and he claimed the right to treat as a renewal the discharge of a previous debt due from himself and others, the date of which debt was anterior to May, 1937, and the contention was raised that at the time of this antecedent debt he was not an agriculturist and therefore by reason of *Krishnaswami Aiyar* v. *Nagalinga Mudaliar*[1], there could not be a renewal within the meaning of the explanation to S. 8. We held that this objection was unsustainable and that for the purpose of finding out whether the antecedent debtor was or was not an agriculturist, regard must be had to the state of affairs subsisting on 1st October, 1937, and thereafter, the reason being that the definition of an agriculturist includes certain provisos which relate, only to the financial status of the alleged agriculturist during the two years anterior to 1st October, 1937, and it is impossible to apply this definition to the state of affairs existing before the time when those provisos would be effective. Now applying the logic of that decision to the present case, we find that the petitioner claims that his promissory note (Ex. A) is a renewal of two

1. (1940) 2 M.L.J. 174. 2. (1941) 2 M.L.J. 257.

Nagabhushanam v. Venkayya.

earlier promissory notes executed in 1933 and 1935 by the testator Pitchayya who died in 1935. It cannot be said that Pitchayya was an agriculturist at the time of his death, for by that time the state of affairs contemplated in the definition of an agriculturist had not come into being. It seems to follow therefore that it is impossible to show that these antecedent debts of the testator were debts due from an agriculturist. For all we know, had Pitchayya continued to live for another two years, he might have been assessed to income-tax or had to pay profession-tax or incurred one or other of the disqualifications contemplated in the definition. It follows therefore that the debtor is not able to show that the antecedent debts were debts due from an agriculturist within the definition of the Act and that the suit debt cannot be treated as a 'renewal' of those previous debts so as to import the benefits of the explanation to S. 8. The debt must therefore be scaled down as a fresh debt coming under S. 9, which is what has been done by the Court below. I wish to make it clear that I am not concerned with what would have been the case had Pitchayya lived long enough to make the definition of an agriculturist applicable to him, and I express no opinion on the question whether in such a case a legatee who was obliged to pay his testator's debt could or could not claim that a fresh document in discharge of the testator's debt was a renewal thereof.

The petition is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE MOCKETT.

Vasantam Venkayya .. *Appellant* (1st Respondent)*

v.

Vasantam Raghavamma .. *Respondent (Petitioner).*

Venkayya v. Raghavamma.

Husband and wife—Decree for maintenance in favour of wife—Subsequent resumption of cohabitation—Effect on enforceability of decree.

Though a Hindu wife may not sue for judicial separation she can if she is compelled to live apart sue for and obtain a decree directing her husband to maintain her. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for

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* A.A.A.O. No. 261 of 1940. 29th April, 1941.

Venkayya v. Raghavamma.

permanent alimony embodied in a decree for judicial separation. Where the wife resumes cohabitation after obtaining the maintenance decree, the decree is annulled by reason of the subsequent resumption of cohabitation and therefore the wife cannot execute the decree.

English and Indian authorities reviewed.

Haddon v. *Haddon*, (1887) 18 Q.B.D. 778, applied.

Ellen Ma Noo v. *William Po Thit*, (1924) I.L.R. 2 Rang. 163, followed.

Appeal against the order of the Court of the Subordinate Judge of Tenali in A. S. No. 63 of 1940 (A. S. No. 557 of 1939, District Court, Guntur) presented against the order of the Court of the District Munsif of Tenali in E. P. No. 174 of 1939 in O. S. No. 645 of 1928, District Munsif's Court, Bapatla.

A. Lakshmayya for Appellant.

K. Kotayyah for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice*.—This appeal raises the question whether a wife who has obtained a decree for maintenance can enforce it after having cohabited with her husband. The appellant is the husband of the respondent. In 1930 the respondent instituted a suit in the Court of the District Munsif of Bapatla for a decree for maintenance. She alleged that her husband had so illtreated her that she was unable to live with him. On the 23rd June, 1930, by consent a decree was passed in her favour for Rs. 120 per annum. Shortly after this decree had been passed the parties decided that they could live together happily and the wife returned to the husband. They lived together for several years. According to the appellant the second separation did not take place until the 24th August, 1937, but according to the respondent, it took place on the 15th July, 1935. Admittedly they lived together for over five years and during this period the respondent bore a son to her husband. On the 2nd May, 1939, the respondent filed an application for execution of the decree which she had obtained on the 23rd June, 1930. She asked for the payment of Rs. 663-12-0, being maintenance calculated at the decretal rate from the 15th January, 1935. The appellant opposed the application. He contended that by reason of the fact that his wife had returned to him and had lived with him for five years thereafter the decree had become a nullity. The District Munsif overruled the objection and his decision was concurred in by

the Subordinate Judge of Tenali on appeal. This appeal is from the order of the Subordinate Judge. The appellant maintains the contention which he advanced below. For the respondent it is said that the decree not having been set aside, adjusted or satisfied, she is at liberty to execute it. Her learned advocate went so far at one stage as to say that she could have executed the decree against her husband during the five years she was living with him but later asked the Court to regard the decree as being suspended during the period they were living together.

In *Bateman* v. *Countess of Ross*[1], Lord Eldon held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of the separation. This doctrine was applied by a Division Bench composed of Hawkins and A. L. Smith, JJ., in *Haddon* v. *Haddon*[2] and by Jeune P. and Gorell Barnes, J., in *Williams* v. *Williams*[3]. In *Haddon* v. *Haddon*[2], the Justices of the County of Leicester made an order under S. 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband and that he should pay to her a weekly sum for her maintenance. After the order had been passed the wife resumed cohabitation with the husband but the reunion did not prove to be permanent. The question was whether she was entitled to enforce the order which she had obtained against him before she resumed cohabitation. It was held that the order was annulled by reason of the subsequent resumption of cohabitation and therefore the wife could not enforce payment of the weekly sums. Hawkins, J., said:

> "It is impossible to suppose that the Legislature, in giving Magistrates power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from, and resume cohabitation with, her husband when and as often as she should think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation."

If she was compelled to leave him after resuming cohabitation she should apply for a new order. In discussing the judgment of Lord Eldon in *Bateman* v. *Countess of Ross*[1], Hawkins, J., pointed out that the general principle stated

1. (1813) 1 Dow. 235: 3 E.R. 684. 2. (1887) 18 Q.B.D. 778.
3. (1904) Prob. 145.

Venkayya
v.
Raghavamma.
Leach, C.J.

by Lord Eldon was expressly recognised by the Court of Appeal in *Nicol* v. *Nicol*[1] and that in *Linton* v. *Linton*[2], Lord Esher in speaking of weekly alimony ordered to be paid to a wife by the Divorce Court had said that they were not payments of a life annuity; they might be stopped at any moment if the husband and wife returned to cohabitation.

In *Williams* v. *Williams*[3], it was held that the effect of the condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895, does not depend on the wording of any section of the Act, but on the common law. In that case the Court had no hesitation in holding that the resumption of cohabitation put an end to the cause of complaint, and therefore the power of the Justices to make an order passed away altogether.

The decision in *Haddon* v. *Haddon*[4], was applied by Beasley, J., in *Ellen Ma Noo* v. *William Po Thit*[5] In that case the petitioner obtained a decree for judicial separation from her husband and embodied in it was an order for the payment to her of permanent alimony. The decree was passed in 1903 and the wife lived apart from her husband until 1st, February, 1907. On that date she returned to him and they lived together until the 25th October, 1921, a period of over 14 years. The wife then left the husband and applied for execution of the decree for alimony which she had obtained in 1903. Relying on *Haddon* v. *Haddon*[4], Beasley, J., held that she was not entitled to execute the decree. If she desired to obtain an order for maintenance or alimony she was bound to institute fresh proceedings, founded on her allegations of further cruelty. The same principle was applied in *U Po Shein* v. *Ma Sein Mya*[6], where it was held that a *bona fide* reunion must be interpreted as removing the basis on which an order for maintenance rests and therefore as vacating the order. In *Syed Saib* v. *Meeram Bee*[7], a Division Bench of this Court held that a Magistrate was bound to refuse to enforce an order under S. 488 of the Code of Criminal Procedure on the ground that the relationship of husband and wife had ceased to exist since the date of the

1. (1886) 31 Ch.D. 524.
2. (1885) 15 Q.B.D. 239 at 245.
3. (1904) Prob. 145.
4. (1887) 18 Q.B,D. 778.
5. (1924) I.L.R. 2 Rang. 163.
6. (1930) I.L.R. 8 Rang. 460.
7. (1909) 20 M.L.J. 12.

Venkayya *v.* Raghavamma.

Leach, C.J.

order. The Allahabad High Court has given similar decisions. (See *Phul Kali* v. *Harnam*[1] and *Shah Abu Ilyas* v. *Ulfat Bibi*[2].

The learned advocate for the respondent has relied on *Kanagammal* v. *Pandara Nadar*[3], *Pearey Lal* v. *Naraini*[4], *Kallu Mal* v. *Barfo*[5], and *Meharana Shri Ranmalsangji* v. *Bai Shri Kundankuwar*[6] and this is a convenient stage to examine these decisions. In *Kanagammal* v. *Pandara Nadar*[3], Curgenven, J., held that when a wife has obtained an order for maintenance under S. 488 of the Code of Criminal Procedure and has subsequently returned to her husband the order is not thereby put an end to but its operation is merely suspended during the period of co-habitation. This decision runs directly counter to the principle embodied in the judgment of *Haddon* v. *Haddon*[4]. I can see no difference in principle between an order passed under S. 488 of the Indian Code of Criminal Procedure and an order under the Matrimonial Causes Act of 1878 or the English Summary Jurisdiction (Married Women) Act, 1895. If the principle stated by Lord Eldon is to be applied there can be no question of the suspension of the order. The order goes entirely.

In *Meharana Shri Ranmalsangji* v. *Bai Shri Kundankuwar*[6], a wife had obtained a decree for maintenance against her husband and when she applied to execute it he objected to the execution on the ground that she had lost her right to maintenance inasmuch as she left his house without any cause and without his consent. It was held that no modification of the decree could be allowed in execution on grounds not recognised in the decree itself as giving a right to such modification. This decision has really no bearing here. *Pearey Lal* v. *Naraini*[4], was decided by a single Judge of the Allahabad High Court who concurred in the opinion expressed by Curgenven, J., in *Kanagammal* v. *Pandara Nadar*[3]. In *Kallu Mal* v. *Barfo*[5], the question was whether reduction of a decree for maintenance could be claimed in execution proceedings but it was held that it could not. That question is also far from the present one.

The English authorities are in favour of the appeal and most of the Indian authorities. The learned advocate for the

1. (1888) 8 A.W.N. 210.
2. (1896) I.L.R. 19 All. 50. 3. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663.
4. (1935) I.L.R. 58 All. 379. 5. I.L.R. (1938) All. 535.
6. (1902) I.L.R. 26 Bom. 707.
7. (1887) 18 Q.B.D. 778.

Venkayya v. Raghavamma.

Leach, C.J.

respondent has, however, suggested that the English decisions have no application because the provisions of the Indian Divorce Act cannot be applied to them and a Hindu wife is not entitled to sue for a judicial separation. This is an argument which I am not prepared to accept. It is true that the Indian Divorce Act does not apply to the parties and that a Hindu wife may not sue for a decree for judicial separation, but she can sue for a decree requiring her husband to maintain her if she is compelled to live apart. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. There being no difference in principle I can see no reason why the English authorities should not be applied.

The respondent mainly relies on the provisions of the Code of Civil Procedure. She points to the fact that under that Code a decree remains in force unless it has been satisfied or adjusted and the satisfaction or the adjustment has been recorded. The present case is not concerned with a matter of procedure or the adjustment or satisfaction of a decree. The question is whether the Court is to disregard a sound principle of law and enforce a decree the basis of which has by the action of the parties themselves been demolished. By returning to her husband the respondent became disentitled to claim maintenance against him. The decree which she had obtained must, it seems to me, be regarded in the circumstances as having become ineffective. By going back to her husband the wife restores the position to what it was when they were married. It seems to me that the rule stated in *Haddon* v. *Haddon*[1], must be given effect to here if justice is to be done.

For these reasons I would allow the appeal and dismiss the application for execution. This will not prevent the respondent from obtaining a fresh decree if she left her husband on the second occasion as the result of his ill-treatment of her, but this is not a question which can be considered in this case. There will be no order as to costs here or below.

Mockett, J.

Mockett, J.—I agree with the judgment of my Lord. I prefer the judgment of Beasley, J., in *Ellen Ma Noo* v. *William Po Thit*[2], to the judgment of Curgenven, J., in *Kanagammal*

1. (1887) 18 Q.B.D. 778. 2. (1924) I.L.R. 2 Rang. 163.

v. *Panadara Nadar*[1], and to that of Ganga Nath, J., in *Pearey Lal* v. *Naraini*[2]. I consider that the judgment of Beasley, J., should be followed. As the learned Judge has pointed out, and as my Lord has pointed out, the decree in a case as this in the words of A.L. Smith, J., comes to an end from the resumption of cohabitation. I have asked the learned counsel for the respondent whether it is possible for him to distinguish a decree passed in a suit for maintenance from a decree passed under the Indian Divorce Act or an order passed under S. 488 of the Code of Criminal Procedure. He has said that it is impossible to do so so far as the basis is concerned. That must be so because the basis of all these orders is that if the husband neglects to maintain his wife, she by reason of his unlawful neglect is entitled to maintenance. That is important in this case, for this reason. The parties, as my Lord has indicated, went before the Court and admitted that shortly after the consent decree, they had lived together as husband and wife, there being a difference as to whether the period was five or seven years. That fact was therefore within the knowledge of the Court and therefore no investigation by the Court was required to ascertain it. In a decision of Burn, J., and myself in which Burn, J., gave the judgment of the Court A. A. O. No. 446 of 1938, a question arose which is of some assistance to us here. It is a well-ascertained principle, and supported by innumerable decisions, that an uncertified adjustment cannot be recognized by an executing Court. In the case before us it was within the knowledge of the Court from its own records that the decree sought to be executed had been paid. The Court took the view that no question of O. 21, r. 2 arose as there was no question of an uncertified adjustment. The only question was whether there was any provision in the Code of Civil Procedure which compelled the Court to perpetrate what it knew to be an injustice, and the decision was that with those facts within its knowledge execution should be refused. I think that the position is analogous to this case. It was within the knowledge of the executing Court that the whole basis of this decree had disappeared by act of parties. I think that it would be equally wrong for such a decree to be executed with that knowledge as it would be to execute the decree in the case to which I have just referred. I desire to emphasise again as my Lord has done that nothing in the decision in any way affects the law as it has

1. (1925) 62 M.L.J. 176; I.L.R. 50 Mad. 663. 2. (1935) I.L.R. 58 All. 379.

Venkayya *v.* Raghavamma.

Mockett, J.

been held to be by this High Court in relation to O. 21, r. 2 of the Code. I further wish to guard myself against deciding anything with regard to a case in which the Court is invited to make an inquiry in the circumstances of the case. When such a case arises it can be decided. As already indicated I agree with my Lord that this appeal should be allowed.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Chilakamarri Lakshminarasimhacharyulu... *Appellant* (Plaintiff)*

v.

The McLaurin High School, Cocanada by Manager Rev. Eric L. Quirk. *Respondent (Defendant).*

Lakshminarasimhacharyulu *v.* McLaurin High School, Cocanada.

Master and servant—Contract of service—Provision that appointment is 'permanent' and will not 'ordinarily' be terminated—Construction.

Where a contract of service provided that the appointment was permanent and will not "ordinarily be terminated" by the employer, and the employee's services were subsequently dispensed with on the ground of 'financial stringency, in the employer institution, in a suit for damages for breach of contract,

Held, that it is not every financial stringency that would come under the definition of other than 'ordinary' but it must be of a sufficiently grave character as to necessitate the termination of the contract with the plaintiff and the burden is on the employer to prove that there was such an extraordinary financial stringency.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 22 of 1935.

V. Govindarajachari and *D. Suryaprakasa Rao* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *D. Narasaraju* for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal from the decree dated 9th September, 1937, of the Subordinate Judge of Cocanada in O. S. No. 22 of 1935 on his file. The suit was for damages estimated at Rs. 10,000 for wrongful dismissal of the plaintiff from his appointment as First Assistant in the defendant School, namely, The McLaurin High School, Cocanada, which is represented in the litigation by its manager. The suit

* Appeal No. 209 of 1938. 11th October, 1940.

Lakshmi-narasimha-charyulu *v.* McLaurin High School, Cocanada.

Pandrang Row, J.

was dismissed with costs by the Court below and the plaintiff is the appellant before us.

Two questions arise for determination in this appeal, namely, whether there was a breach of contract by the defendant, or, in other words, whether the dismissal of the plaintiff by the manager of the school was wrongful and if so, what is the amount of damages to which the plaintiff is entitled.

So far as the first question is concerned, a similar question arises in a connected appeal, Appeal No. 30 of 1939, in which the contract of service or employment is couched in similar language. In the present case, as observed already, the suit was dismissed, but in the connected case, the suit was decreed, the Court which passed that decree being the District Judge of East Godavari. In other words, in these two cases, two Courts have taken different views as to the interpretation to be placed on the contract and also as regards the actual financial position at the time when the services of the teachers were dispensed with. It seems desirable that we should deal with the appeals separately though in some respects the questions are the same in both the appeals. The plaintiff is a trained graduate who was employed in 1912 when the defendant school was started. He was then on a temporary basis. On 1st July, 1927, the position was changed to his advantage, a contract being signed between him and the manager on that day giving him the status of a permanent employee. The important portion of the contract is as follows:

"This is a permanent appointment and will not ordinarily be terminated by the Manager for reasons other than that of such conduct or unsatisfactory work as, in his opinion, unfits the teacher for his post; or by the teacher except for reasons which, in his opinion, make it impossible for him to continue in the school. In either case three month's notice shall be given to the other party by the party that terminates the agreement".

The order of communication which terminated the services of the plaintiff is dated 24th January, 1934 (Ex. F). It runs as follows:

"Due to the stress of extraordinary financial circumstances I hereby give you three months' notice that the agreement made between you and the manager of the McLaurin High School, Cocanada on July, 1st, Year nil, is terminated from to day and that your appointment to the staff of this school ends 30th April, 1934."

This letter was sent by the Manager, Mr. Quirk, D. W. 3, and it purports to have been sent under the authority of the C. B. Mission Conference, 3rd January, 1934. Before this

Lakshmi-narasimha-charyulu *v.* McLaurin High School, Cocanada. — Pandrang Row, J.

final notice terminating the plaintiff's services, there was some previous correspondence which may be briefly referred to. On 18th October, 1933, the then manager, Mr. Wilton, wrote a letter (Ex. C) which runs as follows:

> "Owing to the financial stringency a reduced scale of salaries throughout the Mission will come into force from 1st January, 1934. According to that scale we can offer you Rs. 90 per month without further increments.
>
> If you desire to enter into a contract with the Mission on this basis and to continue in your present capacity, please intimate the same below."

It must be mentioned in this connection that the pay that the plaintff was entitled to get under his contract even in 1927 was Rs. 125 a month. Subsequent to Ex. C there was a reminder and a request for more time to make a decision by the plaintiff and finally a reply was sent by the plaintiff on 15th December, 1933. The material part of it runs as follows:

> "I beg to state that during the period of financial stringency, I agree to a reduction of my salary in the maximum cut of 12½ per cent. which is usual in all institutions public or private. Kindly consider the possibility of a contract on that basis, in the absence of which, the original contract stands."

The final notice was in answer to this letter from the plaintiff, terminating the services of the plaintiff with effect from 30th April, 1934. Later on on 23rd April, 1934, the plaintiff wrote again to the manager protesting against the termination of his services and again expressing his willingness to submit to a cut of 12½ per cent. during the period of financial depression and threatening a suit in case his offer was not accepted. The final reply sent to the plaintiff by the manager is Ex. H which stated that there was no breach of contract committed by the management and that on account of extraordinary financial conditions the management was constrained to make the changes and terminate his services. (*Vide* Ex. H dated 30th June, 1934.) The suit was instituted on 29th March, 1935.

The defendant's main defence, as disclosed in the correspondence, is that the termination of the services of the plaintiff was necessitated by the plaintiff's refusal to accept the reduced salary of Rs. 90 a month, which reduction in its turn was necessitated by the extraordinary financial stringency that prevailed at the time. Apart from their income in the shape of fees and Government grant, the maintenance of the school was possible only with the addition of a grant from the Mission whose head office is at Toronto, Canada. It is the case of the

Lakshminarasimhacharyulu *v.* McLaurin High School, Cocanada.

Pandrang Row, J.

defendant that the first intimation they had of this extraordinary financial stringency was a cablegram sent unofficially by the Chairman of the Mission, Dr. MacNeill, on 14th March, 1933, which was to the following effect:

"Foreign Board facing unprecedented financial crisis: severe reductions likely near future: earnestly suggest missionary leaders consult immediately and submit to Board recommendations of voluntary reduction in salaries and work effective at earliest possible date. This message purely personal and unofficial."

It would seem that immediately on the receipt of this cable, a few missionaries met at Cocanada on 27th March, 1933, and they seem to have straightaway decided to propose at the regular Conference in July, that there should be a 'downward revision of salary schedules of the more highly paid Indian workers'. It would appear from the evidence that this description would take in every Indian worker paid more than Rs. 21 a month. It will at once be seen that this proposal which was ultimately carried into effect after approval by the Conference in July and subsequent approval by the Home Board on 25th October, 1933, went very much further than the information before the meeting justified, because, what the cablegram had stated was that recommendations in respect of *voluntary* reductions of salaries and work should be made as soon as possible and there was no suggestion as to the extent of the reduction that would be necessary and no hint of any lowering of salaries even in the case of existing and permanent employees. In any case, this proposal seems to have met with the approval of the Conference in July, 1933. At the same time, so far as the missionaries themselves are concerned, their proposal was that there should be a cut in salaries. Between these two dates, there was a meeting of the Home Board early in May, 1933 at which a statement of the financial position of the mission was read and a copy of the statement was forwarded to the missionaries in India. It is however unnecessary to go into the question of the financial condition of the Mission in Canada because it was admitted by both the parties in the Court below that what the Court had to consider was, not the financial condition of the Home Board but the financial condition of the Indian branch of the Mission in 1933 and the early part of 1934. It is obvious that so far as any reduction in the salaries or expenditure of any other kind in India was concerned, there could be a necessity to effect it only if there was an

Lakshmi-narasimha-charyulu *v.* McLaurin High School, Cocanada.

Pandrang Row, J.

anticipated reduction in the income of the Indian branch. In short, unless there had been or there was going to be a serious reduction in the contribution made by the Home Board to the Indian branch of the Mission, there would not have been any necessity to effect any economies or make any reductions in salary. Unfortunately, so far as this aspect of the case is concerned, there is very little evidence as to the information that was before the school authorities (including in this phrase not merely the Manager but also the Conference which appears to have exercised some power of supervision over the school finances) when they decided to put into force the reduced scale of salaries even in the case of existing permanent employees and authorised the giving of a notice like Ex. F to the plaintiff. So far as Ex. C dated 18th October, 1933 is concerned, it would appear that it was sent even before the Home Board had approved the scheme of reduced salaries being applied even to existing employees, for the communication sent by the Home Board after their meeting in May, 1933, was substantially to the effect that alternative budgets should be sent for the year 1934 on the basis of a reduction in the grant from the Home Board of 12½ per cent. and 16⅔ per cent. respectively and a note was added to the effect that at that moment the best that could be done was to limit the reduction to 12½ per cent. but that it might be necessary to make the larger reduction of 16⅔ per cent. In short, the information which the Conference had before it in July, 1933, was that in all probability there would be a reduction in the grant from the Home Board to the extent of 12½ per cent. and that the reduction might be even as much as 16⅔ per cent; in other words, that the reduction was likely to be ⅛th and might even have to be ⅙th. The actual reduction made in the salaries by the scheme approved by the Conference in July, was however much more drastic, because, in some cases the reduction was as much as 38 per cent. and the average was 22 per cent. It is clear therefore that the scheme went very much beyond what the situation required. There is, moreover, no clear evidence as to whether the threatened reduction by 12½ per cent. or 16⅔ per cent. was actually made in the budget of 1934. It is extraordinary, but the fact remains, that there is no clear evidence to show what was the actual reduction made by the Home Board in their contribution for the year 1934. No com-

munication or paper has been put before us from which it can be seen at a glance what the contribution by the Home Board was in 1933 and what it was in 1934. No doubt, in respect of the High School, with which we are concerned in this case, there is the evidence of the Manager given in cross-examination to the effect that the monthly contribution in 1933 was Rs. 548 and the contribution in 1934 was Rs. 439-11-1. This, however, is not sufficient, because, it is admitted that the High School is only one of several institutions which have, so to say, a common finance. The Manager himself admits that though separate accounts were kept, the finance of all the institutions is treated as one unit. In his own words:

" The accounts of the two schools, the High School and the Training School are kept separate but are grouped together for institutional finances".

Again, he stated in his examination-in-chief that the:

"Mission makes a grant in the name of the defendant school but it is divided into four heads, the defendant school, the Training School, the Manual Training School and the Hostel."

These figures, namely, the grants made by the Mission in Canada for all these four institutions for the year 1933 and for the year 1934 are not before us, because the figures given by the Manager in his cross-examination relate only to the grant actually allocated to the High School proper by the local authorities here. It is, therefore, not inaccurate to say that there is no evidence before us to show what was the actual reduction in the grant made by the Board in Canada in its contribution to the Indian branch for the year 1934. Assuming however that the threatened cut in the grant which was foreshadowed in the cable and in the proceedings of the Board in Canada, was sufficient to justify the need for a reduction of salaries, it would have justified the imposition of a cut of 12½ per cent. or so. The Manager himself, in his letter to the Director of Public Instruction (Ex. XX) admitted that to meet the 12½ per cent. Mission cut, a 12½ per cent. cut on the Mission institutions would have been sufficient to meet the expected deficit for 1934. He also admitted in that letter that for 1934 only a 12½ per cent. cut was made on the Indian work but nevertheless a more drastic reduction was made in the salaries because the Conference

" decided to make a permanent new scale which should meet the situation with which the Mission was faced",

Lakshmi-narasimha-charyulu v McLaurin High School, Cocanada.

Pandrang Row, J.

In his evidence also, the Manager, as D. W. 3, admits that during 1934 the cut on the institutions was only $12\frac{1}{2}$ per cent. This discussion of the evidence is sufficient to show that while a case could be made out for reduction in salaries to the extent of $12\frac{1}{2}$ per cent. either in the shape of compulsory reduction or of voluntary cuts, there was no need to make a more drastic reduction of salary even in the case of existing employees and in particular of employees who enjoyed the privilege of being permanent employees with contracts in their favour.

This leads us to the question of the interpretation of the contract in this case. The two words in the contract which are relied upon are the words 'permanent' and 'ordinarily', which are found in the following sentence:

"This is a permanent employment and will not ordinarily be terminated by the Manager for reasons other than that of such conduct or unsatisfactory work".

It is not necessary to consider the exception of bad conduct or work, because it is not the case of the defendant that the dismissal or termination of services in this case was on account of unsatisfactory work or conduct. Throughout, the reason for the act complained of by the plaintiff has been the extraordinary financial circumstances which faced the Mission in India. Mr. Govindarajachari for the plaintiff-appellant relies on a comparatively recent ruling of the Court of Appeal in England in *Salt* v. *Power Plant Co. Ltd.*[1] The agreement in that case contained the following relevant words:

"In the absence of such notice the engagement to remain in force as a permanent one subject to your continuing to perform your duties to the satisfaction of the directors."

It was argued in that case on behalf of the company that the word 'permanent' was used in the same sense as a permanent civil servant as opposed to a temporary civil servant and that the use of the word was compatible with the employment being from year to year. This argument was repelled by the Court of Appeal which observed that actually this argument amounted to saying that permanent does not mean permanent but means an engagement which can be determined at any time by notice expiring on 31st December, or at any other time in the year, and it was held that the words mean that the plaintiff in the suit was to have a permanent employment, that is employment for life, subject to the proviso contained in the

1. (1936) 3 A.E.R. 322.

agreement, namely, his continuing to perform his duties to the satisfaction of the directors. In the present case, there is not only the use of the word 'permanent', but also the additional words which have been quoted above which provide so to say against termination of the employment. In substance, omitting the cases of dismissal for bad conduct or work, the words are: this is a permanent appointment and will not ordinarily be terminated by the Manager. Unless the word 'ordinarily' is given such a meaning as to nullify the effect of the word 'not' preceding it, it is impossible to interpret the contract in the way pressed before us by the learned Advocate-General, namely, that in spite of the appointment being declared to be permanent and in spite of the words which provide that the appointment will not ordinarily be terminated by the Manager, nevertheless, if the management at any time in its opinion thought that the circumstances were other than ordinary, it could validly terminate the appointment and the Court would have no right to canvass the reasons which led the management to form the opinion that the circumstances were other than ordinary or required the termination of the services. We are unable to accept such an interpretation of the contract in the present case. 'Ordinarily', no doubt, must be given its full force but the meaning of this word as well as of all words in ordinary use must be their ordinary meaning. It means, in our opinion, that in other than ordinary circumstances, or, to put it differently, in exceptional or special or unusual or extraordinary circumstances the management shall not be prevented by the contract in doing what these extraordinary or unusual circumstances required; and the management's right to terminate the services must be a right which can be made the subject of examination by a Court. It is more or less on this basis that the case proceeded in the Court below, that the reason given for the act complained of, namely, the extraordinary financial stringency, must be established by the defendant and must be shown to have necessitated the termination of the services. As the lower Court put it, it is not every financial stringency that would come under the definition of 'ordinary' but it must be of a sufficiently grave character and what has to be considered in the present case is, whether the financial stringency was of such grave character as to necessitate directly a revision of the scales of pay and indirectly the termination of the contract with the plaintiff. This appears to us to interpret the contract in a reasonable and correct way. The

Lakshmi-narasimha-charyulu *v.* McLaurin High School, Cocanada.

Pandrang Row, J.

'extreme' contentions on both sides appear to be extreme in reality. They were put forward before us as extreme contentions and they do not deserve to be regarded in any better light. On the one side, it was argued that it was for the management to decide whether the circumstances had changed and thus to terminate the services at their discretion and that their act could not be questioned in a Court of law. On the other side, it was contended that the word 'ordinarily' practically meant nothing and that actually the management had no right to terminate the services except on the grounds of bad conduct or work. We dismiss both these contentions as not being supported by the language found in the contract.

It would follow from what has been already stated regarding the facts of the case, that even the existence of an extraordinary financial stringency has not been clearly established. Even assuming that there was a financial stringency, which was brought to the notice of the Indian branch by the Home Board in March, 1933, the stringency was not sufficiently stringent to necessitate a permanent and unduly drastic reduction in the salaries of the existing permanent staff. There was in particular no reason why the remedy that was found to be sufficient and proper in the case of the missionaries themselves should not have been considered sufficient to meet the needs of the situation in the case of what are described as the more highly paid Indian workers, who are not more highly paid than the missionaries themselves. It is contended before us that the local authorities preferred to make a greater reduction in the salary of the Indian employees than the needs of the situation demanded, with the idea that the economies thereby effected would make their own sacrifice a little less than what it might otherwise have to be. We are not prepared to go to the length of saying that this was done with this object, though it is impossible to reject the contention entirely that some such impression might have had its effect on the final decision of the Conference. It is also possible as argued, though there is no evidence on the subject, that with the reduced salaries it was thought possible to get sufficiently qualified persons for the work owing to the increase in the number of unemployed qualified men. Whatever the other motives might have been, we are prepared to assume that the motives of those who effected the reduction complained of in this case were not other

Lakshmi-narasimha-charyulu *v.* McLaurin High School, Cocanada.
—
Pandrang Row, J.

than honest. We are unable to say that the defendant has satisfied us that there was such an extraordinary financial stringency as made it necessary to make a drastic reduction of the kind that the plaintiff complains of. In other words, there was no justification or need for reducing the salary of the plaintiff by as much as 28 per cent. especially when he had offered, even before the final notice was given to him, to submit to a cut of 12½ per cent. We are therefore satisfied that in this case the termination of the plaintiff's services was wrongful because it amounted to a breach of the contract Ex. A.

The only other question relates to the quantum of damages. The plaintiff's exact date of birth is not given in the evidence but it is clear, and the fact is admitted, that he was 53 years old when he was given notice of termination of his services. Though the contract merely says, 'permanent' and though the word 'permanent' may in a proper case be taken to mean for life, nevertheless, in the matter of appointment of teachers in schools, it is the general usage, so to say, for the educational institutions not to continue to employ teachers who have passed the age of sixty, the ordinary age of superannuation being fifty-five, those who are over fifty-five being kept on till sixty in case the management is of opinion that they are fit to perform their duties efficiently. This usage prevailing in the educational world must be deemed to be part of the contract and it is impossible in our opinion to regard the contract as being one for life having regard to the conditions and usages known to both the parties at the time of the contract. It is not necessary to elaborate this aspect of the case because the plaintiff himself has not made the claim that the contract gives him an appointment for life. He has claimed only on the basis that he would have been entitled under the contract to continue in service till sixty and he does not contend that even during this period he cannot be sent away if found to be not fit for work. The lower Court has found that the plaintiff would have been entitled under the contract to continue till he was 60 years old. There is a qualification introduced by the Court below to this finding. In paragraph 44 of the judgment which contains the finding, the lower Court observes as follows:

"I hold that plaintiff is physically fit to continue in service till he completed 60 years of age. I hold that but for the plaintiff's growing incapacity to teach, he could have continued in service till he completed 60 years".

It must be remembered in this connection that the first finding is to some extent an attempt to forecast the

Lakshmi-narasimha-charyulu v. McLaurin High School, Cocanada.

Pandrang Row, J.

future, because the plaintiff had not attained the age of 60 when the lower Court pronounced its judgment and it was certainly impossible for the lower Court to hold that he is physically fit to continue till he completed 60 years of age. In fact, no one can be so positive about any-one's health and even continued existence. It would seem that even the lower Court was thus of opinion that there was a growing incapacity to teach though the lower Court appears to have also thought that but for that growing in-capacity he could have continued till he completed 60. It is obvious that under the contract if the growing incapacity for service really made the plaintiff unfit to perform his duties efficiently, his services could have been terminated by the management. There is also the statement of the Manager as D. W. 3 to the effect that the plaintiff was never a good teacher in his subject and it would appear that the inspection reports by the Governmont educational authorities were not quite favour-able to him. The inspection reports show that from 1928 adverse remarks were being made about the teaching in history. Having regard to the facts in this case, it is extremely unlikely that the plaintiff would have been retained in service by the Manager after he attained fifty-five years. The chances of his retention upto sixty were so remote that it is not possible in our opinion to allow him damages on the basis that he would have continued in service till he completed 60 years. Under the circumstances, damages have to be calculated on the basis that he was likely to have continued in service only till he completed fifty-five years. Having regard to this important considera-tion and having in mind the other circumstances as well —which bear on the question of damages, we are of opinion that damages to the extent of Rs. 3,000 would be a reasonable compensation for the breach of contract established in this case. There would be a decree accordingly for this amount against the properties of the institution, the appeal being allowed to this extent. The plaintiff-appellant will have his proportionate costs on this amount in this Court and in the Court below to be paid by the defendant. The decree amount will bear interest at 6 per cent. per annum from this date until the date of realisation.

K. S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VENKATARAMANA RAO.

Messrs. Sha Moolchand Kesarimull by its partner Mita Lal. *Appellant** (*Plaintiff*)

v.

Messrs. Associated Agencies, a Firm of Merchants, Mount Road, Madras. *Respondent* (*Defendant*).

Sha Moolchand Kesarimull *v.* Associated Agencies.

Sale of goods—C.I.F. contract—Printed form with type-written portion—Conflict—Construction—Contract for sale of goods to be delivered in two instalments—Wrongful refusal by buyer to take delivery of first instalment—Right of seller to cancel contract and claim damages.

If the type-written and printed portions of a contract can be read together effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the type-written portion the type-written portion must prevail.

In deciding whether there has been a repudiation of the contract regard must be had to the ratio quantitatively which the breach bears to the contract and the degree of probability or improbability that the breach will be repeated. When there is a contract for the sale of goods to be delivered in two equal instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him.

Appeal against the judgment and decree of the Honourable Mr. Justice Gentle dated 30th January, 1940 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 215 of 1939.

K. Rajah Aiyar, K. S. Rajagopalachari and *P. V. Subramanyam* for Appellant.

T. A. Rangachari for Respondent.

The Court delivered the following

Leach C.J.

JUDGMENTS. *The Chief Justice.*—The appellant sued on the Original Side of this Court to recover a sum of Rs. 7,920 claimed as damages for breach of contract. The appellant also asked for an order directing specific performance of part of the contract and put his claim for damages hare in the alternative. The nature of the contract, however, precludes any decree for specific performance being granted and the claim for damages alone calls for consideration. Mr. Justice Gentle who tried the

* O. S. A. No. 22 of 1940. 24th April, 1941.

Sha Moolchand Kesarimull *v.* Associated Agencies.

Leach, C.J.

suit came to the conclusion that there had been no breach of the contract by the respondents, but the appellant himself had broken it.

The contract is partly type-written and partly printed and is dated the 5th July, 1939. A printed form commonly used by the respondents, who are a firm of merchants carrying on business in Madras was used, but the main provisions were inserted by means of a type-writer at the beginning of the document. By the type-written portion, the appellant agreed to buy and the respondents agreed to sell sixty bottles of quicksilver, each bottle to contain 34.5 kilograms net. The quicksilver had to be obtained from Italy and it was stipulated that there should be a shipment of half the quantity in July and half in August, 1939. The type-written portion of the document includes these terms:

> " Price.—£ 16-12-0 per steel bottle, C.I.F. Madras.
>
> Terms.—Document against sight payment".

It is a C.I.F. contract and if the document had stopped at the end of the type-written portion there could be no doubt that the appellant would have made himself liable to pay for each consignment as soon as the bill of lading and the other shipping documents were presented to him, irrespective of the arrival of the goods. Mr. Rajah Aiyar on behalf of the appellant has rightly conceded this, but he relies on the following statement in paragraph 3 of the printed conditions:

> " On arrival of the steamer by which the goods have been shipped, the indentor shall take up the documents. The documents shall be delivered against payment only."

He says that this clause gave him liberty to refuse to pay until the goods had actually arrived in Madras. The case for the respondents is that the printed clause is in direct conflict with the type-written portion of the document and that the type-written portion must prevail.

The goods comprising the first consignment were duly shipped from Italy, but the ship never arrived in Madras. The goods were placed on board a German vessel and was at sea when the present war broke out on the 3rd September, 1939. The vessel was apparently in the vicinity of Mormagao in Portuguese territory on the out-break of hostilities and sought refuge there. The August portion of the contract was duly shipped on a Dutch vessel and arrived in Madras on the 19th September, 1939. On the 18th August, 1939, the respondents wrote to the appellant informing him that they had received the

relevant shipping documents with regard to the first consignment and they would be sending their invoice for the amount due in respect of the goods in the course of the week. The invoice and the relative shipping documents were forwarded to the appellant the next day and on the 23rd August, the respondents wrote to the appellant enclosing a copy of the invoice which had been certified by the customs and asked him to pay the amount into the Eastern Bank, Ltd, Madras. On the same day, the manager of the Eastern Bank, Ltd., wrote to the appellant informing him that he had received instructions to collect the amount and requested him to make arrangements for payment. The appellant took no notice of these communications. On the 8th September, 1939, the respondents wrote to him demanding payment within 24 hours and informing him that on his failure to comply with the demand, the contract would stand cancelled and he would be held responsible for the damages which might be incurred as the result of his non-compliance with the demand. This letter brought a reply from the appellant two days later, in which he stated that he would make arrangements for payment to the bank as soon as the steamer had arrived in port. He did not challenge the validity of the respondents' demand for immediate payment.

When the second consignment arrived on the 19th September, 1939, the appellant, through an advocate, wrote to the respondents claiming that delivery should be given to him, but the respondents refused to do so on the ground that the contract had been cancelled by reason of the appellant's breach in respect of the first consignment. Thereupon the appellant filed this suit. He maintained that he was fully justified in refusing to pay for the first consignment until the ship carrying the goods had reached Madras, and that as there had been no breach of contract on his part he was entitled to delivery of the goods which had been consigned in August, and had arrived here in September. He also averred that even if there had been a breach of the agreement on his part, the breach was not of a nature which warranted the respondents cancelling the contract, and therefore he was entitled in law to delivery of the second consignment. The learned Judge decided against the appellant on all his contentions.

The contract is a C. I. F. contract, whether it is to be construed in the way the appellant would have it construed or in

Sha Moolchand Kesarimull v. Associated Agencies.

Leach, C.J.

the respondents' way. The effects of a C. I. F. contract are fully stated in the judgment of Kennedy, L.J., in *Biddel Bros.* v. *E. Clemens Horst Co*[1]. which received the approval of the House of Lords (1912 A.C. 18). The tender of the goods under a C.I.F. contract is effected by the tender of the bill of lading and accompanied, in case the goods have been lost in transit, by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. As the result of the decision in *Biddel Bros.* v. *E. Clemens Horst Co*[1], it is now settled law that in the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided, of course, that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time.

If the type-written and printed portions of the contract can be read together, effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the type-written portion the type-written portion must prevail. See *Gumm* v. *Tyre*[2], and *Glynn* v. *Margetson & Co.*[3]. In *Glynn* v. *Margetson & Co.*[3], the House of Lords had to construe a charter party, and in his judgment in this case Lord Herschell said:

"Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent".

Lord Halsbury agreed and in so doing laid stress on the principle stated by Lord Ellenborough in *Robertson* v. *French*[4] where Lord Ellenborough said:

"The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects".

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1. (1911) 1 K.B. 934.
2. (1864) 33 L.J. Q.B. 97.
3. (1893) A.C. 351.
4. (1803) 102 E.R. 779 at 782: 4 East 130 at 136.

Sha Moolchand Kesarimull v. Associated Agencies.

Leach, C. J.

The same principle has been accepted in India. See *Paul Beier* v. *Chotalal Javerdas*[1], and *Mohanlal Kashinath* v. *Krishna Premji & Co.*[2]

Therefore Cl. 3 of the printed terms of this contract must be given effect to if this can be done without doing violence to the type-written portion, but not otherwise. Before turning to examine in detail the two portions of the document, I would mention that this contract was entered into at a time when war clouds were gathering. The goods had to be obtained from Italy, a direction from which some of the war clouds were coming. The printed form represented the usual conditions on which the respondents did business in normal times. Therefore it can be well understood that in entering into the contract the sellers insisted that the buyer should pay the price as soon as the bill of lading and other relevant documents were presented to him. The intention of the parties must be gathered from the words used, but in deciding what was the intention the Court is not called upon to ignore the surrounding circumstances.

I have already indicated that in my opinion the type-written portion of the document, if read alone, entitled the respondents to present the bill of lading and other documents to the appellant when they did and that the presentation required him to pay then and there for the goods represented by the documents. Reading the type-written portion in conjunction with the printed portion I am of the opinion that there is a direct conflict. The expression "at sight" means on demand, and therefore the words "document against sight payment" can only mean that the appellant was to pay when the documents were presented to him. The printed portion relied upon by the appellant stipulates that the appellant should only be required to pay after the arrival of the steamer in Madras. Mr. Rajah Aiyar has suggested that the two portions can be reconciled by reading them as embodying these conditions: (1) the appellant should not be required to pay until the goods arrived (2) after arrival the appellant should pay as soon as the shipping documents were presented to him. I cannot accept this construction. In the type-written portion of the document, which is the governing portion, there is an unqualified statement to the effect that goods must be paid for at sight, that is, whenever the shipping

1. (1904) I.L.R. 30 Bom. 1. 2. (1927) 30 Bom.L.R. 415.

Sha Moolchand Kesarimull *v.* Associated Agencies.

Leach, C.J.

documents were presented. The subsequent printed condition is a negation of this condition. The learned Judge has read the contract in this way and I am in full agreement with what he has said. The parties could, of course, have contracted that payment should not be demanded until after the arrival of the goods, but this they have not done, and no doubt the war clouds were responsible for the respondents refusing to do business in these goodson the condition to be found in Cl. 3 of their printed form. The appellant having refused to pay the price of the goods comprised in the first consignment when the documents were presented to him and payment demanded means it that he broke the contract and therefore can have no claim in respect of that consignment.

It remains to decide whether the appellant had the right of demanding that delivery should be made of the goods consigned in August, 1939. In *Maple Flock Co., Ltd.* v. *Universal Furniture Products* (*Wembley*) *Ltd.*,[1] Lord Hewart, C. J., in delivering the judgment of the Court of Appeal pointed out that in deciding whether there has been a repudiation of the contract, regard must be had first, to the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that the breach will be repeated. In the present case Gentle, J., considered that the reasons given by the appellant for refusing the first consignment was a breach which the respondents might well expect to be repeated with regard to the second half of the consignment and I see no reason for dissent from this opinion. The first consideration referred to by Lord Hewart, C. J., also applies here. The breach which took place when the appellant refused to pay for the first consignment was a refusal to perform the contract to the extent of one half. When there is a contract for the sale of goods to be delivered in two instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. In *Honck* v. *Miller*[2], the Court of Appeal held that a seller was entitled to cancel a contract when the buyer had refused to take delivery of goods representing one-third of the total sold under the contract. The considerations which applied in the *Mersey Steel & Iron Co., Ltd.* v. *Naylor, Benzon*

1. (1934) 1 K.B. 148. 2. (1881) 50 L.J. Q.B. 529: L.R. 7 Q.B.D. 92.

& Co.,[1] do not arise here, but *Honck* v. *Miller*[2], has direct bearing. I hold that the contract was lawfully cancelled by the respondents and consequently the appellant had no claim to the goods which comprised the second consignment.

Sha Moolchand Kesarimull *v.* Associated Agencies.

Leach, C.J.

For these reasons I would dismiss the appeal with costs. I also consider that there should be a certificate for two counsel.

Venkataramana Rao, J.

Venkataramana Rao, J.—I agree with my Lord the Chief Justice that the view of Gentle, J., on both the points is correct and the appeal should be dismissed with costs.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Valur Krishna Menon and others .. *Appellants* (Defendants Nos. 2, 5 and 6 Appellants)*

v.

Puthan Veettil Kurungara Kunhu *alias* Devu Amma and others. *Respondents (Plaintiffs and Defendants Nos. 1, 3 and 4 Respondents).*

Krishna Menon *v.* Kurungara Kunhu *alias* Devu Amma.

Will—Construction—Property bequeathed to wife and his children by her—Wife and children, whether take as tenants in common—Wife representing children in prior litigation—Sale in execution of decree therein, if will bind children—Incidents of tavazhi *inconsistent with provisions in will—Inference—Malabar law.*

A testator bequeathed certain properties by his will to his wife and children, one of whom had been born when the will was executed and the other was born later. The will recited *inter alia* that the bequest was to operate in favour of the daughter already born as well as of all progeny that might yet be born to him by his wife, that the legatees should have joint possession and enjoyment holding the properties as his legal representatives and heirs, that in realising outstandings the wife was to act as the guardian of the children who had not come of age and that none but the wife and children shall have any right to the properties. The present suit was brought by the children for partition and recovery of possession of ⅔ of the properties on the ground that they and their mother took as tenants in common under the will, and a sale of the properties in execution of a decree obtained on the basis of a mortgage executed by their father, in a suit to which their mother alone was a party, would not bind their shares, she having no right to represent them as *karnavathi*. On the question whether the bequest in favour of the wife and children constituted a tenancy in common or whether they became joint tenants forming a group of *tavazhi* with the incidents of a Marumakkathayam tarwad and continued to remain so even after the wife married again after her first husband's death and had children by the second marriage,

* S. A. No. 162 of 1938. 8th April, 1941.

1. (1884) 9 A.C. 434.
2. (1881) 50 L.J.Q.B. 529: L.R. 7 Q.B.D. 92.

Krishna Menon v. Kurungara Kunhu alias Devu Amma.

Held, that if a *tavazhi* was to be understood as consisting of a mother and her children and descendants in the female line, as observed in *Moithiyan Kutty* v. *Ayissa*, (1928) I.L.R. 51 Mad. 574: 55 M.L.J. 208, the provisions in the will in the present case being in conflict with the underlying idea of a *tavazhi* and the intention of the testator being to bequeath the property to his wife and his own offspring by her, the beneficiaries took only as tenants in common. that being so, the mother could not have represented her children (the present plaintiffs) in the previous litigation and therefore the sale in execution of the decree therein was not binding upon them.

Appeal against the decree of the District Court of North Malabar in A. S. No. 216 of 1936, preferred against the decree of the Court of the Additional District Munsif of Tellichery in O. S. No. 477 of 1934.

P. Govinda Menon for Appellants.

O. T. G. Nambiar and *A. Achuthan Nambiar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for partition and recovery of possession of two-thirds share in the property bequeathed by the plaintiffs' father Narayanan under a will dated the 21st January, 1921, Ex. A, to his wife and children, one of whom had been born at the time when the will was executed and the other was born later. The suit was brought as the property was alleged to have been owned by the plaintiffs as tenants in common with their mother who had no right to represent them as a *Karnavathi* in the suit (O. S. No. 203 of 1932) instituted on the basis of a mortgage executed in favour of the second defendant by their father. To this suit the plaintiffs' mother alone was made a party and the plaintiffs were not impleaded. It was decreed but it was contended in the present suit that the decree was not binding on the plaintiffs and their shares which were two thirds in the property bequeathed by their father remained unaffected by the decree and the purchase of the same by the decree-holder was invalid. The decree-holder assigned the property after his purchase to the three persons who were also made parties to the present action. This was decreed by both the Courts below and defendants 2, 5 and 6 have preferred the present appeal.

The interesting question whether a bequest by a father in favour of his wife and children constitutes a tenancy in common or whether they became joint tenants forming a group of *tavazhi* with the incidents of a Marumakkathayam tarwad and continue to remain so even after the wife is married to another

Krishna Menon *v.* Kurungara Kunhu *alias* Devu Amma.

person subsequent to her first husband's death as a result of which there are fresh offspring has been debated before me in this appeal. Relying on the natural presumption that the bequest or gift must have been intended to be made by the father to his own children and not to the offspring of another marriage, the answer was given in two decisions of this Court that the latter, could not partake of any share or interest in the properties given by a person who was not their own father. But in arriving at this result two methods were adopted by the two division benches of this Court who decided those cases. Since the decision of the Full Bench in *Chakkra Kannan* v. *Kunhi Pokker*[1], was to the effect that if the father gave a property to his wife and children they would take it or would in any case be presumed to do so as members of a *tavazhi*, unless, a contrary intention had been expressed by the donor or the testator and Mr. Justice Sadasiva Aiyar who had considerable experience of Malabar law and customs had observed in the Full Bench decision referred to above that in such cases two small *tavazhis* or groups might be taken to have come into existence, the members of one group not sharing with the members of the other—their mother being the common factor to both of them or perhaps even more, if she had married more than twice and had children by each marriage, a division bench of this Court (*Imbichi Beevi Umma* v. *Raman Nair*)[2], of whom Mr. Justice Phillips at least had large judicial experience in this presidency, took the same view as was expressed by Sadasiva Aiyar, J., in the above stated Full Bench case. Inasmuch as a *tavazhi* consists of a woman and all her children and the effect of holding that the *tavazhi* had come into existence would be to confer a share of the property given by a father to his wife and his offspring, on the offspring of another marriage, another division bench of this Court consisting of Krishnan and Venkatasubba Rao, JJ., held on the other hand that a *tavazhi* should be found not to have come into existence at all in these circumstances and the wife and children who took the property should be presumed to have taken it merely as tenants in common. But in both these decisions the property was given by the second husband of the woman and not by the first one. This to my mind makes a considerable difference as by remarrying, a woman cannot be found to have forfeited her right to the

1. (1915) 29 M.L.J. 481: I.L.R. 39 Mad. 317 (F.B.).
2. (1919) 37 M.L.J. 220: I.L.R. 42 Mad. 869.

Krishna Menon *v.* Kurungara Kunhu *alias* Devu Amma.

tavazhi—if one is held to have come into existence on the death of her first husband—and is not held to have been disjointed on account of a second marriage of the wife, in the absence of any authority which has not been, in spite of my asking for it shown to me. As the idea of a *tavazhi* was that the property would devolve on a woman and all her children, Mr. Pocker learned counsel for the appellants was prepared to put the extreme contention that the children of the second marriage would enter into the group of the *tavazhi* that was already in existence and tried to steer clear of the decision in *Moithiyan Kutty* v. *Ayissa*[1], by distinguishing it on the ground that the property in that case was left by the second husband to his own children.

The decision of this interesting question would have been essential only if I found that there was nothing in Ex. A which would lead me to hold that the property was not given by Narayanan to his wife and his own children as tenants in common or that in other words, there was nothing in the will to rebut the presumption as to the property having been given to a *tavazhi* raised in *Chakkra Kannan* v. *Kunhi Pokker*[2]. A perusal of the deed would however show that the property in this case was undoubtedly given by Narayanan to his own wife and his children as tenants in common and he made it clear that it would devolve on nobody else. Had the property been given to the *tavazhi* as suggested by learned counsel for the appellants, one should not have found the will to be in favour of the daughter Devu who was already born and "to all the progeny that may yet be born *to me* of her". This is not all. In the next paragraph of the will the testator makes it clear that the wife and children should remain in joint possession and enjoyment of all moveable and immoveable properties holding them directly themselves and causing them to be held *as his legal representatives and heirs.* What is more, the testator adds that his wife shall "effect the collections of outstandings due to me in her own capacity and in her capacity *as guardian of the children* who have not come of age". It was suggested by Mr. Pocker that every mother is the guardian of her children in every *tavazhi* and the mention of that fact by the testator did not alter the position in any way. This appears to be incorrect. It is the

1. (1928) 55 M.L.J. 208: I.L.R. 51 Mad. 574.
2. (1915) 29 M.L.J. 481: I.L.R. 39 Mad. 317 (F.B.).

Krishna Menon v. Kurungara Kunhu *alias* Devu Amma.

manager of the tarwad alone and not each Karnavan or Karnavathi of the various *tavazhis* inside the tarwad that would be the guardian of all the minors in the various groups or *tavazhis* existing in the tarwad (*Kalliani Amma* v. *Govinda Menon*[1]) and the appointment by Narayanan of his wife as guardian could not therefore be regarded as having been made in pursuance of the ordinary law prevailing amongst the Malabar families but on account of a special direction that he was giving as opposed to the custom. This was apparently done as the property was bequeathed by him to his own wife and his own children as tenants in common and as he wanted his wife to act as a guardian on behalf of the children irrespective of the fact that someone else would have been their legal guardian if one was not appointed by him. The succeeding sentence of the will makes it clearer still. It reads as follows:

"No persons other than my wife and children have any right or claims to any of the moveable and immoveable properties or any of my future acquisitions, that I have hereby bequeathed to them".

If a *tavazhi* has to be understood as consisting of a mother and of her children and descendants in the female line as observed in *Moithiyan Kutty* v. *Ayissa*[2], the above mentioned provision of the will would come into conflict with the underlying idea of the *tavazhi* and indicate that the intention of the testator was not to bequeath the property to the *tavazhi* but to his own wife and his own offspring as tenants in common. That being my construction of the document, the mother could not have represented the plaintiffs in the previous litigation and the suits were rightly decreed. For the above reasons this appeal must fail and is dismissed with costs of respondents 1 and 2.

Leave to appeal refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Rangaswami Nadar ... *Petitioner** (*Defendant*)

v.

Minor Pitchaimani Nadar by next friend A.K.P. Chinna Nadar. *Respondent* (*Plaintiff*).

Rangaswami Nadar v. Pitchaimani Nadar.

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1. (1911) 22 M.L.J. 23: I.L.R. 35 Mad. 648 at p. 654.
2. (1928) 55 M.L.J. 208: I.L.R. 51 Mad. 574.

* C. R. P. No. 1511 of 1938 (S. A. No. 746 of 1938 converted into) 24th January, 1941.

Rangaswami Nadar
v.
Pitchaimani Nadar.

Civil Procedure Code (V of 1908), O. 41, r. 10—Appeal—Order directing security to be furnished within a specified time—Security tendered in time—Rejection of appeal before testing—Propriety.

Where security for costs of appeal is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the security itself need not be within the time.

Decision of Jackson, J., in 52 M.L.J. 53 (Short Notes) relied on.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Madura dated 11th December, 1937 and made in A. S. No. 116 of 1937 (O. S. No. 20 of 1936, District Munsif's Court, Tirumangalam).

R. Desikan for Petitioner.

P. N. Appuswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT:—The petitioner was the defendant in O. S. No. 20 of 1936 on the file of the District Munsif of Tirumangalam. The suit was decreed against him and he filed an appeal in the Court of the District Judge of Madura. The respondent (plaintiff) however filed an application asking that he should be directed to furnish security for costs of the appeal and on this application the District Judge made an order by which he directed the petitioner to furnish security for costs and giving him four weeks, which expired on the 3rd of December, in which to furnish the security adjourned the appeal for orders to the 4th of December, 1937. On the 3rd December, 1937 the petitioner did tender security and it appears that the District Munsif of Tirumangalam adjourned the question of testing the security until the 15th of December. On the 11th of December, however, the District Judge rejected the appeal on the ground that the security had not been furnished within the time prescribed.

The contention advanced by the learned counsel for the petitioner is that the order of the lower Court was complied with by tendering security on the 3rd December, namely the last day of the time allowed for furnishing security. The learned District Judge did not take this view but said that what is contemplated by an order granting time to furnish security is that the security should be furnished within the period allowed by the Court, and that the party should not have the time

Rangaswami Nadar *v.* Pitchaimani Nadar.

automatically extended by offering security on the last day and then saying that it should be tested later on. The only authority to which I have been referred which directly bears on the point is a case decided[1] by Jackson, J. In that case Jackson, J., held that an order granting time for furnishing security was complied with if the security was tendered before the period expired. In my opinion this is the correct view. There must be a specific date by which the security has to be furnished, and there will be no specific date if the person ordered to furnish security has to furnish it some unspecified time before the expiration of the period fixed in order that it may be tested. I am of opinion therefore that the order of the learned District Judge rejecting the appeal must be set aside. The security tendered will be tested and if it is found to be sufficient it must be held to have been furnished in time. If however the security is not found sufficient it would follow that the order of the District Judge had not been complied with and it will then be open to the District Court to reject the appeal. The costs of this revision petition will abide the result of the appeal.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Avana Mana *alias* Kanhiyur *alias* Thekkiniyedath Kirangat Manakkal Vasudevan Nabudiripad. *Appellant** (*Plaintiff*)

v.

Mangat Valapil Avathala's daughter Panikka Veettil Abdul Kader's wife Maria Kutti Umma. *Respondent* (*1st Defendant*)

Vasudevan Nambudiripad *v.* Maria Kutti Umma.

Transfer of Property Act (IV of 1882), S. 59—Rule as to attestation of mortgage—If applicable to registered hypothecation bond of a fund in Court.

On a question whether a registered bond hypothecating a fund in Court executed by the first defendant, but not properly attested, would operate as a valid hypothecation,

Held, that the provision regarding attestation in S. 59 of the Transfer of Property Act was not applicable to a case of hypothecation of movables and therefore the bond operated as a valid hypothecation of the fund in Court.

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1. (1927) 52 M.L.J. (Short Notes) 53.

* S. A. No. 586 of 1938. 17th July, 1941.

Vasudevan Nambudiripad v. Maria Kutti Umma.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 103 of 1936 preferred against the decree of the Court of the District Munsif of Ottapalam in O. S. No. 390 of 1935.

N. R. Sesha Aiyar for Appellant.

B. Pocker for Respondent.

The Court delivered the following

JUDGMENT.—Mr. Pocker, the learned advocate for the respondent, reported no instructions and the respondent does not appear. I have therefore to decide the appeal in the absence of the respondent. The sole question that arises in this second appeal is whether Ex. A the registered hypothecation bond executed by the first defendant, the sole respondent in this second appeal, operates as a valid hypothecation of a fund in Court O. S. No. 238 of 1920. The lower appellate Court found that the mortgage was not properly attested and therefore declined to give a mortgage decree. It gave a simple money decree against the defendant. Hence the second appeal.

The necessity for attestation is to be found in S. 59 of the Transfer of Property Act. Chapter IV in which that section occurs relates to mortgages of immoveable properties and charges. S. 58 (*a*) which defines a mortgage says:

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money. . . . . . "

Obviously a hypothecation of movable property is not a mortgage within the meaning of S. 58 (*a*). S. 59 provides how a mortgage defined under S. 58 is to be executed. Hence if S. 58 does not apply to a case of movables S. 59 also will not apply. Ex. A is therefore a valid hypothecation of the fund which is in deposit in O. S. No. 238 of 1920 on the file of the Additional District Munsif's Court of Palghat. The decree of the appellate Court is reversed and that of the trial Court restored so far as this item is concerned. The second appeal is confined to the amount of Rs. 286-14-0 in deposit in the above suit. The appellant will have his costs of this second appeal and also in the lower appellate Court calculated on the sum of Rs. 286-14-0 which is the extent of success in that Court.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Santhappa .. *Appellant** (*Petitioner—1st Judgment-debtor*)

v.

Eswarappa Holiappa Bulla, by L. R. Siddalingappa Bulla *Respondent* (*Counter-Petitioner-Decree-holder*).

Santhappa *v.* Holiappa Bulla.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Decree of Bombay Province transferred to Court in Madras Presidency for execution—Interest payable under—Not liable to be scaled down—C. P. Code, S. 47.

Interest payable under a decree passed by a Court in the Bombay Presidency but transferred for execution to a Court in this Province is not liable to be scaled down under S. 8 of Act IV of 1938. Proceedings under the Act for scaling down decree debts are not proceedings in execution under S. 47 of the Code of Civil Procedure and the executing Court has no power to give any relief under S. 19 of Act IV of 1938 by reducing the interest provided in a decree made by Courts in other Provinces. To hold that the interest which the decree carries could be wiped out from the date of the decree to 1st October, 1937, and thereafter shall be recovered only at 6¼ per cent. will be to amend the decree, and the mere use of the word "discharged" in S. 8 to indicate the compulsory scaling down of debts cannot bring the matter within the scope of S. 47, C. P. Code.

Appeals against the orders of the District Court of Bellary dated 23rd July, 1940, and made in E. A. No. 162 and 163 of 1940 in E.P. No. 74 and 75 of 1936 respectively (in O.S. No. 168 and 167 of 1923 respectively on the file of the Court of the Additional First Class Subordinate Judge, Dharwar).

B. Sitarama Rao and *Kasturi Seshagiri Rao* for Appellant.

V. S. Narasimhachar and *N. Appu Rao* for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—The question that falls to be decided in these appeals is whether interest payable under a decree passed by a Court in the Bombay Presidency but transferred for execution to a Court in this Province is liable to be scaled down under S. 8 of the Madras Agriculturists' Relief Act, (hereinafter referred to as the Act).

The respondent obtained two decrees against the appellant in O. S. No. 167 and 168 of 1923 in the Court of the Additional First Class Subordinate Judge, Dharwar, and got these decrees transferred to the District Court of Bellary for execution as the appellant was residing in Bellary and owned properties there. The decrees were passed on 10th March, 1927,

* A. A. O. Nos. 424 and 425 of 1940. 25th March, 1941.

Santhappa v. Holiappa Bulla.

Patanjali Sastri, J.

and provided for payment of the amount due in instalments which were, in each case, charged on immoveable properties situate in the Bellary District and carried interest at 9 per cent. per annum. The appellant claiming to be an agriculturist applied to the Court below in the course of the execution proceedings after the Act came into force for scaling down the decrees. The Court declined to grant the relief on the ground that as a Court executing the decrees, it could not interfere with the decrees which could be amended only by the Court which passed them, and the mere fact that the procedure laid down in the Act for the scaling down of decrees was not applicable to Courts in Bombay could not enlarge the powers of the executing Court.

Mr. Sitarama Rao appearing for the appellant conceded that the appellant was not entitled to claim in full measure the relief provided by S. 8 of the Act, as S. 19 was not applicable to the Court which passed the decrees in question, that is to say, he admitted that the interest due on the debts prior to the decrees and included in them could not be wiped out, as that would clearly amount to going behind the decree and would be beyond the powers of an executing Court; but he contended that there was nothing in the Act to preclude the Court from granting the more limited relief namely, the wiping out of the interest at nine per cent. per annum ordered to be paid from the date of the decrees that is from 10th March, 1927, to 1st October, 1937, and of the further interest due for the subsequent period in excess of the statutory rate of 6¼ per cent. allowed under the Act. It was urged that this limited relief the Court below was competent and, indeed, bound to grant under S. 47 of the Civil Procedure Code, as the Court being a Court of this Province was bound to give effect to the provisions of the Act as far as it lay in its power to do so.

Though the point for consideration lies in a comparatively narrow compass, the arguments ranged over a wide ground relating to the *situs* of judgment-debts and the competency of the local Legislature to make laws affecting decrees passed by Courts outside the Province. We do not consider it necessary to go into these questions as we are of opinion that the only procedure open to an agriculturist seeking the benefit of the Act in respect of debts which had ripened into decrees before the commencement of the Act is what is provided in S. 19, and no

Santhappa v. Holiappa Bulla

Patanjali Sastri, J.

alternative remedy under S. 47 of the Civil Procedure Code is available in cases where S. 19 of the Act has no application. As pointed out in *Kottayya* v. *Venkata Punnayya*[1], the Act creates new rights in agriculturist debtors to have their debts scaled down in accordance with the provisions of Chap. II and provides a special procedure for the enforcement of the rights in cases where before the commencement of the Act decrees have been passed for the repayment of such debts, and these provisions must, be read together in order to determine the scope of the relief afforded by the Act in such cases. It was accordingly held that the use of the term "decrees" in Chap. II must be understood as referring to decrees passed before the commencement of the Act. On the same principle, it seems to us that the term should be held to refer to decrees passed by the Courts of this Province, for, as already observed, it is conceded that S. 19 is not applicable to decrees made by Courts in other Provinces.

Mr. Sitarama Rao, however, stressed the words "shall be deemed to be discharged" in S. 8 as indicating that the limited relief which he now claimed for the appellant fell within the purview of S. 47 of the Civil Procedure Code and could be granted by the executing Court without the decree being amended in the manner contemplated in S. 19. But when, as in this case, a decree carries interest at 9 per cent. from its date to hold that such interest shall not be recoverable until the 1st October, 1937, and thereafter shall be recovered only at 6¼ per cent. as provided in the Act is, in effect, to amend or alter the decree, and the mere use of the word "discharged" to indicate the compulsory scaling down of debts for which the Act provides cannot, as it seems to us, bring the matter within the scope of S. 47 of the Civil Procedure Code. Indeed this conclusion seems inevitable in view of the recent decision of a Full Bench of this Court in *Nagappa Chettiar* v. *Annapoorani Achi*[2], which has definitely ruled that proceedings under the Act for scaling down decree-debts are not proceedings in execution under S. 47. The Court observed:

"If the scaling down does not wipe out the decretal amount then an amended decree is passed, which can only be enforced in execution proceedings separately instituted under the Code of Civil Procedure. If the scaling down wipes out the decretal amount the Court cannot pass an amended decree. It must then declare that the decree has been satisfied. But here again, the entering up of satisfaction is not in execution proceedings, but in

1. (1940) 2 M.L.J. 202. 2. (1941) 1 M.L.J. 164.

Santhappa v. Holiappa Bulla — Patanjali Sastri, J.

proceedings, under the Agriculturists' Relief Act, which are of an independent nature".

If the entering up of satisfaction of a decree as a result of applying the provisions of the Act is thus not a matter relating to execution of the decree, it is difficult to see how a partial reduction of the amount payable under a decree by the wiping out of the interest can be said to fall under S. 47.

On these grounds we agree with the Court below that the appellant is not entitled to the reliefs claimed and dismiss the appeals with costs. (One set in C.M.A. 424 of 1940).

K. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Minor Nagarajan represented by his adoptive mother and guardian Indra Bai Ammal. *Petitioner* (1st Respondent decree-holder)*

v.

P. T. Krishna Aiyar *alias* Krishna Rao and another. *Respondents (Petitioner and 2nd Respondent).*

Nagarajan v. Krishna Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability—Mortgagor assigning his rights subject to another usufructuary mortgage after the filing of a suit on the simple mortgage—Final decree and sale of some items of property in execution—Right of mortgagor and usufructuary mortgagee to have sales set aside under S. 23.

A suit on a simple mortgage executed on 17th May, 1928, was filed in 1934 and while the suit was pending the mortgagor sold the equity of redemption to the eighth defendant subject to a usufructuary mortgage in favour of the sixth defendant. The preliminary decree was passed on 7th March, 1935. Subsequently there was a final decree and certain items of the hypotheca were sold before Act IV of 1938 came into force. On 17th November, 1937, the decree-holder brought to sale two items of the hypotheca, which he purchased himself on 20th June, 1938. The mortgagor applied under S. 23 of Act IV of 1938 to set aside the sale of 20th June, 1938.

Held, that on the facts of the present case the most that the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage-deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. Such a right does not connote an interest in the property sufficient to satisfy the first clause of S. 23 of Act IV of 1938. But the usufructuary mortgagee who was impleaded as the sixth defendant, if not otherwise disqualified, may be entitled to claim relief under the Act.

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* C. M. A. No. 403 of 1939 (converted into C. R. P. No. 775 of 1941). 3rd April, 1941.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Trichinopoly dated the 20th February, 1939 and made in E. A. No. 470 of 1938 in O. S. No. 99 of 1934.

K. V. Sesha Aiyangar for Petitioner.

T. K. Sundararaman for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal is preferred against an order allowing an application under S. 23 of Madras Act IV of 1938. No appeal lies but a petition has been filed to convert the appeal into a Civil Revision Petition. We have allowed that petition subject to payment of the deficient court-fee and have treated the appeal as a Civil Revision Petition. The decree which gave rise to the sale was passed in a suit on a simple mortgage dated the 17th May, 1928. The suit was filed in 1934. While the suit was pending the mortgagor sold the equity of redemption to the eighth defendant and the sale-deed recites that the sale was subject to a usufructuary mortgage in favour of the sixth defendant. The preliminary decree was passed on the 7th March, 1935. Subsequently there was a final decree and certain items were sold before Act IV of 1938 was operative. On the 17th November, 1937, the decree-holder brought to sale items 4 and 5 and purchased them himself. On the 20th June, 1938, that is to say, within the period allowed under S. 23 of the Act, the mortgagor applied under S. 23 to set aside the sale of these items. The learned Subordinate Judge held that the mortgagor being an agriculturist by reason of the ownership of other lands, had an interest in the land sold and was entitled to apply on the basis that S. 23 does not require that the applicant must have had an interest in the land sold either on the 1st October, 1937, or thereafter. This view of the law requires modification in the light of our decision in C. M. A. No. 255 and 258 of 1939. In the judgment in that case we observed that the clause "where in execution of any decree any immovable property in which an agriculturist had an interest has been sold" contemplates the existence of an interest owned by an agriculturist at the time of the sale. We also held that it was not necessary that the judgment-debtor who applied to the Court on the basis that he was an agriculturist entitled to the benefits of the Act should be the same agriculturist as the person who had an interest at the time of the sale. It follows from this

Nagarajan v. Krishna Aiyar.

Wadsworth, J.

decision that the basis of the decision of the learned Subordinate Judge is to some extent incorrect.

The respondent here, the mortgagor, has sought to support the decision on two different grounds: firstly, he has contended that since the mortgagor as a judgment-debtor has a right to redeem the mortgage, this right of redemption, subsisting on the date of the Court auction sale, is an interest in the property sold. We cannot accept this contention. Whatever may be the position in the case of a decree on a usufructuary mortgage or a mortgage by conditional sale, on the facts of the present case the most that the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage-deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. We cannot accept the contention that such a right connotes an interest in the property sufficient to satisfy the first clause in S. 23 of Act IV of 1938. The case of *Sundaram* v. *Mausa Mavuthar*[1], which has been cited by the respondent has no bearing on the present facts.

The second contention is that, granting that there must be an agriculturist with an interest in the property sold at the time of the sale, the sixth defendant is such a person. It appears from the judgment of the learned Subordinate Judge that the sale by the mortgagor to the eighth defendant was subject to a usufructuary mortgage in favour of the sixth defendant. The sixth defendant was impleaded in the suit and he appeared by an advocate. The decree recites that he was impleaded as a person claiming a right to enjoyment of the mortgaged property. We do not know what was the extent of the sixth defendant's usufructuary mortgage nor whether it was subsisting at the time of the sale; nor has it been established that the sixth defendant is an agriculturist. The lower Court however proceeds on the assumption that the sixth defendant's usufructuary mortgage was subsisting and if so, since the land in question is agricultural land he would *prima facie* be an agriculturist unless disqualified under one of the provisos to S. 3 (2) and it would be incumbent upon the decree-holder to establish the disqualification. It is contended on behalf of the appellant that this Court is not justified in instituting an inquiry into the

1. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F.B.).

question of the sixth defendant's status and interest in the absence of a specific averment in the application that the sixth defendant had at the time of the sale such an interest as would provide a basis for the application by the mortgagor. In fact the application contains no express averment as to the existence of an interest in any agriculturist at the time of the sale; and in the lower Court it does not appear to have been realised that this was a matter of any importance. The applicant having succeeded on the basis of his general contention that as the mortgagor of the property and the judgment-debtor he himself had such an interest as would entitle him to maintain the application and that contention having been negatived by this Court, it does not seem to us right to refuse to the applicant an opportunity to establish a subsidiary contention upon which he could have fallen back in the lower Court had the lower Court rejected his main contention. More especially is it desirable to show this amount of latitude in view of the fact that at the time when this applicatiod was heard by the trial Court there was a very considerable doubt as to the precise effect of the words used in the opening portion of S. 23.

In the result, therefore, treating this appeal as a revision petition we allow the petition and set aside the order of the trial Court and remand the application for fresh disposal directing the lower Court to take such evidence as may be tendered regarding the existence of an interest in favour of the 6th defendant at the time of the Court sale in these items and the question of the agriculturist status of the 6th defendant. Costs in this Court will abide the result.

K. S. *Appeal treated as revision petition and allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Sivasubramania Thevan .. *Petitioner** (*Plaintiff*)

v.

Kalankarayan Konar ... *Respondent* (*Defendant*).

Sivasubramania Thevan v. Kalankarayan Konar.

Stamp Act (II of 1899), S. 19—Promissory note executed abroad—Suit thereon in British India—Need for affixing stamp and cancelling note—Procedure before endorsement of note.

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* C. R. P. No. 221 of 1939. 24th January, 1941.

Siva-subramania Thevan v. Kalanka-rayan Konar.

In a case of assignment or transfer of a promissory note drawn or made outside British India the first holder in British India must affix a proper stamp and cancel the same and the affixing of the stamp and its cancellation must be done before the process of transfer began in British India.

Ebrahim Rowthan v. *Abdul Rahiman Mahomed* (1898) 8 M.L.J. 182 and *Kunhi Koya Haji* v. *Assan Bava Haji*, (1918) 36 M.L.J. 188 relied on.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Tinnevelly in S. C. S. No. 1453 of 1936.

P. N. Marthandam Pillai and *C. Rangaswami Aiyangar* for Petitioner.

M. S. Varadacharya for Respondent.

The Court delivered the following

JUDGMENT:—This is a civil revision petition to revise an order of the learned District Munsif, Tinnevelly and it relates to the Stamp Act. The defendant made a promissory note in Colombo on the 11th March, 1934 in favour of one Arunachala Thevar. The promissory note was at the time stamped with one anna adhesive stamp, the correct stamp for a note in British India and was duly cancelled. That must be taken to have happened on the 11th March, 1934. On or before the 11th March, 1935, the promissory note came into British India and was assigned to the plaintiff. The relevant portions of the Stamp Act are:

"S. 3. Subject to the provisions of this Act and the exemptions contained in Sch. I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say—

(*b*) every promissory note drawn or made out of British India on or after that day and accepted or paid, or presented for acceptance or payment, or indorsed, transferred or otherwise negotiated, in British India".

S. 19 provides that:

"The first holder in British India of any promissory note drawn or made out of British India shall, before he presents the same for acceptance or payment or endorses, transfers or otherwise negotiates the same in British India, affix thereto the proper stamp and cancel the same".

There is a proviso that:

"If, at the time any such bill of exchange or note comes into the hands of any holder thereof in British India, the proper adhesive stamp is affixed thereto and cancelled in manner prescribed by S. 12 and such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person and at the time required by this Act, such stamp shall, so far as relates to such holder, be deemed to have been duly affixed and cancelled".

The important words in S. 19 are the opening words, "The first holder in British India". The Act does not seem to be

Siva-subramania Thevan v. Kalankarayan Konar.

concerned with the possession of the bill or promissory note before then and indeed Seshagiri Aiyar, J., in *Kunhi Koya Haji* v. *Assan Bava Haji*[1], has held that a suit can be brought on a promissory note made outside British India as between promisor and promisee even though unstamped. But the first holder in British India must affix a proper stamp and cancel the note before he presents the same for acceptance or payment or endorses or transfers or otherwise negotiates the same in British India. So far as a promissory note is concerned stamping and cancellation seem to be required only before transfer or indorsement. It has been held in *Mahomed Rowthan* v. *Mahomed Hussain Rowthan*[2], that this provision (S. 19) is only applicable to a holder where there is one of those acts set out in the section and that it need not be stamped in the manner provided when it was not dealt with in any of the ways set out. See also *Griffin* v. *Weatherby*[3]. Mr. Justice Shephard in *Ebrahim Rowthan* v. *Abdul Rahiman Mahomed*[4], following *Griffin* v. *Weatherby*[3], also took the view that the first holder who was the plaintiff had, before presenting it for acceptance or payment or before endorsing, transferring or otherwise negotiating it, to affix the proper stamp but none of these things had happened and therefore there was no obligation to affix any stamp. But in this case, it is common ground that the note has been endorsed to the proper plaintiff. I think that the first holder whether he is the promisee himself or his endorsee should have affixed the stamp and that the time for affixing the stamp must necessarily be some time in British India because it is the first holder in British India who is affected.

I would again refer to Seshagiri Aiyar, J's decision that a promissory note made abroad can be sued on without a stamp at all. There is a proviso to S. 19 as quoted above and the learned counsel for the petitioner claims the benefit of that proviso. I do not think it can assist him because it must be manifest that on a perusal of the promissory note, it is clear and he must have known that it was made at Colombo and therefore that the stamp had been affixed and cancelled before it came into British India and therefore before it came into the hands of the holder in British India as I have already indicated and that is only then and previous to any of the acts set out in

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1. (1918) 36 M.L.J. 188. 2. (1899) 9 M.L.J. 135 : I.L.R. 22 Mad. 337.
3. (1868) L.R. 3 Q.B. 753. 4. (1898) 8 M.L.J. 182.

Siva-subramania Thevan *v.* Kalanka-rayan Konar.

S. 19 that the time for affixing the proper stamp and cancelling it arises. The rules under the Act are consistent with this view. R. 17 reads:

"The following instruments when stamped with adhesive stamp shall be stamped with the following descriptions of such stamps namely,

(*a*) Promissory notes drawn or made out of British India and chargeable with a duty of more than one anna, with stamps bearing the words 'Foreign Bill'."

It is evidently the policy of the Legislature that the Act commences to operate on promissory notes and bills from the moment they are endorsed, transferred or otherwise negotiated or presented for payment and it is at a moment of time before those processes began and in British India that the affixing of the stamp and cancellation must be done. Strangely enough the Legislature does not appear to be interested in whether a promissory note has or has not been stamped outside British India—with the equally strange result that a note stamped outside British India has to be stamped, again before indorsement.

Under the circumstances I am constrained to hold that the ruling of the learned District Munsif was right.

It is further argued that there is an admission in the pleadings that Rs. 50 is due. The pleadings have not been printed or typed and no objection seems to have been taken before the learned District Munsif. I have read the written statement but I am not satisfied that the admission is so clear as to justify a decree for that amount now and I am influenced in this decision by the fact that no such application was made to the lower Court.

This civil revision petition will therefore be dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Rajeswara Rao Garu *v.* Venkata Rayanim Garu.

Rajah V. Rajeswara Rao Garu and another. *Petitioners* (Respondents 1 and 2)*

v.

Chintapatla Venkata Rayanim Garu and others. *Respondents (Petitioner and Respondents 4, 7, 5, 6, 8, 9, 10 and 3).*

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* C. R. P. No. 475 of 1941. 16th July, 1941.

Rajeswara Rao Garu *v.* Venkata Rayanim Garu.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (i)—Reunited Hindu family—If "undivided Hindu family" for purposes of Act IV of 1938.

The words "undivided Hindu family" in the definition of "person" in S. 3 of Madras Act IV of 1938 will cover a re-united Hindu family which therefore will be disqualified from receiving the benefits of Act IV of 1938 where it pays more than Rs. 100 as *kattubadi.*

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bezwada dated 18th February, 1941 and passed in I. A. No. 603 of 1939 in O. S. No. 30 of 1932.

The Advocate-General (Sir A. Krishnaswami Aiyar), B. C. Seshachala Aiyar and *C. Krishna Reddi* for Petitioners.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners were the transferee decree-holders against whom the respondents filed an application under S. 19 of Madras Act IV of 1938 praying the Court to scale down the decree debt and to record full satisfaction. In objection to this application it was urged that the applicants as members of an undivided Hindu family paid more than Rs. 100 as *kattubadi* and were therefore not entitled to claim relief as agriculturists having regard to proviso D to S. 3 (*ii*) of the Act. The contention of the present petitioners that the respondents were members of an undivided Hindu family was based upon an assertion that in the respondents' family there had been a reunion. The lower Court held the view that a re-united family could not be described as an undivided Hindu family. Against this decision the present petition is filed.

It has been pointed by the learned Advocate-General for the petitioners that the Privy Council has laid down, vide *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*[1], that on a reunion the family is remitted to its former status as a joint Hindu family and that reunion cancels a partition and not only remits the parties to their original status, but makes them subject to all the incidents of a coparcenary, vide *Babu* alias *Govinddoss Krishnadoss* v. *Gokuldoss Goverdhandoss*[2]. Mr. Raghava Rao has contended quoting *Suthersanam Maistri* v. *Narasimhulu Maistri*[3], that though the position of the members of a reunited family may not be merely contractual, their status

(1865) 10 M.I.A. 403 at 406. 2. (1928) 55 M.L.J. 132.
3. (1901) 11 M.L.J. 353 at 361.

Rajeswara Rao Garu *v.* Venkata Rayanim Garu.

is not that of an undivided Hindu family. It is pointed out that there are certain peculiarities in the rules of succession to a deceased member of a reunited family as compared with the rules governing ordinary coparceners; so that it cannot be said that a reunited family is clothed with all the incidents of an ordinary undivided family. It is also urged that in the texts a reunited family is described by a special term *samsrishta* to distinguish it from the undivided family which is always called *avibaktha* and that in interpreting this Act IV of 1938, we should read the words 'an undivided Hindu family' as referring to that which was known in ordinary legal parlance as an undivided Hindu family and not as denoting something which is similar to that institution, but different from it. The Court below has based its decision mainly on the fact that the definition in S. 3 uses the word 'undivided' rather than 'joint'. It cannot, I think, be denied that a reunited family is a joint family. It is joint in status and in obligations and is subject to joint management just as the original undivided family was. In fact the only difference in law between the position of the members of a reunited family and that of the members of a family which has never divided consists in certain very minor differences in the rules of inheritance. The argument from the use of the word 'undivided' instead of 'joint' loses much of its force when we find that S. 19 of the Act talks of a joint family debt and an application of any member of the family as if a joint family were the same thing as the undivided family referred to in the definition clause. It is, I think, established—at any rate so far as this High Court is concerned—that a reunited Hindu family is a coparcenary to which survivorship applies, which is managed by a joint family manager and which is subject to the same rules regarding joint obligations as an ordinary undivided family. If we want to be absolutely precise we have to call such a family a reunited family. But it is also not inaccurate to describe it as an undivided family, the word 'undivided' not being historical, but descriptive of the existing status.

The real question therefore is, what was the sense in which the Legislature used the words 'undivided Hindu family' in the definition of person in S. 3 (*i*) of the Act. Clearly the reason for treating an undivided family as a person was not the historical origin of the family nor the future devolution of property on the death of the members of the family. The real reason for

Rajeswara Rao Garu *v.* Venkata Rayanim Garu.

reating the family as a unit was the way in which its property is held and its obligations are incurred jointly. From this point of view there is absolutely no reason to differentiate between the joint family which has never been divided and the joint family which has been divided and has become reunited. Similarly with reference to the question with which we are now concerned especially, namely, the property qualification which is to exclude a family from the rights of an agriculturist, there is no apparent reason why an historically undivided family should be disqualified from claiming to be an agriculturist because it pays over Rs. 100 as *kattubadi,* while a reunited but actually undivided family is allowed to claim those benefits, although it jointly pays the same amount. It seems to me that what the Legislature had in mind in treating an undivided Hindu family as a person, was the present undivided status of that family and not the historical origin of that status. Nor does it seem to me likely that the Legislature intended to differentiate between those joint families which in certain exceptional cases were affected by special rules of inheritance arising out of a reunion and those joint families to which the ordinary rules of inheritance applied. The reasonable course seems to be to regard the term 'undivided Hindu family' in S. 3 of the Act as covering those joint families which have reunited, as well as those joint families which have never separated. For the purposes of the Act, there is no apparent difference between the two classes of joint families in their obligations, their management and their rights.

I therefore hold that it is open to the present petitioners to contend that the respondents are disqualified from receiving the benefits of the Act by proof that they constitute a reunited family which pays more than Rs. 100 as *kattubadi.* The petition is therefore allowed and the case is remitted to the trial Court for further disposal in the light of this judgment, costs to abide the result.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Thiruvengadatha Aiyangar *v.* Sannappan Servai.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Thiruvengadatha Aiyangar ... *Petitioner* (Plaintiff)*

v.

Sannappan Servai ... *Respondent (Defendant).*

* C.R.P. No. 1513 of 1940. 2nd May, 1941.

Thiru-vengadatha Aiyangar *v.* Sannappan Servai.

Madras Agriculturist' Relief Act (IV of 1938), Ss. 9 and 13—Applicability—Fresh debts or debts in discharge of earlier ones incurred after the commencement of the Act—Whether S. 9 or S. 13 applicable.

All debts incurred after the commencement of the Madras Agriculturists' Relief Act, whether they be in discharge of prior debts or not will fall only under S. 13 and S. 9 is not applicable to such debts.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Devakottai in S. C. S. No. 721 of 1939.

A. V. Narayanaswami Aiyar for Petitioner.

G. N. Chari for Respondent.

The judgment of the Court was delivered by

Wads-worth, J.

Wadsworth, J.:—This civil revision petition raises the question whether S. 9 of Madras Act IV of 1938 applies to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. The debt in question is due on a promissory note dated the 2nd October, 1938 which discharged a prior promissory note dated the 1st October, 1935. The learned District Munsif has applied the proviso to S. 9 Cl. (1) and has treated the debt as a renewal of an earlier debt upon which interest up to the 22nd March, 1938 is to be reduced to five per cent.

S. 9 in terms applies to debts incurred on or after the 1st October, 1932, and it does not say that the section shall not apply to debts incurred after the commencement of the Act, namely, 22nd March, 1938. But the scaling down machinery under this section has the effect only of reducing interest up to the date of the commencement of the Act, and from this it may reasonably be inferred that the Legislature did not intend the section to apply to those debts which had no existence before the last point of time up to which the scaling down under this section could be effected. A debt scaled down under S. 9 suffers reductions of interest under that section only up to the commencement of the Act, and for future interest rates the Court has to look to the provisions of S. 12. S. 9 therefore could have no application to a debt incurred for the first time after the 22nd March, 1938; for S. 9 would not provide for any scaling down at all of such a debt, and S. 12 would have no application, for it only relates to interest on debts, after the date up to which they have been scaled down under some other provision. On the other hand

S. 13 seems to provide a complete machinery for dealing with debts incurred after the commencement of the Act, and it appears to have been designed as part of a regular scheme whereby debts of agriculturists are divided into three categories; firstly, those incurred before 1st October, 1932, which fall under S. 8; secondly, those incurred from 1st October, 1932 to 22nd March, 1938 which fall under S. 9; and thirdly, those incurred after 22nd March, 1938. The only point in seeking to apply S. 9 to the last class of debts is to get the advantage of the proviso to S. 9 (1). It seems to us that having regard to the scheme of the Act, if it had been the intention of the Legislature to introduce the theory of renewals into the scaling down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf. We are of opinion that all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under S. 13.

In the result therefore we allow the revision petition with costs and grant the plaintiff a decree for the principal amount of the suit promissory note with interest at $6\frac{1}{4}$ per cent. less the amount of the three payments which will be credited in the first instance to interest at $6\frac{1}{4}$ per cent. as on the dates on which they were made. The plaintiff will be entitled to costs in the trial Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Turlapati Seshayya .. *Petitioner* (Petitioner)*

v.

Bollapalli Venkataramayya .. *Respondent (Respondent).*

Madras Agriculturists' Relief Act (IV of 1938) S. 23—Not applicable to sales held after the Act came into force.

S. 23 of Madras Act IV of 1938 has no application to sales held after the Act came into force.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of

*C R. P, No. 684 of 1941
(Filed as A. A. O. No. 580 of 1938
and converted into a C. R. P.). 2nd May, 1941.

Seshayya v. Venkataramayya.

the Subordinate Judge of Bapatla dated 2nd July, 1938, and made in E. A. No. 114 of 1938 in O. S. No. 78 of 1929.

K. Kotayya for Petitioner.

K. Raghuramiah for Respondent.

Wadsworth, J.

The judgment of the Court was delivered by

Wadsworth, J.—This civil revision petition raises a question regarding the effect of S. 23 of Madras Act IV of 1938 on which there appears to be no decided case. The sale which the petitioner sought to set aside was held on the 29th March, 1938, that is to say, just one week after Act IV of 1938 came into force. S. 23 applies in terms to sales held on or after the 1st October, 1937 and the only future limit which is expressly laid down relates to the date within which an application is to be made, which is within 90 days of the commencement of the Act. It is argued that within these 90 days any judgment-debtor entitled to the benefits of the Act may apply for a sale to be set aside even though that sale has been held after the Act came into force. The only materials for deciding whether this view of the section is correct or not are the use of the tenses in the terms of the section and the alternative provisions found in the Act to relieve agriculturists whose property is brought to sale after the commencement of the Act. The essential words of S. 23 are:

"where in execution of any decree any immovable property, in which an agriculturist *had* an interest, *has been* sold or foreclosed on or after the 1st October, 1937, ... any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, *may* apply to the Court within 90 days of the commencement of this Act to set aside the sale or foreclosure".

Looking at the three verbs used in this passage we find that it contemplates an interest vesting in an agriculturist at some past time, a sale held after the 1st October, 1937 but before the point of time with reference to which the section is drafted and a future application to the Court to be made within 90 days of the commencement of the Act. What is the point of time which the Legislature had in mind in drafting this section? It cannot be the time of the application for that is expressly in future, as is shown by the words 'may apply'. The logical inference from the wording of the section is that the section was drafted with reference to the point of time at which the Act came into force and, if this be so, it would follow that the section only relates to sales held between the 1st October, 1937,

Seshayya *v.* Venkataramayya.

Wadsworth, J.

and the 22nd March, 1938. That this is the correct view is indicated by the other provisions of the Act. The Act contemplates that when there is a decree for the repayment of a debt due from an agriculturist, the judgment-debtor shall apply to the Court under S. 19 to have that debt scaled down in accordance with the provisions of the Act. If that decree is actually in process of execution a remedy is provided by S. 20 whereby the judgment-debtor can get execution stayed for such time as is necessary to prefer an application under S. 19. If, therefore, a decree has been passed and is being executed after the Act comes into force, the judgment-debtor has ample opportunity for preventing the sale of of his property in execution of that decree for such a time as is necessary to get the decree modified in accordance with the Act. It is most unlikely in view of this provision that the Legislature would also have contemplated a power in the judgment-debtor to stand by while execution is going on after the Act has come into force and while third parties are acquiring interests in property sold, and thereafter to claim to have such a sale set aside. It seems to us clear that the view of the learned Subordinate Judge that S. 23 has no application to sales held after the Act came into force, is correct. In this view we dismiss this civil revision petition with costs.

K. S. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Thadi Murali Mohana Reddi, minor by guardian, Sabbella Rami Reddi and another. *Appellants* Defendants 2 and 3)*

v.

Medapati Gangaraju and others .. *Respondents (Plaintiffs 1 and 2 and defendants 1 and 4).*

F.B.

Mohana Reddi *v.* Gangaraju.

Hindu Law—Debts—Pre-partition debts—Acknowledgment by father after partition—If can keep the debts alive against divided sons.

* Appeals Nos. 76 and 77 of 1938. 30th April, 1941.

F.B.

Mohana Reddi *v.* Gangaraju.

X, a Hindu father executed in favour of *Y* four promissory notes on the 10th May, 12th June and 18th August, 1929 and 31st May, 1930 respectively. On the 16th November, 1931 a preliminary decree for partition of *X's* family properties was passed and a final decree followed on the 6th May, 1935. On a creditor's petition dated the 13th March, 1931, *X* was adjudicated insolvent on the 13th November, 1931 and on the 21st December, 1931 he filed his schedule and therein acknowledged his indebtedness in respect of the four promissory notes. *X* died on the 17th January, 1934.

In a suit filed on the 21st December, 1934 on the promissory notes against the sons of *X*,

Held, [The Chief Justice and Mockett, J. (Krishnaswami Aiyangar, J., dissenting.)] The acknowledgment by the father extends the period of limitation against him, and as at the date of the suit his pre-partition debts are still enforceable against him or his estate by virtue of such acknowledgment, his divided sons are by reason of the pious obligation rule in Hindu law also liable.

Munisawmi Goundan v. *Kutti Mooppan*, (1933) I.L.R. 56 Mad. 833: 65 M.L.J. 311 approved.

The father has always the power to give an acknowledgment within the meaning of S. 19 of the Limitation Act; and if he gives one in respect of a pre-partition debt that debt continues to be enforceable against the family property in the hands of his son for another three years.

Per *Krishnaswami Aiyangar, J.*:—The power to acknowledge a debt is incidental to the father's power to contract the debt and to alienate his son's share. The power comes to an end at partition and with it the power to acknowledge also comes to an end even in case of pre-partition debts,

Reference to the Full Bench in appeals against the decrees of the Court of the Subordinate Judge of Cocanada in O. S. Nos. 2 and 3 of 1935, respectively.

Ch. Raghava Rao for Appellants.

K. Rajah Aiyar and *D. Narasaraju* for Respondents.

The following Order of Reference to the Full Bench was made by Venkataramana Rao and Abdur Rahman, JJ.*

The Order of Reference was delivered by

Venkataramana Rao, J.—One of the main questions argued by Mr. Raghava Rao in this appeal was the question of limitation. The suit out of which this appeal arises was instituted to recover certain sums of money due in respect of four promissory notes dated 10th May, 1929, 12th June, 1929, 18th August, 1929 and 31st May, 1930 executed by the father of defendants 2 and 3 in favour of the plaintiffs and the 4th defendant for Rs. 2,000, 3,000, 1,800 and 3,000 respectively, repayable with compound interest at 12 per cent. per annum. At a partition between the plaintiffs and the 4th defendant, the promissory notes fell to the share of the plaintiffs. On the date of the promissory note, the 3rd defendant was not in existence, as he was born subsequently, On a creditor's petition

* 14th February, 1941.

F.B.

Mohana Reddi *v.* Gangaraju.

dated 13th March, 1931 the father was adjudicated insolvent on 13th November, 1931. A few days prior to the date of the order of adjudication, a suit for partition was brought by defendants 2 and 3 against their father and on 16th November, 1931 a preliminary decree for partition was passed. On 21st December, 1931 the father filed a sch. Ex. D before the Official Receiver wherein he acknowledged his indebtedness in respect of the said promissory notes. It is also in evidence that in respect of the three promissory notes dated 10th May, 1929, 12th June, 1929 and 18th August, 1929, the plaintiffs obtained a renewal thereof on 19th April, 1932. In spite of the renewals the suit was not based on the renewed promissory notes on the ground of their having been executed by the insolvent who was yet undischarged. The plaintiffs based their cause of action on the original promissory notes and the suit was instituted on 21st December, 1934 against defendants 2 and 3, their father having died on 17th January, 1934.

Two main contentions were urged in the lower Court: (1) the suit was barred by limitation, and (2) the suit on the promissory notes was not maintainable. Both the contentions were overruled by the learned Subordinate Judge. On the question of limitation, the learned Subordinate Judge relied on the acknowledgment in the schedule filed by the insolvent Ex. D and also on Exs. E series being the renewals of the three original promissory notes. Mr. Rajah Aiyar, counsel for the respondents did not seek to support the finding of the learned Judge based on Exs. E series but relied upon the acknowledgment in Ex. D. The contention of Mr. Raghava Rao for the appellants is that Ex. D would not save limitation as it was furnished by the insolvent in pursuance of his duty enjoined under the Provincial Insolvency Act. He relied on *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*[1], where it was decided that an acknowledgment by an insolvent of a debt in the schedule of assets filed by him could only be treated as one made on behalf of himself and not on behalf of any other. In that case the father and his five sons were members of a joint Hindu family. The 1st defendant was the father and defendants 2 to 6 were the sons, the 6th defendant being a minor. The father with the aid of the family funds started a business. From the facts as found by the trial Judge it appears that defendants 2 to 4 were taking active part in the father's business and the 5th defendant, though he did not take any active part in it, seemed to have acquiesced in the carrying on of the business. The learned trial Judge, Bakewell, J., took the following view of the

1. (1916) 36 I.C. 389.

F.B.

Mohana Reddi *v.* Gangaraju.

business:

"It is, I think, clear that the business was carried on for the benefit of all these defendants, that they shared the profits as a joint family, that they were all aware of and acquiesced in the carrying on of the business as a joint family concern, and they are, therefore, partners therein........All the defendants, therefore, except the minor 6th defendant, are personally liable for the debts of the firm; and since it has not been shown that there is any family property other than the capital employed in the firm, the 6th defendant will be liable to the extent of the assets of his family".

It will thus be seen that it was not a case of contractual partnership but a joint family concern. Defendants 2 to 5 were deemed to be partners on the ground of their having taken part or having acquiesced in the carrying on of the business in order to fix personal liability against them. The sixth defendant could in no sense be a partner; he could only be made liable on the ground of his being the son of his father and a member of a joint Hindu family. The question arose in that case whether the inclusion of the debt by the first defendant, who was adjudicated an insolvent, in the schedule to his petition in insolvency, would amount to an acknowledgment so as to be binding also on the sons. The learned trial Judge dealt with the question of liability thus:

"Before an acknowledgment signed by one partner can be held binding on the other members of the firm, there must be evidence that in the course of business that partner had authority to sign the acknowledgment. . . . . In the present case I think that such evidence is afforded by the fact that the first defendant was not only a partner, *but also the manager of all the property of the persons constituting the firm, since in that capacity he had full power to make contracts, to settle accounts and make admissions as to the contractual liabilities of the family.*" (The italics are ours).

It will be seen that the learned Judge did not rest his decision merely on the fact that the adult members were partners but also on the ground that the father was the managing member of the family and the decree against the sixth defendant could only be sustained on that basis. On appeal the decision of the learned trial Judge was reversed. Dealing with the question of implied agency of the managing member, Wallis, C.J., observed as follows:

"With regard to acknowledgments by the managing member of a joint Hindu family, it is well settled that a managing member has implied authority to make acknowledgments within the Statute, and it has been contended before us that the fact that he has been adjudicated an insolvent does not determine his position as managing member, or that at any rate he may still be allowed to go on acting as managing member, as, it is suggested, the evidence shows that he did in two cases and if so the implication of authority continued. Even supposing, however, that he could retain the position of managing member and the implied authority to make acknowledgments in the ordinary course of the joint family business, I do not think that he can be considered to have been acting or authorised to act under that implied authority in signing his schedule in the insolvency proceedings.

F.B.

Mohana Reddi *v.* Ganga-raju.

Prima facie, *as I have said, in so signing he is acting for himself and for himself only under the statutory duty.*"

The decree was set aside against all the defendants. With great respect to the learned Chief Justice we are unable to agree with the reason that because the schedule was filed under the statute the acknowledgment must be deemed to have been made for the purpose of the statute alone and could not be therefore held to bind the sons. It seems to us that the purpose for which the acknowledgment was made is immaterial; the question is whether there was an acknowledgment and not why an acknowledgment was made. If the manager in spite of the insolvency had not lost his status as a manager and continued to be a member of an undivided Hindu family and if the debt when contracted was one binding on the family, we do not see why his insolvency should prevent him from acknowledging the debt so as to save limitation against the other members of the family. Mr Rajah Aiyar contended that the principle of the decision in *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*[1], would not apply to the case of a father and a son with regard to the son's liability for debts contracted by the father. His contention is that the son would be liable for a debt contracted by the father even though not for a family purpose on account of the pious obligation which the Hindu law imposed on him and that even if the father could in such a case be said to have acknowledged the debt on his behalf alone, that would be enough to make the son's share liable. He therefore urged that if the inclusion of the debt in the schedule by the father would amount to an acknowledgment as against him, it must be equally taken to have that effect as against his sons as well. We are inclined to think that the contention of Mr. Rajah Aiyar is well founded and the decision in *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*[1], may be distinguished on the ground that it did not deal with the liability of the son for the father's debt on the basis of the father's acknowledgment.

Mr. Raghava Rao contends that even assuming Mr. Rajah Aiyar to be correct in his contention, the father's acknowledgment would not save limitation against his sons if subsequent to his insolvency he happened to become divided in status from them. Mr. Rajah Aiyar in answer referred us to the decision in *Munisawmi* v. *Kutti*[2]. Mr. Raghava Rao contends that the decision in *Munisawmi* v. *Kutti*[2], is not correct. He outlined his contention thus: the creditor's right to proceed against the sons' share is derived from the right of the father to subject and alienate the

1. (1916) 36 I.C. 389.
2. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

F.B.

Mohana Reddi *v.* Ganga-raju.

sons' share for his debts by virtue of the pious obligation on the sons, but the power ceases the moment the sons become divided in status from him and with it his right to acknowledge the debt so as to save limitation against his sons ceases. It seems to us that there is considerable force in this contention. The father of an undivided family consisting of himself and his sons has got certain rights by virtue of his position as such. One such right is to alienate his sons' share for a personal debt of his. This is derived from the pious liability which the Hindu law imposes on undivided sons. Both the right and liability are dependent on the continuance of the joint family and the consequent undivided status. The mere paternal relation of a father and sons would not entitle a father to incur a personal debt which would have the effect of subjecting his sons' property for that liability. It is undoubted law that a divided son is not liable for debts contracted by the father after partition both in respect of the separate property of the son as well as the property which he got at the partition. In an undivided family the father not only is the head and manager of that family but if the family consists besides his sons also of his brothers, he will be the head of his own branch if he does not occupy the position of an elder brother. Therefore as such head and manager of his own branch he has got certain rights. In addition to his right as ordinary manager of incurring debts on behalf of the joint family and alienating the family property for purposes connected with the family, the father has got the right to incur debts on his own account and alienate his property which his branch is entitled to including the sons' shares. Ramesam, J., in the Full Bench decision in *Baluswami Aiyar*, In re[1] is of the view that the right of a father to sell the joint family property for his personal debts is dependent upon his occupying the position of the manager of his own branch of the family. At page 430 he explained the power of the father thus:

> "It seems to me that the basis of a Hindu father's right to sell his son's share in the joint family property for antecedent debts is twofold: (1) there must be an antecedent debt of the father which is not illegal or immoral involving a pious obligation on the part of the son to pay it; and (2) the property must be joint family property of which the father was the manager. If either of these conditions is wanting, the father has no right to sell."

The learned Judge elaborates this position at page 436 thus:

> "That he is a manager is clear from the fact that he could be sued by creditors for debts whether incurred by himself only, not illegal or immoral, or for the benefit of his branch so as to bind his own branch. He can sue for a division of the share of his branch and he can sell the share of his

1. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

F.B.

Mohana Reddi *v.* Ganga-raju.

branch for antecedent debts not illegal or immoral. All these are acts of managership and where he expressly abandons managership he cannot do these things. It is because he is the manager he can represent his sons in the various acts just enumerated".

It would seem to follow that in acknowledging a debt contracted when he was undivided he would represent his sons so long as he is undivided with them but when he becomes divided he would not. Apparently this seems to be the view also of Anantakrishna Aiyar, J., in *Subramania Aiyar* v. *Sabapathy Aiyar*[1], where the majority of the learned Judges took the view that for pre-partition debts of the father the sons' shares could be made liable after partition provided the sons were sued along with the father. At p. 415 he observed thus:

" On the question as to what is the proper procedure to be followed by the creditor in such cases, cases have laid down that the effect of partition is to take away from the father the right to represent the sons, whether in Court or outside. *Though by reason of his position at the time of incurring the debt he had the right to make the debt binding on the sons' shares also of the family property, he loses the right to represent the sons after partition.*"

Whether in incurring the debt on his own account and not for the benefit of his family a father is said to represent his sons may be a question; but the right to acknowledge a debt which would save limitation against his sons while the family continues undivided can be supported on the ground that the father has got a right, so long as the family continues undivided, to impose liability on the sons' share for his debt and that would carry with it the right to extend the time for enforcement of such debts and thus the period of liability; but once that right is lost in consequence of a partition, it seems to us that he would not have the right to acknowledge and prolong the period of liability which would have the effect of adversely affecting the sons' shares, the right to dispose of which is no longer in the father. In *Muniswami* v. *Kutti*[2], the learned Judges distinguished *Peda Venkanna* v. *Sreenivasa Dheekshatulu*[3], where the son was held not to be liable on a promissory note executed by the father after partition though in renewal of a note executed by the father before partition on the ground that the renewal would amount to an incurring of a fresh obligation, and remarked as follows:

" If, as *Subramania Aiyar* v. *Sabapathy Aiyar*[1], decides, sons are liable after partition for the original debt of the father incurred before partition then the fact that the debt has been acknowledged by the father, in my view does not alter the position."

With great respect to the learned Judges the latter proposition does not follow from the earlier. It would be seen that even

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. (1933) 65 M.L.J. 311: I.L R. 56 Mad. 833.
3. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.

F.B.

Mohana Reddi v. Gangaraju.

Subramania Aiyar v. *Sabapathy Aiyar*[1], decides that if the sons were not sued along with the father, even for a pre-partition debt, the son's share could not be made liable, whereas before partition even though they were not sued their property could be rendered liable. Kumaraswami Sastri, J., in *Peda Venkanna* v. *Sreenivasa Deekshatulu*[2], dealing with the case of a renewal observed as follows:

"I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition. . . . . The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition."

The learned Judge uses the language 'presumed agency'. It may be a matter for argument whether the learned Judge was right in presuming that the father would be acting as the agent of the son when he acknowledges or renews a debt when he continues undivided. We think he was using it in the sense in which Ramesam and Anantakrishna Aiyar, JJ., explained the father's right, that is, the right of representation. As we have pointed out already, it may be difficult to apply the theory of representation because in contracting a debt on his own account the father could not be said to be acting as the representative of his sons. The view we are inclined to take is that the right to acknowledge is derived from the father's right to impose liability on the son's shares, which continues to subsist until the family is divided, but when that right ceases with division, the right to acknowledge also ceases. However, as the matter is one of some importance and as we doubt the correctness of the decision in *Munisawmi* v. *Kutti*[3], we think it desirable that both the matters which we have discussed should be referred to a Full Bench. We accordingly refer to the Full Bench the following questions:

1. Whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons; and

2. Would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency?

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1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
3. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

In pursuance of the aforesaid Order of Reference to the Full Bench, the Court made the following

ORDER. *The Chief Justice.*—The following questions have been referred to a Full Bench:

" 1. Whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons; and

2. Would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency?"

On the admitted facts it is clear that the word 'undivided' in the first question should have been 'divided', because the appeal has reference to an allegation of liability on the part of sons who were divided from their father before the filing of the schedule and the second question cannot arise in this case.

Before the first question, as amended, arises it is for the Division Bench to decide whether the suit is confined to liability on the promissory notes, or whether the claim has been framed in the alternative, namely, whether the sons are also liable on the debts apart from the promissory notes. We have perused a copy of the plaint and it is obvious that this question calls for a decision. If the Division Bench decides that the suit is merely on the promissory notes the sons cannot be made liable because they were not parties to the instruments, and there will be no need for a reference. In these circumstances the present reference will be returned to the learned Judges and will be re-submitted, if in the light of what is said here, they consider that there is need for a reference.

In pursuance of the directions contained in the above Order, the Court made the following

SECOND ORDER OF REFERENCE TO THE FULL BENCH.

The question now for our decision is whether the suit is maintainable. Mr. Raghava Rao's contention is that the suit is not maintainable and he urges two grounds in support of it. The first is that the suit is laid on the promissory notes and defendants 2 and 3 are not parties to them, and secondly, that the suit cannot be laid on the promissory notes dated 10th May, 1929, 12th June, 1929, and 18th August, 1929, as the plaintiffs obtained renewals of them on 19th April, 1932.

We shall now deal with the first ground. So far as our High Court is concerned, after the decision of the Privy Council

F.B.

Mohana Reddi v. Gangaraju.

in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[1], the prevalent view has been that if during the lifetime of a Hindu father a suit is laid on a promissory note executed by him alone, his sons cannot be made parties to it. It is well settled that a suit can also be laid on the debt impleading the sons as parties thereto so as to render their shares in the joint family property liable. It is enough to refer to the decision in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[2], in support of the above propositions. (Vide the observations at pages 573 and 574.) Therefore the question in each case would be whether the allegations in the plaint are sufficiently wide to cover a claim on the debt as well as on the promissory note. In considering this question a distinction has to be kept in mind between the case of a father and the case of a manager. In the case of a manager, there should be an allegation that the debt was incurred for a necessary purpose if the other members of the family are sought to be made liable, and from the recitals as to necessity the courts could infer that the suit could be treated as one having been brought on the debt as well. In the case of a father, however, the allegation as to necessity is immaterial and all that one need allege is that the debt was incurred by the father and the sons are sued as their shares in the joint family property are to be rendered liable for the debt evidenced by the promissory note.

Before considering the allegations in the plaint in the present case, the important fact that has to be remembered is that the suit was instituted after the death of the father. The plaint is in Telugu and we have gone through it. In paragraph 4 it is alleged that the father of defendants 2 and 3 borrowed several sums of money on several dates referred to therein and that the father executed promissory notes for those amounts on those dates. The incurring of the debts and the execution of the notes are both referred to. Lower down in the same paragraph after referring to the insolvency of the father and to the order of adjudication and to his subsequent death, the following allegation is made:

"The 1st defendant (the Official Receiver) is representing the late Bulli Gangireddi lawfully. *Defendants 2 and 3 are his heirs under Hindu law.*"

It is thus clear that defendants 2 and 3 were impleaded as the father's heirs under the Hindu law, the object being to render their shares in the joint family property liable. This is made clear in the concluding portion of the said paragraph wherein occurs the following:—

"At any rate, since debts due to the plaintiffs were all pre-partition debts they are not in any way concerned with the partition decree, and the plain-

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1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).
2. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

F.B.

Mohana Reddi *v.* Ganga-raju.

tiffs are therefore entitled to recover the same from the whole of the family properties of defendants 2 and 3."

It is thus clear from these allegations that the reason why the sons were made parties is that the debts due to the plaintiffs being pre-partition debts, defendants 2 and 3 should be made liable for the debts in spite of the partition by virtue of their being the sons of their father. The debts apart from the promissory notes were referred to separately and were alleged to be debts due to the plaintiffs. It seems to us that the plaint in this case should be considered to have been laid not merely on the promissory notes but on the debts as well. Though the decision on the basis of a plaint to the suit cannot be treated as an authority for construing the plaint in another suit, yet we think it useful to refer to the plaint in *Krishna Iyer* v. *Krishnaswami Iyer*[1], which was construed by the majority of the learned Judges in that case and by the learned Judges of the Full Bench in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*,[2] as one covering a claim on the debt as well. There were only two paragraphs therein on which the said construction was adopted. Just as in this case the first paragraph was to the effect "for a sum of Rs. 1,000 borrowed, a promissory note was executed". The second paragraph was to the following effect:

"As the plaint debt has been incurred by the defendants for the expenses of their own family and as all defendants are bound to discharge that amount, I instituted this suit against all the defendants who are concerned in it".

These were the only allegations there. This paragraph regarding necessity had to be made because certain persons were sought to be made liable as members of a joint family. Though the debt was simply referred to as the 'plaint debt' still it was considered to be a suit on the debt apart from the note by reason of the fact that the members other than the executant were sought to be made liable by virtue of their obligations under the Hindu law. Similarly in this case paragraph 4 refers first to the borrowing and then to the execution of the notes. Again, there are the necessary allegations to show why defendants 2 and 3 were sued. Defendants 2 and 3 are stated to be the heirs under the Hindu law. The reason why they are sought to be made liable is referred to by alleging that the debts referred to as debts due to the plaintiffs are pre-partition debts of the father.

Even assuming that our view is not correct and the suit can still be said to be laid only on the notes, the suit having been filed after the death of the father against defendants 2 and 3 who are

1. (1900) I.L.R. 23 Mad. 597.
2. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568. (F.B.)

F.B.

Mohana Reddi *v.* Gangaraju.

his legal representatives under the Hindu law, it is maintainable. Where a person executes a promissory note, it cannot be denied that his legal representatives can be sued on it and it is not denied in this case that defendants 2 and 3 are the heirs and therefore the legal representatives of the executant of the promissory notes. If a suit is laid on the note against legal representatives, the decree that will be passed will be a decree against the property of the deceased in the hands of the legal representatives. Where a suit was instituted against the sons or grandsons of an executant, their Lordships of the Privy Council in *Raja Ram* v. *Raja Baksh Singh*[1] pointed out that the proper form of the decree would be a decree against the defendants as representatives of the executant for a sum to be realised out of any property of the executant coming to their hands. Their Lordships stated the effect of such a decree thus:

"Such a decree passed in accordance with S. 52 of the Code of Civil Procedure would have attracted the operation of S 53 and the respondents' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not 'property of the deceased' in the strict meaning of those words".

It is well settled that under the Hindu law in the case of a pre-partition debt the entire joint family property is liable whether there was division or non-division. In this case the first defendant was sued because the share of the deceased vested in him and defendants 2 and 3 were impleaded because they were the heirs under the Hindu law and were also in possession of the property which would be liable in spite of their having become divided from their father, that is, their shares in the joint family property which would be 'property of the deceased' in their hands. We therefore think that the first ground raised by Mr. Raghava Rao is not tenable.

In regard to the second ground it will be seen that the renewals were executed after the father was adjudicated insolvent and before he was discharged. The debts due under the promissory notes were provable in insolvency and it was a fraud on the insolvency law for the insolvent to execute fresh promissory notes in respect of those debts. (Cf. *Jamshedji* v. *MaganLal*[2]). Therefore the fact that there were renewals would not prevent a creditor from suing on the original promissory notes.

We are therefore of opinion that the suit as laid is maintainable. In view of this conclusion of ours, we refer the case to the Full Bench for an answer on the questions already referred as amended by the Full Bench.

1. (1938) 1 M.L.J. 41; I.L.R. 13 Luck. 61 (P.C)
2. (1925) 27 Bom.L.R. 514 at 519.

F.B.

Mohana Reddi v. Ganga-raju.

Leach, C.J.

In pursuance of the aforesaid Second Order of Reference the appeal came up before the Full Bench.

Ch. Raghava Rao and *V. V. Sastri* for Appellants.

Sir A. Krishnaswami Aiyar and *D. Narasaraju* for Respondents.

The Court delivered the following

JUDGMENTS*: *The Chief Justice.*—The question which the Court is called upon to answer in this case is whether a Hindu father who has been adjudicated an insolvent, can by reason of the acknowledgment of indebtedness embodied in the schedule filed by him in the insolvency proceedings extend the period of limitation against his sons who have separated from him since the debts were incurred, the debts not having been incurred for any illegal or immoral purpose.

The first and second respondents filed a suit in the Court of the Subordinate Judge of Cocanada to recover a sum of Rs. 17,909-7-9 claimed to be due on four promissory notes executed by the father of the appellants. The promissory notes are dated the 10th May, the 12th June, the 18th August 1929 and the 31st May, 1930 respectively. When they were executed the first appellant was joint with his father. The second appellant had not then been born. On the 2nd November, 1931 the first appellant brought a suit for the partition of the family estate. On the 16th November, 1931 a preliminary decree for partition was passed, but a final decree did not follow until the 6th April, 1935. The father had died on the 17th January, 1934. A copy of the final decree has not been printed, but it is common ground that its effect was to divide the appellants from their father and from one another.

On the 13th March, 1931 a creditor applied to the Court to adjudicate the father an insolvent and on the 13th November, 1931 an order of adjudication was passed. On the 21st December, 1931 the father filed his schedule and thereby acknowledged his indebtedness on the promissory notes now in suit. The plaint was filed on the 21st December, 1934. The appellants pleaded that the suit was barred by the law of limitation, having been filed more than three years after the execution of the promissory notes. The plaintiffs respondents, however, relied on the acknowledgment of indebtedness made by the father of the appellants in his schedule. The Subordi-

*30th April, 1941.

F.B.

Mohana Reddi *v.* Ganga-raju.

Leach, C.J.

nate Judge of Cocanada in whose Court the suit was instituted held that it was in time and passed a decree for the amount claimed. The appellants appealed to this Court and the appeal was called for hearing before Venkataramana Rao and Abdur Rahman, JJ., who have made this reference.

In *Munisawmi* v. *Kutti*[1], a Division Bench of this Court (Beasley, C.J. and Bardswell, J,) held that a Hindu son is liable on a promissory note executed by his father before partition and kept alive by an acknowledgment made by the father after partition. If this decision is to stand the appellants are out of Court. The learned Judges who have made this reference, however, formed the opinion that this decision requires reconsideration and consequently have referred to a Full Bench the question stated at the outset of this judgment. I may mention that the learned Judges have found that the plaintiffs respondents have based their claim on the debts as well as on the actual promissory notes.

It is a well established rule of Hindu law that a son is under a pious obligation to pay his father's debts, provided that they have not been incurred for any illegal or immoral purpose, but it has been held that the rule does not apply to a debt incurred subsequent to partition. See *Subramania Aiyar* v. *Sabapathy Aiyar*[2], *Baluswami Aiyar,* In re[3] and *Sat Narain* v. *Sri Kishen Das*[4]. As already indicated, the debts in the present case were incurred before partition, and at the time of the institution of the suit were lawfully enforceable against the father's estate, because of the acknowledgment made by him when he signed his schedule in the insolvency proceedings. The signing of the schedule constituted an acknowledgment within the meaning of S. 19 of the Limitation Act. The acknowledgment was, however, a purely personal matter, and the father cannot here be treated as being the agent of his sons. See *Kissendoss* v. *Khatau Makanjee Spinning & Weaving Co., Ltd.*[5] (O.S.A. No. 29 of 1915). In that case the Court (Wallis, C.J., and Phillips, J.) was not, however, called upon to consider the question under reference.

1. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.
2. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.)
3. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B).
4. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.)
5. (1916) 36 I.C. 389.

F.B.

Mohana Reddi v. Gangaraju.

Leach, C.J.

What the Court has now to decide is whether the sons remain liable under the pious obligation rule of their personal law when the father has extended the period of limitation against himself.

It must be borne in mind that by signing the schedule the appellant's father did not create new debts. He merely acknowledged debts which had been incurred by him before partition. I agree with Beasley, C.J., who delivered the judgment in *Munisawmi* v. *Kutti*[1], that the position is not analogous to that created when the father, after partition, executes a fresh promissory note in renewal of a promissory note executed by him before partition. In that event there is a fresh cause of action, the cause of action on the new instrument. It follows that I agree with the learned Chief Justice in the distinction which he made between *Munisawmi* v. *Kutti*[1], and *Peda Venkanna* v. *Srinivasa Dheekshathulu*[2].

It is manifest that unless the Court is to impose a new restriction on the application of the pious obligation rule an acknowledgment by a father which extends the period of his own liability must affect his son. As the law stands at present a debt lawfully incurred by the father before partition must be paid by the son, if the father fails to do so. The son is, of course, only liable to the extent of the family property in his hands. The only restriction which has been placed so far on the application of the rule is that which has been imposed with regard to post-partition debts, but the appellants are asking the Court to place a further restriction on the rule, a restriction by way of limitation. In *Subramania Aiyar* v. *Sabapathy Aiyar*[3], Coutts Trotter, C.J., expressed the opinion that the doctrine of pious obligation should not be extended beyond the point to which the cases had carried it. He regarded the doctrine as being an illogical relic of antiquity, unsuited to any but a primitive and patriarchal society. It may be unsuited to modern conditions but that is the concern of the Hindu community. The doctrine remains and the Court is bound to apply it until the Legislature steps in and changes the law. I consider that *Munisawmi* v. *Kutti*[1], was rightly decided. To overrule it the Court must go

1. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.
2. (1927) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
3. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.)

F.B.

Mohana Reddi *v.* Ganga-raju.

Leach, C.J.

to the length of adding something to the rule which is foreign to it and this would in my judgment amount to the usurpation of power which is vested only in the Legislature. The rule is a simple one and there is no difficulty in its application. All that the Court has to do is to inquire whether the debt was lawfully incurred before partition and whether it is still enforceable against the father. If it was lawfully incurred and is still enforceable against the father the son is liable to the extent of the family property in his hands.

I find support for what I have said in the judgment of Bhashyam Aiyangar, J., in *Periasami Mudaliar* v. *Seetharama Chettiar*[1]. In that case a Full Bench held that independently of the debt arising from an original transaction, a decree against the father, by its own force creates a debt as against him which his sons, according to the Hindu law, are under an obligation to discharge, unless they show that the debt is illegal or immoral. In the course of his judgment Bhashyam Aiyangar, J., said:

"Where the creditor sues the son on the original cause of action the law of limitation—including the article in the second schedule to the Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself This is conclusively established by the principle of the decision of the Court of Appeal in *Beck* v. *Pierce*.[2] It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu law under an obligation to fulfil the father's contract of debt, as a husband is under the English law to fulfil his wife's ante-nuptial contract of debt, the suit against the son or the husband is a suit on the contract just as much as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the

1. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
2. (1889) L.R. 23 Q.B.D. 316.

F.B.

Mohana Reddi v. Ganga-raju.

Leach, C.J.

father, wife or person represented respectively, and the law of limitation applicable is therefore the same."

Bhashyam Aiyangar, J., was, of course, referring to the position in England before the passing of the Married Women's Property Act, 1882. Before then ordinarily a married woman had no capacity in law to contract during coverture. The decision in *Beck* v. *Pierce*,[1] was that an unmarried woman could by her own acknowledgment of a debt create a fresh period of limitation which would be binding on her spouse when she married. After marriage she could not give any valid acknowledgment because of her inability to contract, but before marriage the position was different and her future husband was affected by her action. Here the father has always the power to give an acknowledgment within the meaning of S. 19 of the Limitation Act; and if he gives one in respect of a pre-partition debt that debt continues to be enforceable for another three years, which in my judgment means that it can within the further period be enforced against the family property in the hands of his son.

I would answer the reference in this way. The acknowledgment by the father in his schedule extends the period of limitation against himself and if at the date of the suit pre-partition debts are still enforceable against him or his estate his divided sons are by reason of the pious obligation rule in Hindu law also liable.

I would make the costs of this reference costs in the appeal.

Mockett, J.

Mockett, J:—The point that arises for decision is whether the divided son of a Hindu father can be made liable so far as his own share is concerned, for a pre-partition debt of the father which would have been time-barred had it not been for an acknowledgment made by the father after the partition. The referring Judges, Venkataramana Rao and Abdur Rahman, JJ., doubt the correctness of the decision of a Bench of this Court (Beasley, C.J., and Bardswell, J.,) in *Munisawmi* v. *Kutti*.[2] At the outset it is worthy of note that *Munisawmi* v. *Kutti*[2], which was decided in 1933 does not appear till now to have been the subject of doubt in any High Court; at least no cases have been cited to us suggesting that. In the tenth

1. (1889) L.R. 23 Q.B.D. 316.
2. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

F.B.

Mohana Reddi v. Ganga-raju.

Mockett, J.

edition of Mayne on Hindu Law (published in 1938) in paragraph 328 (page 421) the position is stated as follows:

"A son is not under Hindu law liable to pay a debt of the father which is time-barred against the father. But he continues to be liable for a debt of the father kept alive by the latter's acknowledgment whether before or after partition."

Similarly in Mulla's principles of Hindu Law, 9th edition, 1940 at page 336, the same proposition is stated as follows:—

"If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay even though the acknowledgment by the father is after a partition between the father and the son."

And as authority, *Munisawmi* v. *Kutti*,[1] is cited, the decision of Beasley, C.J., and Bardswell, J. Judgment in that case was delivered by Beasley, C. J. Bardswell, J., expressing agreement and during the course of that judgment certain authorities which have been cited to us are examined. The first was *Peda Venkanna* v. *Srinivasa Dheekshatulu*,[2] in which it was held that a Hindu son was not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. Beasley, C.J., points out that that decision is not an authority on the question which we now have to consider. The suit was not based, as is evident from the facts, on the original debt of the father but on a new cause of action created by him after partition by the execution of a second promissory note. In *Peda Venkanna* v. *Srinivasa Dheekshatulu*[2], Kumaraswami Sastri, J., observes:

"In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition."

If those observations are examined closely they are referable only to a new obligation and not in any way to an acknowledgment within the statute of a pre-partition debt. In *Subramania Aiyar* v. *Sabapathy Aiyar*[3], the following question was referred to a Full Bench of five Judges:

"Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition has taken place between the father and the sons."

1. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.
2. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
3. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).

F.B.

Mohana Reddi *v.* Gangaraju.

Mockett, J.

A majority of the Bench (Waller, Jackson and Ananthakrishna Aiyar, JJ.,) held that the answer was in the affirmative, and the learned Judges approved the decision in *Jagannatha Rao* v. *Viswesam.*[1] Coutts Trotter, C.J., and Srinivasa Aiyangar J., differed. It is evident from a perusal of the learned Chief Justice's judgment that he considered the whole doctrine of the pious obligation to be out of tune with modern requirements. It is described by him as 'an illogical relic of antiquity unsuited to any but a primitive and patriarchal society.' With great respect I think that we are concerned with administering the Hindu law as we find it leaving it to the Legislature to make such changes as public opinion demands. In *Munisawmi* v. *Kutti*[2], these decisions were considered and at page 836 Beasely, C.J., emphasises that in both *Peda Venkanna* v. *Srinivasa Dheekshatulu,*[3] and *Subramania Aiyar* v. *Sabapathy Aiyar*[4], the Courts were concerned not with a suit based on a renewed promissory note but a suit on the original debt and observes:

"The two positions, in my opinion, are quite distinct. If as *Subramania Aiyar* v. *Sabapathy Aiyar*[4] decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable."

The position thus stated seems to me, with respect, to be a correct statement of the law.

It has been argued by the appellant that Cl. 19 of the Limitation Act is applicable and that here we have an acknowledgment 'by an agent duly authorised in this behalf'. This view is, I think, without real foundation. The consideration of managership or agency should, as contended by the learned Advocate-General on behalf of the respondent, find no place in deciding the question before us. The appellant's argument appears to be founded on an observation of Kumaraswami Sastri, J., in *Peda Venkanna* v. *Srinivasa Dheekshatulu*[3]:

"The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a *bona fide* partition."

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1. (1924) 46 M.L.J. 590: I.L.R. 47 Mad. 621.
2. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.
3. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
4. (1927) 54 M.L.J. 726; I.L.R. 51 Mad. 361. (F.B.)

F.B.

Mohana Reddi *v.* Gangaraju.

Mockett, J.

With respect I cannot suppose that the suit against a son claiming payment of his father's debts is based on the debt in the strict sense that it is alleged that the father and the son are jointly liable or that the father contracted the debt on behalf of his son, which logically eliminates the father's own liability. In my view, the learned Judge was using a convenient phrase and no more. His observations on page 143 suggest to me that in any case it was only referable to the acts of a father manager of a joint family. The son's liability is based on a doctrine peculiar to Hindu law by which there is an obligation on him to pay another's debts, namely his father's, provided that the debt is not immoral and incurred before partition. This appears to be the present position as held in modern decisions, for example, *Subramania Aiyar* v. *Sabapathy Aiyar*[1], In re *Baluswami Aiyar*[2], *Sat Narain* v. *Sri Kishen Das*[3] and *Sat Narain* v. *Bank of Upper India*[3]. There is, therefore, in my opinion, no question of agency as between the father and the son. To emphasise the position, let us take a case of a debt incurred by the father for his own, not family, purposes, not being illegal or immoral, In such a case it could not be suggested that the father was the son's agent. Equally, if the father acknowledges it, no question of agency could arise. Limitation finds no place in Hindu law. It is true that the Legislature has made irrecoverable certain debts for which a suit is not brought within a certain time: but no statute has attempted to touch the realms of piety. It seems to me that unless piety, as certain observations in *Subramania Aiyar* v. *Sabapathy Aiyar*[1], suggest is to be regarded as an anachronism today, which I have no doubt would offend Hindu opinion as a whole, the pious obligation to pay still exists, whether the debt is legally recoverable or not. A consideration of these matters makes the decision in *Munisawmi* v. *Kutti*[4], readily acceptable not only as representing good law but as representing the spirit of the Hindu law as well. The acid test is: Is there a debt owed by and recoverable from the father? The fact that the father has, instead of sheltering himself behind the machinery of a modern statute, acknowledged the debt seems to me irrelevant. The relationship

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).
3. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P. C.)
4. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

F.B.

Mohana Reddi *v.* Gangaraju.

Mockett, J.

of a Hindu father and son is dealt with by Curgenven and Sundaram Chetty, JJ., in *Virayya* v. *Pardhasarathi Appa Rao*[1], and the learned Judges emphasise the comprehensive nature of the pious obligation, and that it exists

"irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons."

This is a quotation from the remarks of Iqbal Ahmad, J., in *Lalta Prasad* v. *Gajadhar Shukul*[2], with which the learned Judges express their assent. In *Periasami Mudaliar* v. *Seetharama Chettiar*[3], Bhashyam Aiyangar. J., remarks at page 252:

"Where the creditor sues the son on the original cause of action the law of limitation—including the article in the second schedule to the Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself."

Bhashyam Aiyangar, J., considers that that position is conclusively established by the principle of the decision in *Beck* v. *Pierce*[4], where it was held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and that the statute of limitations has always regarded as beginning to run in the husband's favour as well as in his wife's; and the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. This decision is instructive, but I consider that the position of a Hindu father and son is far simpler than was that of an English wife and husband although the principle may be of assistance.

I would answer the reference in the manner proposed by my Lord the Chief Justice, whose judgment I have had the advantage of reading and with which I respectfully agree. I also concur with the order as to costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The substantial question which arises for decision in this reference is whether a Hindu father can after partition keep alive a pre-partition debt against his divided sons by an acknowledgment of liability made by himself alone. In *Munisawmi* v. *Kutti*[5], a Division Bench of

1. (1933) 65 M.L.J. 417: I.L.R. 57 Mad. 190. 2. (1932) I.L.R. 55 All. 283.
3. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
4. (1889) L.R. 23 Q.B.D. 316.
5. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

F.B.

Mohana Reddi v. Ganga-raju.

Krishna-swami Aiyangar, J.

this Court consisting of Beasley, C.J., and Bardswell, J., have answered the question in the affirmative. The learned Judges who heard the appeal from which the present reference has arisen have doubted the correctness of this decision, and hence it was that they felt obliged to refer the question to a Full Bench. The judgment in that case was pronounced after a consideration of the effect of *Peda Venkanna* v. *Srinivasa Dheekshatulu*[1] and *Subramania Aiyar* v. *Sabapathy Aiyar*[2]. In the first of these cases it was held that the father had no authority to bind his divided sons by a promissory note executed after partition in renewal of one executed before. The grounds of the decision are found more fully expressed in the judgment of Kumaraswami Sastri, J., than in that of Wallis, C. J. They are two in number. The first is that if a *bona fide* partition had been arrived at between the father and the sons the creditor must seek his remedy against the father alone as, in the absence of a term to the contrary expressly agreed to, the share received by the sons at the partition would be wholly exempt from the liability. The learned Judge observed:

"So far as the creditor of the father is concerned, all that he can do, is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interest owing to a *bona fide* partition between them, the creditor can be in no better position. The effect of a *bona fide* partition is *prima facie* to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them . . . . . . There is nothing in Hindu law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu law to pay his debts and so long as the transaction is *bona fide*, a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into".

The second ground is contained in the following sentence occurring in the judgment:

"In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father *to renew* and *keep alive* a debt (increased by the addition of interest and principal at each renewal), so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must, in my opinion, be treated as a new obligation incurred after partition". (The italics are mine).

So far as the first of these two grounds is concerned, it had definitely been rejected by the Full Bench in *Subramania*

1. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
2. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).

F.B.

Mohana Reddi *v.* Ganga-raju.

Krishna-swami Aiyangar, J

Aiyar v. *Sabapathy Aiyar*[1], the decision in which case has finally established the proposition that notwithstanding a *bona fide* partition the sons continue to be liable for a pre-partition debt in so far as the creditor's remedies are concerned. It is the second ground which may be said to approach the question on hand, but it does not in fact touch it. The learned Judge was dealing with the case of a renewed, and not a merely acknowledged promissory note, and he was content to rest his judgment on the fact that the renewal gave rise to a fresh cause of action which of course stands on a different footing from an acknowledgment which only operates to keep the old cause of action alive. But it is to be observed that the learned Judge did not, and was not called upon to, decide whether the father had the right after partition, to make an acknowledgment so as to bind the sons. This case was, if I may say so with respect, rightly distinguished by the learned Chief Justice in *Munisawmi* v. *Kutti*[2], on the ground that it only dealt with a case of a renewed promissory note giving rise to a fresh cause of action. The Full Bench decision in the second of the cases referred to above did not go beyond establishing the liability of a divided son for a pre-partition debt. The question therefore fell to be decided as a matter which was *res integra*, and was apparently decided on that footing. The ground of the decision is to be found from the following passage in the judgment of Beasely, C.J., concurred in by Bardswell, J.:

> "If, as *Subramania Aiyar* v. *Sabapathy Aiyar*[1], decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable. But in the case of a renewed promissory note the suit is not upon the original debt at all but upon the renewed promissory note and I can see nothing which can take away from a father his authority from his sons to make a payment during the period of limitation in respect of a debt incurred by him. It is another matter altogether to wipe out the original debt and substitute therefor another debt."

If, I may say so with the utmost respect, this statement of the law involves the proposition that a father continues to possess even after partition an authority from the sons to make a part payment or acknowledgment, so as to keep alive against them a pre-partition debt. It is with this proposition that the referring Judges in the present case are in disagreement and it

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
2. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

F.B.

Mohana Reddi *v.* Ganga-raju.

Krishna-swami Aiyangar, J.

therefore becomes necessary to examine the Hindu law, in order to find out which is the correct view to be taken.

The general principles governing the liability of the son under Hindu law to pay the debt of the father, and the limitation to which his interest in the ancestral estate is subject, are now so well settled that it is unnecessary at this time of day to enter upon a detailed examination of the case-law, much less to trace its development. In origin, the obligation was legal as well as personal; it was capable of being enforced in a Court of law, and prevailed both against the person and property of the son, irrespective of whether that property was ancestral or self-acquired. Since the advent of the British Courts, the liability has become circumscribed and is now limited to the ancestral estate received by the son. In other words, the obligation has ceased to be personal, as it can no longer be enforced by arrest of the person or by attachment of the son's separate or self-acquired property.

The decisions of the Privy Council in *Girdharee Lal* v. *Kantoo Lal*[1], and *Suraj Bunsi Koer* v. *Sheo Proshad*[2], tended to introduce a remarkable change in the law as theretofore understood. Under the law of the Smriti writers, the son's liability arose not during the lifetime of the father, but only after his death, natural or civil. The effect of the change was to sustain the liability of the son even during the lifetime of the father, as an incident of the heritage from the very inception of the son's interest, on the apparent ground that if it is the pious duty of the son to save the father from sin after his death, it must be equally meritorious to him to permit the father to anticipate it by an alienation made by him during his own life. It stands to reason that the son could not validly object to a sale of the family property by the father to save himself from the very sin from which after his death the son is himself legally bound to purge him. The next step is easy; if the father has the power to alienate the family property inclusive of the son's interest in order to discharge his own debt, it is a necessary corollary that the interest of the son, along with that of the father in the ancestral estate may be attached and sold, the Court merely stepping in to execute the father's power by doing what the father can himself do, for the benefit of a creditor

1. (1874) L.R. 1 I.A. 321.
2. (1879) L.R. 6 I.A. 88.

F.B.

Mohana Reddi v. Gangaraju.

Krishnaswami Aiyangar, J.

whose debt is neither immoral nor illegal. The son's equal ownership with the father in the heritage thus came to be burdened with a liability which may result in its partial or total destruction owing to the pious duty of the son to provide for the discharge of the debt of the father. The Privy Council have made it clear that the liability is one that is annexed to the estate though it does not amount to a hypothecation or charge. The overriding power of the father is thus founded entirely on the pious obligation of the son and is inseparable from it, in the sense that it begins when the obligation begins and ceases when it ceases. The pious obligation is, so to say, the touchstone of the father's power over the son's share.

But the situation materially changes once a partition takes place between the father and the son. The obligations so far incurred, even those arising out of the individual acts of the father done for his personal benefit, still bind the son's interests in the joint estate. But his pious obligation in respect of all future acts of the father is extinguished for ever and with it the power of the father to affect the share of the divided son. After partition the community of interest entirely ceases; the father and the son thenceforth hold their respective shares as if they are independent owners; they become in fact strangers so far as property rights are concerned. But this, of course, is without prejudice to the rights of the creditor which remain unaffected notwithstanding the partition, in respect of the pre-partition debts of the father. In respect of such debts, their rights had already become crystallized. It is the power of the father to affect the son's interest in future, which is eliminated simultaneously with the disappearance of the pious obligation on a disruption of the joint status in consequence of a partition.

It is important in this connection to remember that there is no distinction recognised in Hindu law between a debt incurred by a manager for the necessary purposes of the family and a debt of the father incurred for his personal purposes if they are neither illegal nor immoral, in so far as the creditor's remedies are concerned. In the origin and in the matter of the proof to be adduced there is undoubtedly a difference but none in the nature or quality of the resulting liability once it is validly incurred. Both classes of debts rank *pari passu* and the family property is equally liable for both.

F.B.

Mohana Reddi v. Ganga-raju.

Krishna-swami Aiyangar, J.

The pious obligation is then the only source of the son's liability and its subsistence is the very foundation on which the superior power of the father as such is based. In its absence, the position of the father is indistinguishable from that of a mere manager. After a severance in status is established, the father, no less than the manager, sinks to the level of any other divided parcener of the family. If a manager cannot after the cessation of his managership acknowledge a debt so as to extend the period of limitation as against his divided kinsmen, it is difficult to see how the father can, after the extinction of the pious obligation, as against his divided son. The decisions of this Court in *Peda Venkanna* v. *Srinivasa Dheekshatulu*[1] and *Baluswami Aiyar* In re[2] should in my opinion be regarded as being merely illustrative of a wider principle, which is that the father after partition is as incompetent to affect or extend an existing liability of the son as he is to impose on him a fresh one. To acknowledge a debt is certainly to affect the liability of the son to his possible prejudice, by giving it a new term of life, and holding his share bound for a longer period. If the father has the power, it would lead to the startling result that he could by successive acknowledgments prolong the period of limitation for an indefinite length of time, without the consent and against the will of the son. It would be illogical to recognise the existence of such a power after the destruction of the son's pious obligation from which alone the father's power is derived. In the Full Bench decision of this Court in *Baluswami Aiyar* In re[2] the learned Judges who formed the majority held that the power of the father to sell though derived from the theory of the pious obligation existed only so long as the family remained joint. In substance and effect there is no difference between the two theories as a partition puts an end to both the joint status and the pious obligation, and takes away the power of the father to deal with the son's interest thereafter. But existing obligations in favour of the creditor are saved, though the father has lost his right of disposal over the son's share. It would be more in consonance with principle, to hold that the loss of the father's power is the necessary resultant of the cessation of the pious obligation rather than of the joint status.

1. (1917) 33 M.L.J. 519: I.L.R. 41 Mad. 136.
2. (1928) 55 M.L.J. 175: I.L.R, 51 Mad. 417 (F.B.).

F.B.

Mohana Reddi *v.* Ganga-raju.

Krishna-swami Aiyangar, J.

One other aspect of the question also deserves notice. The Hindu law as such contains no rules of limitation such as are known to modern jurisprudence. There were perhaps rules of prescription affecting property rights, but the sanctity of the obligation to pay a debt properly incurred knew no limit of time. The idea of keeping a debt alive by an acknowledgment or part payment is foreign to the ancient law and it is purely the creation of statute in this country. It would therefore be an anachronism to speak of a power to acknowledge as based on a rule of Hindu law. It is the Limitation Act which has fixed periods of limitation for all kinds of suits without exception and it has been held that on a personal debt of the father there is but one cause of action, enforceable both against the father and the son to the extent of their interests in the joint family property but within the time fixed by the article appropriate for the cause of action against the father; *Periasami* v. *Seetharama.*[1] *Prima facie,* it would seem then if the Limitation Act applies as it undoubtedly does, S. 19 must be held to govern the suit against the son as much as a suit against the father. An acknowledgment of liability to come within the section must be in writing signed by the party against whom, the property or the right in suit is claimed or by some person through whom he derives his liability to be sued. The signature may be that of the defendant or of his agent duly authorised in that behalf. The explanation contained in S. 21 (3) (b) while recognising in the manager a right to make an acknowledgment binding on the other members, confers no similar power on the father. So long as he is joint with his sons, the pious obligation would subsist enabling him to incur fresh debts, and acknowledge old ones already incurred. But after a severance of status, the power ceased under Hindu law, and S. 21 does not help to re-create it. The principle involved is not very different from that laid down by the Full Bench decision of this Court in *Pavayi* v. *Palanivelu,*[2] where a mortgagor who had lost all interest in the mortgaged property was held not entitled to bind by his acknowledgment, the person on whom his interest had devolved. That principle in the words of Lord Westbury quoted *in extenso* in the above decision is that an acknowledgment by one person cannot bind another on the

1. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
2. (1940) 1 M.L.J. 766: I.L.R. (1940) Mad. 872 (F.B.).

F.B.

Mohana Reddi *v.* Gangaraju.

Krishnaswami Aiyangar, J.

ground that the latter derived his liability from the former unless the derivation of title or liability takes place after the acknowledgment has been given. I find it difficult to hold that an acknowledgment by a person who has ceased to have any interest in the property or right claimed, could still be efficacious to bind the party against whom such property or right is claimed in the absence of a writing signed by him. This appears to be a condition of the acknowledgment operating against him, expressly so enacted by S. 19 of the Indian Limitation Act.

I regret therefore that I feel obliged with great respect to differ from my Lord, the Chief Justice and my learned brother Mockett, J. I may add that I have refrained from considering the applicability of the decision of *Beck* v. *Pierce*,[1] to the question before us in view of the fact the two systems of law differ materially, though there may be analogies here and there.

With respect, it seems to me that it is safer to try and gather the limits of a rule so peculiar to Hindu law as the doctrine of pious obligation by resort to the principles of that law than by resort to analogies derivable from another system.

My answer to the question referred is in the negative.

K. S. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AIYANGAR.

Pyda Suryanarayanamurthi .. *Petitioner* (Plaintiff)*

v.

The Municipal Council, Cocanada, represented by its Chairman for the time being L. Subba Rao of Cocanada. *Respondent (Defendant).*

Suryanarayanamurthi *v.* Municipal Council, Cocanada.

Madras District Municipalities Act (V of 1920), S. 83—Premises rented out by owner and used for accommodating a school—If owner exempted from property tax.

Where the owner of a house who had leased it out for accommodating a school run by the tenant, a Municipality, claimed exemption from liability to property tax under S. 83 of Madras Act V of 1920,

Held, that the word 'used' in the section must be read in the sense "used by the person who is primarily liable for the tax" or in other words the 'owner'. Accordingly where the owner leases out the property and

1. (1889) L.R. 23 Q.B.D. 316.

* C. R. P. No. 1259 of 1937, 6th August, 1940.

Surya-narayana-murthi *v.* Municipal Council, Cocanada.

collects full rent, he is not entitled to exemption from liability to property tax.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Cocanada in S. C. No. 620 of 1936.

P. Somasundaram for Petitioner.

B. V. Subramaniam for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition arises out of a suit instituted by the petitioner for the recovery of a sum of Rs. 569-12-0 of which Rs. 112-8-0 is claimed as the balance of rent due and the remaining sum of Rs. 451-4-0 as representing a sum of money wrongfully appropriated by the respondent towards the property tax claimed to be due from the petitioner to the respondent. The respondent is the Municipal Council, Cocanada. The petitioner's advocate did not contend that if the Municipal Council were entitled to recover the property tax from the petitioner, the former could not adjust the arrears against the rents claimed by the petitioner. But what he contended was that no property tax at all was leviable in respect of the house in suit.

The plaintiff purchased the suit house on the 23rd of March, 1933. A portion of the house was rented by the Municipal Council from the previous owner and was—and is even now—being used for the purpose of accommodating a school run by the Municipal Council. The petitioner is apparently in possession of the portion not let to the Municipality. Exemption from liability to property tax in respect of the suit house is claimed under S. 83 of the Madras District Municipalities Act V of 1920. The section says:

"The following buildings and lands shall be exempt from the property tax: (*a*) places set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes and libraries and playgrounds which are open to the public and from which no income is derived."*

Mr. Somasundaram the learned advocate for the petitioner, contends that the suit house was a house used for educational purposes, at any rate, partially and therefore must be held exempt from liability to tax on the wording of the section. According to him, it makes no difference whether the house is

* The section has since been recast by the Madras District Municipalities (Amendment) Act of 1930 and 1939. Ed,

Surya-narayana-murthi v. Municipal Council, Cocanada.

used for educational purposes by the owner himself or by the Municipal Council which had taken a lease of the house. By whomsoever the house was used, provided it was used for educational purposes, the house is exempt from liability to property tax. This was the contention.

Now, to allow the plaintiff to lease out the house, collect the full rent and still give him exemption from liability to property tax is to permit him to enjoy a privilege which strikes me as entirely unwarranted and even senseless. To my mind, it is quite clear that this could not have been the intention of the Legislature. Mr. Somasundaram is of course right when he says that if there is a lacuna in the statute, it is not the function of the Court to remedy it. The Court has simply to ascertain the grammatical meaning of the expression used and give effect to it. But it does appear to me that there is no such lacuna at all in the section. The word "used" necessarily connotes the further idea that the user was by some human agency. Who else could be the human agency unless it be the owner of the property or the person primarily liable for the tax? I am prepared to read the word 'used' in the sense 'used by the person who is primarily liable for the tax' or in other words, the owner. The meaning suggested by the petitioner's advocate would lead to a palpable absurdity and there is nothing in the section which compels me to adopt it.

There was another point to which reference was made, namely, the correctness of the opinion expressed by the Judge as to the suit being barred in respect of the rent for May, 1933. There is no substance in this point either.

In the result, the revision petition is accordingly dismissed with costs.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Gopala Maller .. *Petitioner** *(Plaintiff)*

v.

Vallithokuvayil Velloth Krishnan and another. *Respondents* *(Defendants).*

Gopala Maller v. Krishnan.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8, 9 and 19—Decree debt—Renewal by promissory note—Another person binding himself jointly

* C. R. P. No. 250 of 1939. 25th March, 1941.

Gopala Maller *v.* Krishnan.

and severally with the judgment-debtor—Scaling down under the Act—Whether the other person could have his liability reduced because of his position analogous to that of a surety—Contract Act (IX of 1872), S. 132.

Where there is a debt due by *A* which is renewed by a later debt due jointly and severally by *A* and *B*, *B* cannot claim that his liability under the later debt is a renewal of an antecedent debt, though *A* can put forward such a claim.

The first defendant herein and another were indebted before 1932 under a contract which ripened into a decree of 1933 and to discharge that decree a fresh promissory note was executed by the 1st defendant and the second defendant joined in it, though he had no concern with the earlier decree debt. On the question whether, when the scaling down was effected as regards defendant 1, the same principle could apply to the second defendant also and his liability therefore got reduced under the law,

Held, that merely because the promissory note made it clear that both the defendants bound themselves jointly and severally to pay the amount of the debt to the promisee in consideration for the satisfaction of the decree debt against 1st defendant, it should not be inferred that the second defendant was a surety. The contract itself made the second defendant liable as a principal and for that liability the abandonment by the promisee of his decree against the first defendant was sufficient consideration. By the terms of S. 132 of the Contract Act a mere knowledge by the promisee that the second defendant was only a surety would not affect the liability of the promisors to the promisee under the contract. Nor was it open to let in parole evidence to vary the terms of the contract.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Tellichery dated the 15th August, 1938, and passed in S. C. S. No. 27 of 1938.

O. T. G. Nambiar for Petitioner.

P. Govinda Menon for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.:—This civil revision petition arises out of an order under S. 19 of Madras Act IV of 1938. There is no serious dispute as to the facts. The 1st defendant here and another person were indebted under a contract which was anterior to 1932. That debt ripened into a decree of 1933. To discharge that decree a fresh promissory note was executed by the 1st defendant (one of the two judgment-debtors) and by the 2nd defendant who was not apparently concerned in the earlier debt. Both the defendants are agriculturists and they applied under S. 19 to scale down the debt. The lower Court has scaled down the debt as against both the defendants on the basis of its being a renewal of the original liability. The plaintiff decree-holder has filed the present revision petition in which he contests, firstly, the validity of Act IV of 1938 and secondly, the propriety of the scaling down

Gopala Maller v. Krishnan.

Wadsworth, J.

order. It is conceded now that the question of the validity of the Act is settled by the Full Bench decision and that so far as the 1st defendant is concerned, the scaling down is correct. It is however contended that the 2nd defendant is not entitled to any relief on the basis of the explanation to S. 8 and that the most that he can claim is the relief under S. 9 in the matter of interest on the promissory note which discharged the decree of 1933.

We have held in *Neelappa Reddiar* v. *Solaimuthu Udayan*[1], that in order to claim the benefit of the explanation to S. 8 the debtor must be the same debtor who incurred the antecedent liability. In *Periakaruppan Chettiar* v. *Appaji Naidu*[2], we recognised that there might be cases in which there was a substantial identity of the debtor though in form the debt appeared to have been incurred by different individuals. That was a case of a joint family debt incurred by certain co-parceners along with strangers and renewed by different co-parceners from those who executed the earlier note. In C. R. P. No. 1905 of 1940 we had to deal with an application under S. 19 to scale down a decree against two judgment-debtors one of whom claimed that his liability was only that of a surety, the other judgment-debtor being the person who was liable under the earlier debts to which the decree could be traced back. We held that whereas the judgment-debtor who was a party to the earlier debts could claim that his liability was a renewal of a pre-existing liability, so far as the alleged surety was concerned he could not by any proceeding under Act IV of 1938 claim that his debt was to be scaled down with reference to the amount for which the principal judgment-debtor was found liable and that if the surety was entitled to relief having regard to the terms of S. 128 of the Contract Act he must claim that relief in separate proceedings and not in proceedings under Act IV of 1938. From this decision it follows that when there is a debt due by *A* which is renewed by a later debt due jointly and severally by *A* and *B*, *B* cannot claim that his liability under the later debt is a renewal of an antecedent debt, though *A* can put forward such a claim.

In the present case we are dealing with actual proceedings in a suit so that defences are open not merely under Act IV of 1938 but also under the general law. It is not denied that the

1. (1940) 2 M.L.J. 517.

2. (1940) 2 M.L.J. 786.

Gopala Maller v. Krishnan.

Wadsworth, J.

1st defendant is entitled to the benefit under Act IV which the lower Court has awarded. It is however contended that the 2nd defendant was liable only as a surety and that by virtue of S. 128 of the Contract Act, the liability of the principal debtor having been reduced, the surety's liability should be proportionately reduced on the ground that it must be co-extensive with that of the principal debtor. This contention cannot succeed, for, in the first place, it is not established that the 2nd defendant was a surety, strictly speaking. The promissory note Ex. A makes it clear that both the defendants bound themselves jointly and severally to pay the amount of the debt to the promisee in consideration for the satisfaction of the decree debt against the 1st defendant. The lower Court infers from this fact that the 2nd defendant was a mere surety. But the contract itself makes the 2nd defendant liable as a principal and for that liability the abandonment by the promisee of his decree against the 1st defendant is a sufficient consideration. By the terms of S. 132 of the Contract Act a mere knowledge by the promisee that the 2nd defendant was only a surety for the 1st defendant would not affect the liability of the promisors to the promisee under the contract. Nor is it open to the 2nd defendant to let in parole evidence to vary the terms of the contract Ex. A (Vide *Narasimhamurthi* v. *Ramaswami*[1]). By the terms of a written contract both the defendants are jointly and severally liable for the full amount of the debt. There is sufficient consideration as regards both the defendants for this contract and it is not in our opinion open to the 2nd defendant to try and whittle down his liability by reason of any private arrangement with the 1st defendant to which the promisee was not a party.

It follows therefore that the decree of the lower Court is correct so far as it relates to the 1st defendant but the plaintiff is entitled to a decree as against the 2nd defendant for the principal amount of the promissory note with interest at 5 per cent. from the date of the note to 22nd March, 1938 and thereafter at 6 per cent. and proportionate costs. The petitioner (plaintiff) will pay the costs of the 1st defendant in revision and will receive his costs from the 2nd defendant.

K. C. *Petition allowed.*

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1. (1912) 24 M.L.J. 91.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Palani Kangaya Gounder *alias* Palaniswami Gounder. *Appellant** (*Petitioner—2nd Defendant*)

v.

Muthuswami Gounder *alias* Avanashi Gounder and others. *Respondents* (*Respondents—Plaintiffs and Defendants 1 and 3 to 5*).

Palani Kangaya Gounder *v.* Muthuswami Gounder.

Mortgage Suit—Final decree—Oral agreement prior to preliminary decree pleaded—Agreement not relating to execution but attacking decree—Legality of.

Where a final decree in a mortgage suit directs that the hypotheca or a sufficient part thereof shall be sold, a person who propounds an arrangement entered into before the passing of even the preliminary decree that certain items of the hypotheca should not be sold is clearly attacking the decree itself and therefore such an agreement cannot be pleaded in bar of execution.

Papamma v. *Venkayya*, (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.). and *Butchiah Chetti* v. *Tayar Rao Naidu*, (1930) 60 M.L.J. 721: I.L.R. 54 Mad. 184, followed.

Appeal against the order of the Subordinate Judge of Coimbatore dated 19th July, 1939, and made in E. A. No. 659 of 1938 in E. P. R. No. 147 of 1938 in O. S. No. 118 of 1931.

M. Krishna Bharathi for Appellant.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

Burn, J.

JUDGMENTS. *Burn J.*—This appeal is from the order of the learned Subordinate Judge of Coimbatore in which he dismissed on a preliminary ground the appellant's objection to execution of the decree in O. S. No. 118 of 1931. The appellant was the second defendant in the suit which was filed upon a mortgage. A preliminary decree was passed in the suit on a date of which we have not been made aware and a final decree is said to have followed in due course for the sale of the hypotheca. Neither the preliminary nor the final decree has been produced before us. The appellant objected to execution and he alleged that before even the preliminary decree had been passed in the suit he and the plaintiff had entered into an agreement which was as follows:

"The petitioner should not press his defence and allow the matter to proceed *ex parte*. The first respondent will get a decree for the sum as claimed. After getting a decree the first respondent was to proceed and

* A.A.O. No. 551 of 1939. 14th March, 1941.

Palani Kangaya Gounder v. Muthu-swami Gounder.

Burn, J.

execute the decree against S. Nos. 391-A, 394, 393-B (excluding the house), 563-A, 547, 548, 393-B and 399 of the hypotheca."

It was alleged that the appellant had in accordance with this agreement refrained from pressing his defence and had allowed a decree to be passed *ex parte*. The appellant said that it appeared to him that the plaintiff had also got a final decree but he was not aware of that final decree any more than we ourselves are now. Then, he said that the decree-holder was secretly trying to bring to sale all the survey numbers of the hypotheca in spite of the said agreement and he went on to say that in accordance with this agreement, the decree-holder could execute the decree only against the survey numbers mentioned above in paragraph 4 of his affidavit. The appellant prayed therefore that the Court would order and restrict execution of the decree by the first respondent against S. Nos. 391-A, 394, 393-B (excluding the house) 563-A, 547, 548, 393-B and 399 only and stay proceedings against the other survey numbers in the hypotheca. The learned Subordinate Judge has held that this was an agreement which attacked the decree itself and not a mere agreement relating to the execution or executability of the decree. He therefore held that such an agreement could not be pleaded in bar of execution and accordingly he dismissed the appellant's application with costs. The appellant has preferred this appeal.

There are two grounds on which this appeal must fail. The first is that in the agreement which is said to be an oral agreement as set out in paragraph 4 of the appellant's affidavit in the lower Court, it is not expressly stated that the decree-holder agreed to refrain from executing the decree against any particular items of the hypotheca. Moreover, we have not been informed of what the hypotheca consisted and which items in the hypotheca ought according to the appellant to be exempted from execution. But if it is a fact that the hypotheca comprised other items besides the survey numbers mentioned and if the contention of the appellant is that those items that are included in the final decree cannot be sold in execution, then, the conclusion arrived at by the learned Subordinate Judge appears to be clearly correct. The final decree, as we have said, has not been produced but it must be presumed to be a final decree in the form prescribed by the Civil Procedure Code and if so, it must be a decree directing (not that anybody should pay any money but) that certain items of property or a sufficient part thereof

Palani Kangaya Gounder *v.* Muthu-swami Gounder.

Burn, J.

shall be sold. When the appellant comes up with the allegation that before even the preliminary decree was passed, he had made an arrangement with the plaintiff that certain items of the hypotheca should not be brought to sale, he is clearly pleading an agreement which attacks the decree itself. Such an agreement under the principle enunciated in the case of *Papamma* v. *Venkayya*[1], cannot be pleaded in bar of execution. Learned counsel for the appellant has brought to our notice the decision reported in *Meenakshisundaram* v. *Swaminatha*[2]. It is not however possible for us to say that that decision applies to the facts of this case, partly because the facts of the case reported are not clear, partly because that was a case of an agreement after the preliminary decree and before the final decree, whereas our case is one of agreement before the preliminary decree itself, and partly because, as already observed, we have not been put in full possession of the facts even in this case so that it is not possible to make an accurate comparison. The decision of the Full Bench reported in *Papamma* v. *Venkayya*[1], is quite clear. It adopts the principle set out in the decision in *Butchiah Chetti* v. *Tayar Rao Naidu*[3], wherein Pakenham Walsh, J., showed the guiding principle to be that 'an agreement which does not relate to execution but directly attacks the decree itself cannot be pleaded in execution.' When a final decree in a mortgage suit says that the hypotheca or a sufficient part thereof shall be sold, a person who propounds an agreement that certain items of the hypotheca should not be sold, is clearly attacking that decree and therefore the learned Subordinate Judge was right in holding that such an agreement cannot be pleaded in bar of execution.

This appeal is accordingly dismissed with costs of the first respondent.

Mockett, J.

Mockett, J.:—I agree. We are asked to presume that the oral agreement pleaded in precise terms by the appellant contained certain conditions which have not been pleaded. This would result in an agreement different to that—actually set out —an impossible position. With regard to the second point, it is urged that the decree is to be read as containing an order for the sale of some items and not of others, whereas the words of

1. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.).
2. (1938) 2 M.L.J. 404: I.L.R. (1938) Mad. 451.
3. (1930) 60 M.L.J. 721: I.L.R. 54 Mad. 184.

Palani Kangaya Gounder v. Muthuswami Gounder.

Mockett, J.

the decree provide for the sale of all. This amounts to an attempt to vary the terms of the decree by an oral agreement and not to an agreement that the decree should not be executed —vide the judgment of the Full Bench in *Papamma* v. *Venkayya*[1] where the learned Judges expressly say that an agreement not to execute the decree does not vary its terms.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Manbuval Hasanath Hamedia Madrasa School, represented by its trustee, S. Muhammad Sheriff Sahib. *Appellant* (Plaintiff)*

v.

The Municipal Council, Tiruvarur, represented by its Commissioner. *Respondent (Defendant).*

Hamedia Madrasa School v. Municipal Council, Tiruvarur.

Madras District Municipalities Act (V of 1920), S. 267-A—Owner of private market in a municipality—Not entitled to prevent municipality from opening a new market.

All that S. 267-A of the Madras District Municipalities Act says is that it is open to a Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not open a new market. The English common law rule that the owner of a private market can prevent another market being opened within a radius of 6⅔ miles, is an artificial rule and is not countenanced even in England as being a sound one. It is not a rule which is based on any equity or principles of good conscience which the Courts are compelled to adopt in India. There is no such thing as a market franchise or a right to hold a market conferred by grant from the Crown in this presidency.

Hem Chandra Roy Chaudhury v. *Krishna Chandra Saha Sardar,* (1920) I.L.R. 47 Cal. 1079, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 35 of 1940 preferred against the decree of the Court of the District Munsif of Tiruvarur in O. S. No. 269 of 1938

K. Rajah Aiyar and *K. S. Desikan* for Appellant.

S. Muthiah Mudaliar for Respondent.

The Court delivered the following

JUDGMENT.—The question for decision in this appeal is whether the owner of a private market in a municipality is

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1. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.) at pp. 1000-1001.

* S. A. No. 1125 of 1940. 16th July, 1941.

Hamedia Madrasa School, *v.* Municipal Council, Tiruvarur.

entitled to prevent the municipality from opening a new market. Both the lower Courts have decided against the plaintiff.

Two grounds are urged before me: (1) that under the provisions of the Madras District Municipalities Act a private owner has got such a right. The sections referred to are Ss. 259 to 267 and Mr. Desikan relies very strongly on S. 267-A as conferring that right by necessary implication. I am not able to see how S. 267-A gives rise to such a necessary implication at all. All that the section says is that it is open to the Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not to open a new market.

The second ground is that under the common law of England the owner of a private market can prevent another market being opened within a radius of $6\frac{2}{3}$ miles and, in the absence of any positive enactment in India, that rule ought to be followed. Such a contention was advanced in a case in Bengal and their Lordships of the Calcutta High Court were not prepared to uphold it. In *Hem Chandra Roy Chaudhury* v. *Krishna Chandra Saha Sardar*[1], Richardson, J., observed that 'there appears to be no such thing as a market franchise or a right to hold a market, conferred by grant from the Crown', in Bengal. I do not think that a different principle applies to this presidency. At the same time, the question is whether I should give effect to that rule of English law. It seems to me that the rule is an artificial rule and is not countenanced even in England as being a sound one. I do not think it is a rule which is based on any equity or good conscience which compels me to adopt it.

The view of the lower appellate Court seems to be correct. I therefore dismiss this second appeal with costs.

Leave to appeal is refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. Venkataraghava Aiyar .. *Petitioner** (*Accused-Appellant*).

Venkataraghava Aiyar, *In re.*

Madras Local Boards Act (XIV of 1920), Ss. 193 and 207—Storing and selling firewood within Panchayat Board limits—No licence necessary.

1. (1920) I.L.R. 47 Cal. 1079.

*Cr. R. C. No. 161 of 1941.
(Cr.R.P. No. 154 of 1941). 16th July, 1941.

Venkataraghava Aiyar, *In re.*

Schedule VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act, does not require that a licence should be taken out for storing firewood. Accordingly a person by not taking out a licence for storing and selling firewood during the year 1939-1940 within the limits of a Panchayat Board, has committed no offence in storing firewood.

Quaere:—Whether he could sell firewood without a licence and by doing so exercises a trade.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Saidapet dated 6th December, 1940 and passed in C. A. No. 41 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate, Uttaramerur in C. C. No. 151 of 1940.

K. V. Ramachandra Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted—and the conviction has been upheld in appeal—under S. 193 of the Local Boards Act, read with S. 207 and Sch. VII, for failure to obtain a license for storing and selling firewood during the year 1939-1940 within the limits of the Panchayat Board of Uttaramerur and he has been fined Rs. 5.

Schedule VII of the Local Boards Act, unlike Sch. VI of the City Municipal Act, does not require that a license should be taken out for storing firewood. It was unnecessary therefore for the petitioner to have taken out a license; and by not taking out a license he committed no offence in storing firewood. Whether he could sell firewood without a license may depend on whether by doing so he was exercising a trade. But this case did not turn on that. It was assumed that a license was necessary for storing firewood and both Courts seem to have been under a misapprehension on that point. The conviction is therefore set aside and the fine refunded.

K. S. —— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor ... *Appellant**

v.

Jevan and others ... *Respondents* (*Accused*).

Public Prosecutor *v.* Jevan.

Motor Vehicles Act (VIII of 1914), S. 123 (1)—Transport vehicle used on the public road without permit—Liability of driver.

* Crl. Appeals Nos. 116 to 126 of 1941. 29th April, 1941.

Public Prosecutor *v.* Jevan.

The drivers of two transport vehicles were prosecuted under S. 123 (1) of the Motor Vehicles Act for driving the vehicles on the public road without a permit authorising the use of the vehicles in a public place. They pleaded that it was the duty of the owner to obtain the permit.

Held, the fact that the permit is to be obtained by the owner cannot make any difference and whoever drives the vehicle in a public place in contravention of S. 42 (1) without a permit would be punishable under S. 123 (1) of the Act.

Appeals under S. 417 of the Criminal Procedure Code against the acquittal of the aforesaid respondents (accused) by the Sub-Magistrate of Mettupalayam in C. C. Nos. 703, 808, 810, 812, 814, 816, 823, 825, 828, 839 and 840 of 1940 respectively.

Appellant in person.

Respondent not represented.

The Court delivered the following

JUDGMENT.—These are appeals by the Provincial Government against the orders of acquittal of the respondents of an offence under S. 123 (1) of the Motor Vehicles Act.

The respondents are drivers of transport vehicles and they were prosecuted under S. 123 (1) of the Motor Vehicles Act for driving the vehicles on the public road without a permit authorising the use of the vehicles in a public place. They pleaded that it was the duty of the owner to obtain the permit and accepting their plea the Sub-Magistrate acquitted them.

The alleged driving of the transport vehicles on the public road without a permit authorising the use of the vehicles in a public place was not denied by the respondents, and so far as is material, S. 42 (1) of the Motor Vehicles Act provides that no owner of a transport vehicle shall use or permit the use of the vehicle in any public place save in accordance with the conditions of a permit authorising the use of the vehicle in that place. The driving of a transport vehicle on the public road without such a permit would certainly contravene S. 42 (1) of the Act; and S. 123 (1) enacts that whoever drives a motor vehicle in contravention of the provisions of sub-S. (1) of S. 42 shall be punishable with fine. That the permit is to be obtained by the owner cannot make any difference and whoever drives the vehicle in a public place without a permit authorising the use of the vehicle in that place would be punishable under S. 123 (1) of the Act. The orders of acquittal are therefore set aside and the respondents are convicted under S. 123 (1) of the Motor

Vehicles Act. They are sentenced to pay a fine of Rs. 5 each and in default to simple imprisonment for one week.

K.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Muthilakath Krishna Menon ... *Petitioner** (*Petitioner —Defendant*)

v.

Chathankandath Chamunni's son Kunjandi. *Respondent* (*Respondent —Plaintiff*).

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Scope—Mortgage by jenmi with possession and a lease back of the property to jenmi—Rent payable by jenmi is not 'interest'—Mortgagee whether 'intermediary'—Right of mortgagor lessee to relief in respect of arrears of rent.

In the case of a mortgage with possession and a contemporaneous lease back the 'rent' payable is not 'interest' so far as Act IV of 1938 is concerned. The lease although contemporaneous with and closely related to the mortgage must be regarded as a lease and the payment thereunder must be regarded as rent.

Such a mortgagee from a jenmi leasing back the properties has by reason of the mortgage an interest entitling him to possession of the land which he has transferred to another, namely, the jenmi himself. The mortgagee is therefore an 'intermediary' as defined by the Malabar Tenancy Act. The "rent" payable to the mortgagee therefore falls within S. 15 of Madras Act IV of 1938 and the mortgagor jenmi is entitled to relief under that section if he has made the required deposit within the time laid down in the Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of South Malabar at Palghat dated 20th February, 1939, and made in M. P. No. 874 of 1938 in O. S. No. 42 of 1937.

P. Govinda Menon for Petitioner.

A. K. Pavitran for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner in this case filed an application under S. 19 of Madras Act IV of 1938, praying that the amount due under a decree in favour of the respondent might be scaled down. The petitioner mortgaged his property to the respondent with possession and on the same day there was a lease back to the petitioner whereunder the petitioner was to pay rent to the respondent. He defaulted and in 1937 the mortgagee got a decree for the principal sum due under the

* C. R. P. No. 1448 of 1939. 16th July, 1941.

Krishna Menon v. Kunjandi.

mortgage and for the amount of rent due under the lease. In the lower Court the petitioner contended firstly, that the annual payments under this double transaction were interest and were to be scaled down as such and alternatively that these annual payments were rent to which S. 15 of the Act applied. The lower Court negatived both the contentions.

The contention that in a transaction of this kind the rent is really interest is no longer tenable so far as Act IV of 1938 is concerned since the decision in *Abdul Khadir* v. *Subramanya Pattar*[1]. The lease, although contemporaneous with and closely related to the mortgage, must be regarded as a lease and the payment thereunder must be regarded as rent. If it is rent, then the only question remaining to be decided is whether it is rent payable to a jenmi or to an intermediary so as to attract the provisions of S. 15. The respondent is clearly not a jenmi so far as this land is concerned. The word "intermediary" is defined in the Malabar Tenancy Act as any person who, not being a jenmi, has an interest in land and is entitled by reason of such interest to possession thereof, but has transferred such possession to others. It seems to me that this definition clearly applies to the respondent. He is himself a transferee by way of mortgage from the jenmi and by reason of this mortgage he has an interest entitling him to possession of the land and has transferred the possession to which he is entitled to another. The fact that this other is himself the jenmi will not prevent the respondent from being an intermediary so far as the words of the definition go. In fact the petitioner with reference to this land was the holder of two quite separate interests, *viz.*, the original interest of the jenmi or mortgagor and the interest of the lessee derived from the mortgagee. By reason of the latter interest, he pays rent and the person to whom he pays it is a person who comes within the definition of "intermediary". The rent therefore falls within S. 15 of Madras Act IV of 1938, and the petitioner is entitled to relief under that section if he has made the required deposit within the time laid down.

The petition is therefore allowed with costs and the case is remanded to the lower Court for disposal in the light of this judgment.

K.S. —— *Petition allowed.*

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1. (1940) 2 M.L.J. 760.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Periya Yelumalai Chetti and others ... *Petitioners** (*Appellants*) (*Accused 1, 2 and 4 to 19*).

Yelumalai Chetti, *In re.*

Madras Gaming Act (III of 1930), Ss. 3 and 4—House in which betting on horse race takes place—If 'common gaming house' under S. 3—Paraphernalia of betting found in the house—How far evidence.

No doubt the main part of S. 3 reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used"; such expressions being hardly applicable to the slips drawn up in connection with betting on horse racing. But the second paragraph of that section says: "'gaming' includes wagering or betting on a horse race".

Accordingly, a house in which wagering or betting on horse race takes place is a common gaming house. It cannot be said that the wording of Ss. 4 (*i*) and 4 (*ii*) makes it impossible to apply the definition of a common gaming house to a house in which such wagering or betting on horse race takes place. S. 6 enables a Court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia (betting slips etc.) of betting were found in it.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Trivellore dated 31st December, 1940 and passed in C. A. No. 57 of 1940 (C. C. No. 1461 to 1479 on the file of the Court of the Stationary Sub-Magistrate, Ponneri).

T. R. Venkatarama Sastri, F. S. Vaz, K. Seshagiri Rao Naidu and *N. Krishnamurthi* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The Inspector of Police, Ponneri, who was examined as P. W. 1 in this case, obtained a warrant from the Deputy Superintendent of Police under S. 5 (*i*) of the Madras Gaming Act (III of 1930) to search the house belonging to the 1st and the 2nd accused. He went to that house and saw two persons lying inside the door and others busy writing something. He posted a constable and a bus conductor to see that nobody ran away and went to the front of the house. There he found the first and the 3rd accused keeping watch. He knocked on the door and it was opened by the 2nd accused after the 1st and the 3rd accused had called to those inside. The Inspector entered the house and found accused 6 and 9

* Crl. R. C. No. 1 of 1941.
(Crl. R. P. No. 1 of 1941.) 16th July, 1941.

Yelumalai Chetti, *In re.*

lying down on the pial while others were busy writing slips of paper. He made a search and amongst other things found a large number of papers of various kinds relating to the business of betting on horse racing. He made out a charge sheet, and on his evidence the Stationary Sub-Magistrate of Ponneri has found the 1st and the 2nd accused guilty under S. 4 (*i*) and accused 4 to 19 guilty under S. 9 of Madras Act III of 1930. All the convicted accused have filed this revision petition.

The principal point argued in this petition is whether the house that was searched and raided was a "common gaming house" within the meaning of the definition found in S. 3 of that Act. The main part of the section no doubt reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used"; such expressions being hardly applicable to the slips drawn up in connection with betting on horse racing. But the second paragraph of that section, which is found only in this Act of 1930 says, that "gaming. . . . . includes wagering or betting on a horse race . . . . ." That being so, one must conclude that a house in which wagering or betting on horse race takes place is a common gaming house.

The objection to the above conclusion is the wording of Ss. 4 (*i*) and 4 (*ii*) which undoubtedly does suggest that S. 4 was intended to deal with gaming on a horse race alone thus suggesting that the rest of the Act applied to gaming other than gaming on horse races. The learned Public Prosecutor has however pointed out that it is not necessary to draw this conclusion. S. 4 (*ii*) makes liable to punishment any person found gaming on a horse race, the wording of this sub-section being entirely different from that of any other provision of the Act dealing with gaming in general. S. 4 (*i*) is worded very much the same as S. 8, and it has therefore been argued that if S. 8 applied to horse racing also, S. 4 (*i*) would be redundant; but, for some reason not very clear, the punishment awarded in S. 4 (*i*) is different from that for gaming in general under S. 8. It cannot be said therefore that the wording of Ss. 4 (*i*) and 4 (*ii*) makes it impossible to apply the definition of a common gaming house to a house in which wagering or betting on a horse race takes place. The apparent reason for this difficulty in construing the Act as a whole arises from the fact that Act III of 1930 is based on an older Act of 1890, the wording of

Yelumalai Chetti, *In re.*

which has to a great extent been embodied in Act III of 1930, insufficient care having been taken in the grafting of the new provisions on to the old Act.

The importance of the point whether a "common gaming house" can be applied to a house in which betting on horse racing takes place relates to S. 6, for under that section "cards, dice, gaming table or cloth, board or other instruments of gaming" are evidence that such place is used as a common gaming house; so that if the house in question was a common gaming house, the mere fact that papers relating to horse racing were found inside would in itself be evidence that the house was being used as a common gaming house and that all the persons found therein were present for the purpose of gaming.

It is argued on the authority of *Benoy Krishna Roy* v. *Emperor*[1], that the mere fact that certain papers relating to horse racing were found inside the house in question is not sufficient, even if we make use of S. 6 of Act III of 1930, to warrant a conclusion that the house was used as a common gaming house. In the present case a large variety of papers were found in the house relating to horse racing and, above that, a number of persons were found actually making betting calculations. It is possible to conceive of cases where a person may have a common gaming house in one place and then take to his private house certain books when the day's proceedings are over. In such a case his private house would not be a common gaming house; but in the present case all the circumstances point to the fact that this house was used as a common gaming house. It is of course possible, as has been argued, that the betting actually took place somewhere else and that the slips and other papers were taken away to the house searched after the business was over and that the only purpose for which the house itself was used was for calculating the results of the bets and determining to whom money was due. I think it however more reasonable to draw the conclusion the learned Magistrate did, especially in view of the provisions of S. 6, which enables a Court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia of betting were found in it. There is no evidence which points to or suggests a contrary conclusion.

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1. A.I.R. 1941 Cal. 32.

Yelumalai Chetti, *In re.*

The facts found by the lower Court were that the 1st and the 2nd accused were keeping a common gaming house and that the petitioners were in that house for the purpose of gaming. So far as the 1st and the 2nd accused are concerned, there can be no doubt that this finding was correct. The fact that the other accused were in this house calculating what was due by or to various persons as a result of the betting on horse races only shows that these persons were present in that house for the purpose of assisting the persons who were conducting the betting; but not that they themselves were actually gaming. Despite the fact that the presence of the other accused is evidence under S. 6 of the fact that they were there for the purpose, if I were trying the case myself, I would be inclined to find the other accused guilty under S. 8 rather than under S. 9; but I do not consider that this is a sufficient reason for interfering with the conviction or the sentences imposed by the trial Magistrate. The appellants, who have been fined only Rs. 75 in the case of accused 1 and 2, and Rs. 50 in the case of others, may be considered to have got off lightly. The petition is accordingly dismissed.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. S. Sehu Mohammed Maraikayar .. *Petitioner* (Accused).*

Sehu Mohammed Maraikayar, *In re.*

Madras Local Boards Act (XIV of 1920), S. 229—Uttering offensive abuse against third person on the occasion of a demand for tax being presented to accused by a bill collector—Whether offence under S. 229 of Local Boards Act—"Molest"—Meaning.

The petitioner uttered abusive language against some unnamed persons on the occasion of a demand for tax being presented to him by the complainant, a bill collector of a panchayat board. It was contended by the prosecution that the uttering of offensive abuse amounted to 'molesting' and would be an offence under S. 229 of the Local Boards Act.

Held, that S. 229 does not make punishable a molestation *during* the course of the performance of the duty but only one *in* the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. Where the person abused was not the bill collector but some unnamed person, inimically disposed towards the petitioner, who had given information leading to an exaggerated assessment though a conviction under S. 504, I. P. Code, would have been proper the conviction under S. 229 of the Local Boards Act cannot stand and must be set aside.

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* Cr. R. C. No. 259 of 1941.
(Cr. R. P. No. 245 of 1941). 24th July, 1941.

Sehu Mohammed Maraikayar, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Tinnevelly in C. A. No. 42 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tiruchendur dated 25th November, 1940 and passed in C. C. No. 1362 of 1940.

S. Ramachandra Aiyar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the Second Class Magistrate of Tiruchendur of an offence punishable under S. 229 of the Local Boards Act for having uttered offensive abuse on the occasion of a demand for tax being presented to him by the complainant, a bill collector of the Panchayat Board of Kayalpatnam. He was fined Rs. 15 and the conviction and sentence were affirmed on appeal to the Sub-Divisional First Class Magistrate of Tinnevelly.

The learned advocate for the petitioner contends that even though it was true that the petitioner uttered the abusive language complained of, it would not be an offence punishable under S. 229 of the Local Boards Act. S. 229 runs thus:

"No person shall obstruct or molest, a local board, ... , or any person employed by the local board,. . . . . in the performance of their duty or anything which they are empowered or required to do by virtue, or in consequence, of this Act or of any by-law, rule, regulation or order made under it".

It was contended by the prosecution that the bill collector was molested. The word 'molest' to my mind carries with it some suggestion of interference or restraint or obstruction; but that is not the ordinary dictionary meaning. The Oxford Dictionary does give a meaning of this kind:

"To interfere or meddle with (a person) injuriously or with hostile intent;"

but it adds that this meaning is almost exclusively used in negative contexts. The positive meaning would seem to be,

"subject to intentional annoyance";

in which case it might be said that the accused did molest him. This meaning is sometimes used in English law; for example, a woman is said to molest a man within the meaning of the "Bastardy Act" if she falsely imputes to him that he is the father of her illegitimate child; and a creditor who is a signa-

Sehu Mohammed Maraikayar, *In re.*

tory to a deed of agreement is said to molest a debtor if the agreement is broken by his bringing an action against the debtor for a debt included in the deed. It is of some interest that a definition of "molestation" is given in Ordinance No.5 of 1932, which was drawn up in connection with the boycott of 1931-1932, and the principal part of that definition was that a person is said to molest another person who:

> " With a view to cause such other person to abstain from doing or to do any act which such other person has a right to do, or to abstain from doing, obstructs or uses violence to, or intimidates such other person or anyone in whom such person is interested, or loiters at or near a house where such person or anyone in whom such person is interested, resides or works or carries on business or happens to be or persistently follows him from place to place or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof".

This definition conveys what, in my opinion, seems to be the essence of molestation. However that may be, S. 229 of the Local Boards Act does not make all molestation punishable, but only molestation of a person in the performance of his duty. If, for example, the bill collector had been prevented or hindered in the fulfilment of his duty by this vulgar abuse, I think the petitioner would have been rightly convicted. But it appears that the bill collector went to the house of the petitioner merely for the purpose of serving a demand, and even if he had not been abused by the petitioner he could have done no more than he did. Having served his demand notice, he had nothing to do but to leave again. S. 229 does not make punishable a molestation *during* the course of the performance of the duty but *in* the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in someway interfere with his work. It is not immaterial to state that the person abused was not the bill collector, but some unnamed person inimically disposed towards the petitioner who had given information leading to an exaggerated assessment.

Although the petitioner would perhaps have merited the fine imposed on him if he had been charged under S. 504, Indian Penal Code; yet the conviction under S. 229 of the Local Boards Act cannot stand and must be set aside. The conviction is therefore set aside and the fine, if paid, ordered to be refunded.

K. S. —— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

M. Varadaraja Pillai and another .. *Appellants** (*Defendants Nos. 1 and 2—Applicants*)

v.

Rukmani Ammal .. *Respondent* (*Plaintiff-Respondent*).

Varadaraja Pillai *v.* Rukmani Ammal.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 9—"Decree"—Preliminary decree on mortgage passed after Act came into force—If liable to be scaled down on application preferred subsequently.

A debtor cannot subsequently apply to scale down a preliminary mortgage decree passed after the Act came into force. The fact that no final decree had yet been passed is immaterial as it is the preliminary decree in a mortgage suit which fixes the rights and liabilities of the parties. The final decree does not change the position except that it gives the mortgagee the right to sell the property for realising the amount declared to be due in the preliminary decree.

Appeal against the order of the Hon'ble Mr. Justice Somayya dated 29th August, 1940 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1435 of 1940 in C. S. No. 86 of 1937.

K. P. Ramakrishna Aiyar for Appellants.

N. Panchanatha Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—We agree with Somayya, J., from whose decision this appeal has been preferred that the case is governed by the decision of this Court in *Kotayya* v. *Venkata Punnayya*[1]. That case was decided by a Division Bench and its decision is binding on us. The learned advocate for the appellant has suggested that the decision should be reconsidered and has asked us to refer the question to a Full Bench. We see no reason why we should adopt this course. Leach, C. J.

It has been suggested that there is a difference here because in the present case there has not been a final decree, only a preliminary decree. The learned Judge has rightly pointed out that it is the preliminary decree in a mortgage suit which fixes the rights and liabilities of the parties. When a preliminary decree has been passed time is given to the mortgagor to pay

* O. S. A. No. 52 of 1940. 13th February, 1941.

1. (1940) 2 M.L.J. 202.

Varada-raja Pillai *v.* Rukmani Ammal.

Leach, C.J.

off the decretal amount and redeem the mortgage. The final decree does not change the position except that it gives the mortgagee the right to sell the property for the amount declared to be due in the preliminary decree.

For these reasons we concur in the decision of the learned Judge, and the appeal will be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Km. K. R. Km. Kuppan Chettiar by agent S. Krishnamachariar ... *Appellant** *(Respondent)*

v.

Kaliammal .. *Respondent (Petitioner).*

Kuppan Chettiar *v.* Kaliammal.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Mortgages by A *to* B*—Purchase of properties by* B *from* C *and assignment of mortgages to* C *towards sale price—*C *assigning his rights to* D*—Suit by* D *against the heirs of* A *and alternatively against the heirs of* B*—Decree against* B's *heirs only on the basis of covenants in the assignment deeds—Application by* B's *heirs for scaling down—Nature of liability.*

A executed two mortgages for Rs. 2,000 and Rs 1,000 respectively, in favour of *B* in 1921 and 1922. In 1928, *B* purchased certain properties from *C* and for a portion of the sale price assigned the mortgages executed by *A*, and also gave a covenant for indemnity. In 1935 *D*, an assignee from *C*, brought a suit against the heirs of *A* on the mortgages and alternatively against the heirs of *B* on the basis of the covenants. The suit as on the mortgages was dismissed but a decree was passed against the heirs of *B* for the amount which represented the balance of sale price for which the mortgages were assigned. In an application by one of the heirs of *B* for scaling down the decree debt,

Held, that the liability of the heirs of *B* could not be traced to the mortgages by *A*, but only to the assignment by *B*, and that the basis for scaling down the decree should not be the principal of the original mortgages by *A* but the amount for which the assignments were made by *B*.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 121 of 1935 as amended by order of the said Court of the Subordinate Judge of Coimbatore dated 21st July, 1939 and made in I.A. No. 1533 of 1938 in the said O.S. No. 121 of 1935.

R. Desikan for Appellant.

S. V. Venugopalachari for *N. Sivaramakrishna Aiyar* for Respondent.

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* Appeal No. 77 of 1941.
(A. A. O. No. 91 of 1940 converted into) 24th March, 1941.

Kuppan Chettiar *v.* Kaliammal.

Wadsworth, J.

The Judgment of the Court was delivered by

Wadsworth, J.:—The facts which led up to this appeal are the following: One Madar Sahib executed two mortgages to Thangammal, one for Rs. 2,000 in 1921 and the other for Rs. 1,000 in 1922. In 1928 Thangammal purchased certain properties from one Ramanatha Aiyar for Rs. 20,000 and by way of making up part of the sale price she assigned to her vendor her rights under the two mortgages from Madar Sahib, the value thereof being estimated at the time as Rs. 5,290. In 1931 Ramanatha Aiyar assigned his rights under these mortgages to the plaintiff who is the appellant here. In 1935 the plaintiff brought a suit claiming as against defendants 1 to 6 (the heirs of Madar Sahib) a decree on these two mortgages and as against defendants 7 to 9 (the heirs of Thangammal) a decree on the basis of the covenants of title contained in the deeds, of assignment. The trial Court found that Madar Sahib had no title to the lands mortgaged and dismissed the suit on the mortgage documents as against his heirs. He gave a decree against defendants 7 to 9 for Rs. 5,290 with interest on the basis that they were liable for damages for the breach of the covenant of title. After Madras Act IV of 1938 came into force, the 9th defendant filed an application under S. 19 to scale down this decree and the learned Subordinate Judge of Coimbatore has scaled down the decree with reference to the original principal of the two mortgages allowing only Rs. 3,000 with interest at 6¼ per cent. from 1st October, 1937. He repelled the contention that the liability was exempt under S. 10 (2) of the Act.

It seems to us that the learned Subordinate Judge has misunderstood the nature of the transaction. Thangammal was never liable under these mortgages. She was the mortgagee and not the mortgagor. Her liability to the plaintiff is the liability of a vendee who instead of cash hands over a commodity as part of the purchase price, guaranteeing that the commodity will fetch the amount at which it is valued. When eventually that commodity is found to be worthless, an action lies against the vendee for the breach of the covenant regarding its value. The mortgages which Thangammal assigned were mere securities made over in lieu of cash with a guarantee as to the amount which they would fetch. The decree of the lower Court finally decided these securities to be worthless and dec-

Kuppan Chettiar v. Kaliammal. — Wadsworth, J.

clared Thangammal's heirs liable to pay the amount which they should have realised. It seems, therefore, to follow that there can be no question of scaling down this liability with reference to the principal of the mortgage debts for which Thangammal herself was never liable. The appellant is satisfied with a decree for Rs. 5,290 the amount at which the securities were valued, with interest thereon at 6 per cent. from 1st October, 1937 to the date of the lower Court's order and costs. Subsequent interest will be at 6 per cent.

In these circumstances it is unnecessary to go into the further question whether the appellant is entitled to the protection of S. 10 (2) of the Act. The appeal is allowed with proportionate costs on the application and on the appeal and the decree of the lower Court will be amended as indicated above.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE HAPPELL.

Mundla Gangi Reddi .. *Appellant* (Petitioner-Creditor)*

v.

Golla Narasimha Reddi .. *Respondent (Respondent-Debtor).*

Gangi Reddi v. Narasimha Reddi.

Provincial Insolvency Act (V of 1920), Ss. 4, 9, 24 and 25—Scope—Petitioning creditor's right to apply for adjudication of debtor as insolvent questioned—Insolvency Court bound to decide the question.

Where in a creditor's petition for adjudication of the debtor as an insolvent, the debtor objected to adjudication alleging that the creditor had agreed to a composition scheme which had been accepted by other creditors also, it is not open to the Court to dismiss the petition on the ground that complicated questions of law and fact have to be decided before it can be held that a subsisting relationship of creditor and debtor has been established and refer the petitioning creditor to a regular suit to establish his debt.

Gopikabai Mahadev v. Chapsi Purshottam, (1934) I.L.R. 59 Bom. 161, dissented from.

Appeal against the order of the District Court of Cuddapah dated 20th September, 1938 in I. P. No. 90 of 1936.

Kasturi Seshagiri Rao for Appellant.

V. Govindarajachari and *P. Ramalinga Reddi* for Respondent.

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* A.A.O. No. 179 of 1939. 17th July, 1941.

Gangi Reddi v. Narasimha Reddi.

Burn, J.

The Court delivered the following

JUDGMENTS. *Burn, J.*—This appeal is from the order passed by the learned District Judge of Cuddapah dismissing I. P. No. 90 of 1936. This petition was filed by a creditor named Alladu Nagiah against one Golla Narasimha Reddi. The present appellant Mundla Gangi Reddi was substituted as the petitioning creditor in 1937.

The learned District Judge has dismissed the petition on the ground that the case involves the decision of complicated questions of law and fact before it can be held that a subsisting relationship of creditor and debtor has been satisfactorily established. The debtor objected to adjudication at the instance of the present appellant, alleging that this creditor had agreed to a composition scheme which had been accepted by other creditors also. The appellant, as appears from the order of the learned Judge, did not file any counter affidavit to this statement and the agreement set up by the debtor was sent for examination to the Government Examiner of Questioned Documents. After that official expressed the opinion that the signature on the alleged agreement was the signature of the appellant, the appellant put in a statement in which he alleged that the signatures of the creditors in the alleged agreement had been obtained by fraud, and that he, even if his signature also were found to be genuine, would not be bound by it. It is the raising of these pleas that has caused the learned Judge to say that complicated questions of law and fact have to be gone into before it can be decided that the petitioner and the respondent stand to each other in the relation of creditor and debtor. The learned Judge has said that these questions ought to be decided in a regular suit and he has referred the petitioner to a regular suit and dismissed his petition.

Mr. Seshagiri Rao for the appellant has contended that in so doing the learned District Judge has acted wrongly. Mr. Seshagiri Rao argues that the sole question of importance to be decided by the Insolvency Court in this case was whether the relation of creditor and debtor still existed between the petitioner and the respondent or not. He says that the Insolvency Court has no right to say that it will not decide this question merely because difficult questions of law and fact arise. The learned District Judge has relied upon a decision of a single Judge of the Bombay High Court, *Gopikabai Mahadev* v. *Chapsi*

Gangi Reddi *v.* Narasimha Reddi.
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Burn, J.

Purshottam[1]. That was a case somewhat similar to this. The petitioning creditor was confronted with a receipt signed by herself. She was obliged to admit that she had passed a receipt to the debtor, but she alleged that it had been obtained from her by means of fraud and misrepresentation. The Insolvency Court which was hearing the petition thought that these allegations on the part of the petitioning creditor ought to be inquired into, but the District Court on appeal held that it was not necessary for the Insolvency Court to inquire into these questions and said that the receipt passed by the petitioner could not be impeached in insolvency proceedings. It was on second appeal that the matter came before the Bombay High Court. The learned Judge held that a second appeal did not, properly speaking, lie, but he observed that it was competent for the Insolvency Court to refer the petitioning creditor to a regular suit on the facts of that case. At page 169 the learned Judge is reported to have said:

"Therefore, *prima facie*, not only is she not a creditor for an amount of Rs. 500, but she is no creditor at all of the opponents on the date, of the petition, and if she replies in answer to the opponents' objection that the receipt was fraudulently obtained, it is for her to establish that allegation, and if the Insolvency Court thinks that the question is of such a nature as can be properly adjudicated upon by a civil Court in a regular suit, I do not think that the discretion of the Insolvency Court to refer parties to a regular suit is taken away by any of the provisions cited above."

The provisions cited above were Ss. 4, 9 and 24 of the Act. The learned Judge does not state the source of the discretion which, in his opinion, the Insolvency Court has to refer parties to a regular suit. It is clear that no such discretion can be derived from S. 4 of the Provincial Insolvency Act. S. 4 (3) authorises the Court in certain circumstances after the insolvency proceedings have been set on foot to order the sale of the debtor's interest in property without deciding the precise nature or extent of that interest. But there is nothing in this provision to warrant the statement that the Insolvency Court can dismiss an insolvency petition on the ground that the questions raised in it are too difficult or complicated for the Insolvency Court to decide.

Mr. Govindarajachari for the respondent has referred us to S. 25 of the Provincial Insolvency Act. In sub-S. (1) it is provided that, in the case of a petition presented by a creditor,

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1. (1934) I.L.R. 59 Bom. 161.

where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. Mr. Govindarajachari contends that the present case can be brought within the clause 'for any other sufficient cause no order ought to be made'. This contention I find myself unable to accept. It is provided in S. 13 (6) of the Presidency Towns Insolvency Act that, when the debtor appears in response to a creditor's petition and denies that he is indebted to the petitioner, the Court on taking security may, instead of dismissing the petition, stay the proceedings for such time as may be required for trial of the question relating to the debt. This means that the Insolvency Court in the Presidency Town is not obliged to go into disputed questions of debt but can refer the creditor to the ordinary civil Court to get a decree for the amount which he claims postponing insolvency proceedings meanwhile. But this is a very different thing from saying that the Insolvency Court, if it considers the question of the debt between the petitioner and the respondent to be difficult, can dismiss the creditor's petition. There is no provision in S. 13 (6) of the Presidency Towns Insolvency Act for dismissal of the petition. The only provision is for adjournment of the insolvency petition until the civil suit is tried. Moreover, in the present case the decision of the learned District Judge is not a decision that for some sufficient cause no order ought to be made; but it is a decision that the petitioning creditor must go to the civil Court to establish his case. It is obvious that the dismissal of the insolvency petition outright is wrong, because, even if the petitioning creditor goes to the civil Court and gets a decree against the respondent for the amount claimed, it will be by that time too late for him to bring any insolvency petition. The act of insolvency in this case is alleged to have been committed in 1936; and any insolvency petition based upon that act of insolvency must be summarily rejected if filed hereafter.

I regret, therefore, I am unable to agree with the decision of the Bombay High Court referred to above. I find myself in agreement with the contention of Mr. Seshagiri Rao that the question which has arisen in this case between the petitioner and the respondent is a question expressly and explicitly for the deci-

Gangi Reddi v. Narasimha Reddi.

Burn, J.

sion of the Insolvency Court. I do not see how the Insolvency Court can have a discretion to refuse to decide this question and to refer the parties for the decision of it to a different tribunal. I would, therefore, allow this appeal and set aside the order of the District Court and direct that the insolvency petition be restored to file and disposed of according to law.

The appellant, I think, should have the costs of the appeal from the respondent.

Happell, J.

Happell J.—I agree.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Bayyana Veeraraghava Rao and others ... *Petitioners**

v.

The Debt Conciliation Board, Bezwada and another. *Respondents.*

Veeraraghava Rao v. Debt Conciliation Board, Bezwada.

Madras Debt Conciliation Act (XI of 1936), Ss. 10 (2), 14 and 18—Board passing orders without investigation of competency of application and charges of fraud etc., against debtor—Validity—Failure to frame schedule of creditors—Effect—Powers under S. 10 (2)—Abuse of—Pointed out.

In response to notices under S. 8 (1) of the Madras Debt Conciliation Act, objections were filed by a number of creditors, alleging *inter alia*, (1) that the petitioner was not a 'debtor' as defined by the Act, and (2) that he had included several false debts in his petition in order to defraud the real creditors. Without going into these charges affecting the maintainability of the petition for conciliation, notices to creditors under S. 10 (1) were straightaway issued. Some of the creditors filed statements repeating the allegations against the petitioner already made. Without making any inquiry into the truth of the allegations in spite of repeated representations by the creditors, and without drawing up a schedule of creditors under S. 12 (1), the Debt Conciliation Board passed orders declaring the debts owing to the creditors who had not filed statements to be discharged under S. 10 (2) and effecting a settlement of debts in the case of certain other creditors. In *certiorari* proceedings to quash the Board's orders,

Held, (1) that where the jurisdiction of the Board to entertain the petition for conciliation has been challenged on the ground of the applicant not being a "debtor" under the Act, the Board will have no jurisdiction to proceed further without giving its finding on the objection; and

(2) that no attempt whatever having been made by the Board on any occasion to investigate the grave charges of fraud etc., brought against the debtor in the course of the proceedings, its orders were not sustainable and should be quashed, including the orders passed under Ss. 10 (2), 14 and 18.

Abuse of powers under S. 10 (2) pointed out.

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* C. M. P. No. 297 of 1941. 3rd April, 1941.

Veeraraghava Rao v. Debt Conciliation Board, Bezwada.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a *writ of certiorari* calling for the records in Application No. 61 of 1939 on the file of the Debt Conciliation Board, Bezwada, and quash all the proceedings therein and the orders passed by the said Board on 31st October, 1940.

Ch. Raghava Rao for *N. Vasudeva Rao* for Petitioners.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS: *The Chief Justice.*—I am in entire agreement with the judgment which my learned brother is about to deliver. If administered in accordance with its spirit the Debt Conciliation Act should, in spite of its defects, prove beneficial, but my experience, gained from the hearing of petitions for the quashing of orders of Debt Conciliation Boards, convinces me that the Act has not been administered by some Boards in the way it ought to be administered. I have noticed a tendency to use the powers conferred by S. 10 (2) of the Act arbitrarily and at times there has been flagrant misuse of the section. When a debtor applies to the Board for settlement of his debts, he has to embody in his application detailed information. One requirement is that he shall state the amount and particulars of all claims against him, together with the names and residences of his creditors so far as they are known to him or can by the exercise of reasonable care and diligence be ascertained by him. The particulars required are set out in S. 6. S. 10 (1) says that if, after examining the debtor, it is in the opinion of the Board desirable to effect a settlement between him and his creditors, a notice shall be issued calling upon every creditor to submit a statement of the debts owed to him by the debtor. Sub-section (2) of that section states that, subject to the provisions of sub-section (3), every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-section (1) shall be deemed for all purposes and all occasions to have been duly discharged. Sub-section (3) gives the Board power to recall such an order under certain circumstances.

Recalcitrant creditors are not deserving of sympathy, but it is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because the creditor has not filed a statement confirming the particulars set out in the debtor's application. I

Veera-raghava Rao v. Debt Conciliation Board, Bezwada.

Leach, C.J.

can well understand that when a creditor fails to file a statement under S. 10 (1) he should be precluded from disputing the debtor's figures, but there can be no justification for depriving him of what the debtor has acknowledged to be due to him. But assuming that there is justification for sub-section (2) the power of cancellation conferred by it has been used without the slightest justification. For instance, some Boards have passed orders cancelling debts for failure to comply with the provisions of S. 11, but whatever happens to be the nature of the failure to comply with S. 11 the Board has no power to act under S. 10 (2). The cause for the maladministration of the Act in some cases may be that the members of the tribunals concerned have not the time to devote to the proper investigation of claims. The arbitrary nature of some of the orders which I have seen would suggest this. But if the legislative authority enacts a statute of this nature, it should make certain that there is proper machinery for working it. If there is not the proper machinery grave injustice is bound to follow.

The present case is an example of gross maladministration of the Act. The disregard of the principles of elementary justice which has taken place here is to be gathered from the details which my learned brother gives. From beginning to end there has been no attempt made to investigate the grave charges of fraud which have been brought against the debtor in the course of the proceedings. It would be difficult to imagine a more regrettable disregard of duty on the part of a tribunal possessing wide statutory powers than we have here, and there is no other course open to the Court but to quash the orders of the Board with costs against all the respondents; advocates fee Rs. 200.

Somayya, J.

Somayya, J.:—This is an application for the issue of a *writ of certiorari* calling for the records in Application No. 61 of 1939 on the file of the Debt Conciliation Board, Bezwada and quashing all the proceedings therein including the orders passed on 31st October, 1940. The first respondent is the Debt Conciliation Board and the second respondent is the debtor, Kasi Viswanadham of Bezwada.

In his petition to the Board, the second respondent disclosed debts to the extent of Rs. 70,000, outstandings of the value of Rs. 35,000, immovable properties including houses at Bezwada valued at Rs. 23,450 and movables worth Rs. 690.

Veeraraghava Rao v. Debt Conciliation Board, Bezwada.

Somayya, J.

He gave a list of the creditors to whom the debts were alleged to be due and requested a settlement of the debts under the Act.

The application was taken on the file and found to be in order. The Board then directed issue of notice for 20th November, 1939 under S. 8 (1) of the Act. Objections were filed by various creditors on that day. In particular creditors Nos. 3, 46, 52 and 53 raised two objections:

(1) that the petitioner was not a 'debtor' as defined by the Act, and

(2) that he included several false debts in his petition in order to defraud the real creditors.

The Board adjourned the matter to the 30th of that month as some of the parties represented that they wanted to effect a settlement. On the 30th, creditors Nos. 52 and 53 filed further statements in which they elaborated their previous objections. In particular they pointed out that the debts alleged to be owing to creditors Nos. 78, 80, 84, 85, 90, 91 and 94 were fictitious debts and that the creditors were the debtor's kith and kin. On the statement filed by creditor No. 52 the Board passed the order:

"Notice to debtor. Hearing 14th December. Sd. N. S. M. 30-11".

This is followed by another order dated 1st December, 1939 in these terms:

"This is a reply to S. 8 notice. S. 10 (1) notices have been ordered to be issued. File with papers. Sd. N.S.M. 1st December, 1939".

On 30th November, 1939 we find another order passed on the debtor's petition in which after stating that the debtor was examined and that some creditors were served and some not, the Board straightaway directed notices under S. 10 (1) to issue for 20th February, 1940. In the meantime creditor No. 81 filed a statement on 16th February, 1940 in the form prescribed by S. 10 (1) in which he stated that the petition was not maintainable as the petitioner was not a 'debtor' as contemplated by the Act. In paragraph 4 it was pointed out that creditors Nos. 84 and 85 are the mother and wife of the petitioner, that the creditor representing items 90 and 91 is his uncle, that creditor No. 94 is his brother-in-law, that the debt alleged to be due to the brother-in-law amounted to over a third of the total liability and that the brother-in-law was not in a position to advance such a large sum. Then it was stated:

"It is all bogus and it is to be deleted out of the list of creditors; and also the debts of the creditors Nos. 84, 85, 90 and 91 are bogus and they are also to be deleted."

Veera-raghava Rao v. Debt Conciliation Board, Bezwada.

Somayya, J.

In paragraph 5 it was pointed out that the debtor secreted valuable properties and that if a true account of the assets and liabilities of the debtor was taken it would be clear that the petition was a false and vexatious one. No enquiry was made regarding the truth of the various allegations made in this statement. On 13th March, 1940 the Board passed the order:

"32 of the creditors have transferred their dues in favour of Rallapalli Subramanyam'..... The debtor wants time to settle the dues in respect of others. Adjourned to 20th March, 1940."

On 11th April, 1940, the debtor and about fifty creditors filed a petition requesting permission to sell the debtor's property and to settle the debts of all creditors. The order on that is:

"Permission granted to do the needful. Notice will issue to the absent creditors".

As regards some creditors who had not filed their statements within time, their debts were directed to be discharged under S. 10 (2) of the Act. On 21st May, 1940 the proceedings of the Board show that creditor No. 1 filed a counter-affidavit, objecting to the proposal of 11th April and notices were directed to issue under S. 21 of the Act to the creditors. This notice was apparently to hear objections, if any, to the proposal of 11th April, 1940 to sell or assign some properties for payment of the debts. On 7th June, 1940 creditor No. 20 filed a statement that the petitioner was not a debtor under the Act and that an inquiry should be held to see if some of the debts were not fictitious ones. It was urged that fifty per cent. of the creditors who were alleged to have agreed to the proposal of 11th April, 1940 must represent genuine creditors. It was said that the Board had not up to that date passed final orders on the various miscellaneous and the interlocutory petitions pending before it and that it was premature to consider at that stage the legality or otherwise of the proposal of 11th April, 1940. It was also stated that the proposed sale price was out of all proportion to the value of the properties, that the amount was not arrived at *bona fide* and that if the properties were sold in public auction there was every likelihood of the properties realising a much higher price. Then this statement winds up by pointing out that five questions had to be decided by the Board before they could proceed further and they are stated

thus:

"(1) The maintainability of the petition itself on the ground that the petitioner was not a land-holder or a debtor as contemplated by the Act;

(2) The sieving out of real and false debts;

(3) The correctness of fifty per cent. of the creditors (*i.e.*, real creditors);

(4) The transfer or assignment of some debts in favour of two persons;

(5) The omission of some real creditors and the inclusion of some false creditors".

The order passed on the same day is:

"Counter filed by creditor No. 20 impeaching the genuineness of the debtor in filing the petition. This ought to have been done long ago. Put up on 10th June, 1940 at the next hearing day".

It is curious that the Board should have said this seeing that a number of other creditors had said the same thing on 20th and 30th November, 1939.

On the debtor's application we find the following order on 5th July, 1940:

"For passing orders on the several petitions in the case, the case is adjourned to 12th July, 1940".

On 12th July, 1940 a number of creditors filed a joint petition again pointing out that the petitioner was not a "debtor" under the Act. This petition contains an elaborate statement regarding each of the three items of properties put forward by the debtor as enabling him to file a petition under the Act. These are items 5, 10 and 11. As regards item 11 it was pointed out that the debtor had only a leasehold interest and that under the Act a lessee is not a "debtor"; the lease itself was attacked as a bogus one. As regards item 10 it was pointed out that the land, though purchased in the names of the father and uncle of the debtor, had been recognised as belonging to a deity under a registered partition deed dated 25th March, 1934 and a public copy of it was also filed to support the statement. As regards item 5 it was pointed out that it was a house site in the Bezwada Municipality and that the tax upon it was being levied and collected by the Municipality. On 20th July, 1940 after stating that a number of creditors filed a petition objecting to the filing of the application by the debtor, the Board ordered notice to the debtor for 30th July, 1940. On that day some more creditors filed counter affidavits and the matter was adjourned from time to time for want of quorum as the Chairman of the Board was otherwise engaged. The

Veera-raghava Rao v. Debt Conciliation Board, Bezwada.

Somayya, J.

debtor filed on 28th August, 1940 what may be called his reply to the objections of the creditors. After several adjournments the Board passed on 16th October, 1940 this order:

"Creditors Nos. 1 and 82 a Marwadi present and they accept to take item 3 of the property if sold and proceeds paid to them. As the Sub-Collector has not joined the case is adjourned to 31st October, 1940".

On 31st October, 1940 the proceedings were closed by the following order:

"Debtor-creditors present. The debts of creditors 2, 5, 10, 14, 18, 32, 43, 53, 61, 63, 72, 64 and 76 are ordered to be discharged under S. 10 (2) for failure to file claims. Orders are passed dismissing objection petitions to the legality of the petitions *at this stage*. Settlement arrived a between 55 creditors. Agreement will be drawn up accordingly. The remainder will be excluded from the agreement and a certificate under S. 18 (1) granted".

This is the history of the proceedings.

It will be observed that at no stage was the objection regarding the maintainability of the petition on the ground that the petitioner was not a "debtor" under the Act inquired into or decided by the Board. The only order we find is the one just set out that orders were passed dismissing the objection petitions raising the legality of the petition *at that stage*. Evidently, the Board meant that the objections ought to have been filed much earlier and that they could not be considered at that stage.

This is an extraordinary position for the Board to take. Again and again the creditors filed counter affidavits and objection petitions drawing the attention of the Board to the fact that the petitioner was not a "debtor", that certain creditors to whom debts were not really owing had been included, that one of them, the brother-in-law of the petitioner, was shown as a creditor for nearly a third of the total indebtedness and that the petitioner's wife, mother and uncle were shown as creditors. We are unable to find any order of the Board dealing with these objections on the merits. It is contended that on 30th November, 1939 the objection as to the maintainability of the petition on the ground that the petitioner was not a "debtor" under the Act was considered and decided. The order passed on that date is:

"Debtor present and examined * * * * Issue S. 10 (1) notices".

There is nothing to indicate that any inquiry was made whether the petitioner was a debtor under the Act and we

Veera-raghava Rao v. Debt Conciliation Board, Bezwada.

Somayya, J.

cannot take this order as implying a rejection of the objection that the petitioner was not a debtor. If really the objection was considered and disposed of by the Board on 30th November, 1939, as Mr. Satyanarayana Rao, the learned advocate for the respondent contends, it is curious that when later on objection petitions were filed by the creditors raising this very question, they were not disposed of on the ground that the matter had already been decided on 30th November, 1939. Several of the creditors had not been even served by that time and some of them took the objection later on after service of notice on them. It is therefore impossible to accede to the contention that the expression "debtor examined * * * Issue notice under S. 10 (1)" is an implied adjudication that the petitioner was a debtor under the Act.

It is further admitted that no schedule of creditors was ever drawn up as required under S. 12 (1) of the Act. This is a very important matter and the omission is a very serious one. This matter was again and again brought to the notice of the Board in the various objection petitions. It is incomprehensible how, in spite of these objections being repeatedly brought to its notice, the Board failed to adjudicate upon them and to prepare a schedule of creditors. *Prima facie* there are very strong grounds for closely scrutinising the claims of the wife, mother, uncle and brother-in-law of the debtor. The debts alleged to be due to these creditors come to over Rs. 32,000. The total indebtedness was Rs. 65,000 and odd and so the debts alleged to be due to the mother, wife, uncle and brother-in-law came to nearly a half and the attack that these were not real creditors was a very serious one which the Board was bound to inquire into and give a decision thereon. The Board failed to do its duty.

In a case where the jurisdiction of the Board to entertain the petition is challenged on the ground that the petitioner was not a "debtor" under the Act, it was the obvious duty of the Board to inquire into the objection and give its finding. Without a finding on that question the Board would have no jurisdiction to proceed further. Then, one of the most important duties laid upon the Board is the preparation of the schedule of assets and liabilities. Here again, the Board has lamentably failed to do its duty. The Board never inquired into the genuineness of the debts which were challenged as false debts

Veera-raghava Rao v. Debt Conciliation Board, Bezwada.

Somayya, J.

and there is no indication anywhere that the Board inquired into the allegation of the creditors that the debtor had secreted valuable moveables. It is impossible to sustain the order of the Board when even a schedule of the assets and liabilities was not prepared.

This is a case of gross dereliction of duty on the part of the Board. At every stage we find utter indifference to the provisions of the Act even though the attention of the Board was drawn repeatedly to them. If the allegations of the creditors are true, then this is a case in which gross fraud has been perpetrated on the real creditors. S. 9 (*c*) provides that if the application included a claim which in the opinion of the Board is collusive and intended to defeat a creditor, the application should be dismissed. Therefore when it was repeatedly urged by the creditors that the petitioner included various false debts with a view to defraud the real creditors, it was the duty of the Board to inquire into the matter and passs orders under S. 9 (*c*). Nothing was done. Then again, the creditors alleged that in the scheme of 11th April, 1940, valuable properties were proposed to be assigned at a very low value. This has not received the attention of the Board. Throughout, there has not been one occasion on which the objections of the creditors were inquired into on their merits.

As the preamble shows, the Act is intended for relief of agriculturists; and in practice the Act is grossly abused by a trader as in this case, trying to use the provisions of the Act and the Board, to defraud his genuine creditors by including fictitious debts, by suppressing assets and by assignments of the bulk of the property to his nominees at an inadequate price.

It is impossible in these circumstances to maintain the order of the Board. We, therefore, issue a writ as prayed for and quash all the proceedings in D.C.B. No. 61 of 1939 on the file of the Bezwada Debt Conciliation Board including the orders under S. 10 (2), 14 and 18 of the Act. I agree to the order passed by the learned Chief Justice as regards costs.

K.S. *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

M.N.M. Chelliah Pillai ... *Petitioner** (*Petitioner*)

v.

Ramiah Thevar *alias* Ramalinga Thevar and others ... *Respondents* (*Counter-Petitioners*).

Chelliah Pillai *v.* Ramiah Thevar *alias* Ramalinga Thevar.

Criminal Procedure Code (V of 1898), S. 147—Scope—Dispute regarding easement—Magistrate unable to decide rights of parties—Order of attachment under S. 146—Propriety.

Where the question in dispute before a Magistrate is whether a right existed in the counter-petitioners to take rain water from the field of the petitioner through the bund separating the petitioner's field from the counter-petitioners' field and the Magistrate after enquiry under S. 145, Criminal Procedure Code is unable to decide whether such right existed or not he should act under S. 147 and not pass an order under S. 146 (1) ordering attachment. Simply because he is not satisfied that either S. 147 (2) or S. 147 (3) applied and is therefore unable to pass an order either prohibiting interference or prohibiting the exercise of the alleged right, he cannot pass an order attaching the land.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Devakottah dated 19th May, 1941, and made in M.C. No. 7 of 1941.

V. T. Rangaswami Aiyangar for Petitioner.

N. Somasundaram for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The question in dispute before the Magistrate was whether a right existed in the counter-petitioners to take rain water from the field of the petitioner through the bund separating the petitioner's field from the counter-petitioners' field.

The learned Magistrate purported to make an enquiry under S. 145 Criminal Procedure Code and passed an order under S. 146 (1) ordering attachment by the Court because he was unable to decide whether such right existed or not. He clearly should have acted under S. 147, which deals with disputes with regard to easements: that section does not make any provision for action to be taken in case the Magistrate is

* Crl. R. C. No. 529 of 1941.
(Crl. R. P. No. 498 of 1941).

8th August, 1941.

Chelliah Pillai v. Ramiah Thevar alias Ramalinga Thevar.

unable to decide between the parties. If it appears to the Magistrate that such a right exists, he may issue an order prohibiting interference with the exercise of the rights; on the other hand, if it appears to the Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right. As he was not satisfied that either S. 147 (2) or S. 147 (3) applied, he was unable to pass an order either prohibiting interference or prohibiting the exercise of the alleged right: nor could he pass an order attaching the land; for such an order can only be passed where there is a dispute with regard to immovable property that can be dealt with under Ss. 145 and 146 Criminal Procedure Code. The order of the Magistrate is, therefore, clearly wrong and must be set aside.

It has been suggested by the learned counsel for the fifth counter-petitioner that the Magistrate should be directed to give a definite finding one way or the other; but a definite finding where the evidence is conflicting may not be possible. The petition is, therefore, allowed and the order of the lower Court set aside.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE SOMAYYA.

L. R. Rama Aiyar .. *Appellant** (*Plaintiff*)

v.

A. S. Madhava Rao and others .. *Respondents* (*Defendants*).

Rama Aiyar v. Madhava Rao

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2)—Uusufructuary mortgage in renewal of earlier simple mortgage—If liable to be scaled down—Clause in usufructuary mortgage that simple mortgage should be kept alive—Effect.

A usufructuary mortgage dated 9th January, 1926 was executed in renewal of an earlier simple mortgage and it stipulated that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee. There was a clause in the mortgage deed that the earlier simple mortgage should be kept alive. It was contended that the suit on the mortgage must, therefore, be deemed to have been laid even on the original mortgage and that the mortgagee was not entitled to claim the benefit of the exemption under S. 10 (2).

Held, that the clause providing that the earlier simple mortgage should be kept alive, was put in for the benefit of the mortgagee to shield him against any intervening mortgages and the plaint having been laid only on

* Appeal No. 87 of 1939. 14th February, 1941.

the mortgage of 9th January, 1926 it came directly within S. 10 (2) of Act IV of 1938 and cannot be scaled down.

Appeal against the preliminary decree of the Court of the Subordinate Judge of Madura dated 24th September, 1936 as amended by the order dated 4th January, 1939 in I. A. No. 920 of 1938 and the final decree dated 4th January, 1939 in O. S. No. 71 of 1935.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

K. Bhashyam Aiyangar and *O. V. Baluswamy* for Respondents.

The Judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.:—The only question for decision in this appeal is whether the mortgage debt for which the suit was laid is liable to be scaled down under Madras Act IV of 1938. The mortgage is dated 9th January, 1926 and purports to be a deed of usufructuary mortgage in and by which the property in suit was mortgaged under a stipulation that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee. Therefore, on the plain language of the document, it comes directly within S. 10 (2) of the Act, which distinctly provides that nothing contained in Ss. 8 and 9 shall affect mortgages of the description of the suit mortgage. The learned Judge in the Court below took the view that this usufructuary mortgage was executed in renewal of two prior mortgages which were simple and as there is a clause in the present mortgage deed that those simple mortgages should be kept alive, the suit must be deemed to have been laid even on the original mortgages and therefore the plaintiff was not entitled to claim the benefit of the exemption under S. 10 (2). It seems to us that the learned Judge has misconstrued the clause by which it was agreed that the prior mortgages should be kept alive. That clause was put in for the benefit of the mortgagee so that he can use it as a shield against any mortgages which might have intervened between the two prior mortgages and the present usufructuary mortgage; and in fact on a reference to the plaint it will be seen that the third defendant was setting up a claim under such an intervening mortgage. We have looked into the plaint and we think that the suit was laid upon the mortgage dated 9th January, 1926. We think that the learned

Rama Aiyar v. Madhava Rao. — Venkataramana Rao, J.

Judge on his mistaken view of the deed of mortgage scaled down the debt which he is not entitled to do. We therefore set aside the preliminary decree and the final decree of the lower Court dated 4th January, 1939 and restore the preliminary decree as it was originally passed on the 24th September, 1936. A final decree will be passed by the lower Court in terms of the said preliminary decree. The appellant is entitled to his costs of this appeal and also in the Court below.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AIYAR.

T. M. Venugopala Mudaliar and another. *Appellants** (*Defendants 1 and 2*)

v.

T. K. Embaru Naidu and others ... *Respondents* (*Plaintiffs*).

Venugopala Mudaliar v. Embaru Naidu.

Madras High Court Original Side Rules—O. 45, r. 1, Cl. (d)—*Scope—Moneys which ought to be in the hands of executors, administrators or trustees—If can be ordered to be paid into Court.*

An originating summons may be taken out under the provisions of Cl. (*d*) of r. 1 of O. 45 of the Original Side Rules of the Madras High Court for an order directing payment into Court only of moneys in the hands of executors, administrators or trustees and not of moneys which ought to be in their hands. Before an order under Cl. (*d*) of r. 1 of O. 45 can be passed it must be admitted by the executors, administrators or trustees that they have money actually in their hands.

Appeal against the order and judgment of the Hon'ble Mr. Justice Gentle dated 10th January, 1941 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 236 of 1939.

N. Panchanatha Aiyar for Appellants.

V. Sundararajan for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal is concerned with the interpretation of O. 45, r. 1, Cl. (*d*) of the Rules of the Original Side of this Court. O. 45, states when an originating summons may issue. Cl. (*d*) of r. 1 provides for the issue of an originating summons to compel executors, administrators or

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* O. S. A. No. 4 of 1941. 18th July, 1941.

trustees to pay into Court moneys in their hands. The appellants say that before an order can be passed under this clause it must be admitted by the defendant that he has money actually in his hands. The respondents say that this interpretation is too narrow and the Court can on the issue of an originating summons investigate accounts of an executor, administrator or trustee and order him to pay into Court what is found to be due by him.

The relevant facts of this case are these. On the 7th December, 1926 one Chellammal died leaving a will dated the 19th August, 1926. She appointed three executors, two of whom are the present appellants. On the 4th May, 1927, the executors applied to this Court for probate of the will and probate was granted. The will directed that a sum of Rs. 6,000 should be paid to Balammal, a grand-daughter of the testatrix, for the purchase of a house. The will also directed that the house should be enjoyed by Balammal during her lifetime and that after her death the property should be divided equally among her children when the youngest had attained majority. The respondents are the children of Balammal and on the 20th October, 1939 they took out the originating summons which has given rise to this appeal. They asked that the appellants should be directed (*i*) to pay into Court a sum of Rs. 3,717 alleged to be in their hands as executors, (*ii*) to exhibit a true and proper account of receipts and disbursements in connection with the administration of the estate and (*iii*) to bring into Court such further sums as might be found to be due on the taking of the account. The allegation that the appellants had in their hands the sum of Rs. 3,717 was based on a statement of account filed in Court by the executors on the 3rd November, 1927 in accordance with the provisions of S. 317 of the Indian Succession Act requiring a statement to be filed within one year of the grant of probate. It is common ground that until the present proceedings were instituted no final statement of account was filed by the executors. The defence was that the appellants had not got in their possession this sum of Rs. 3,717. They averred that they had lawfully disposed of it in connection with the administration of the estate.

Without considering whether in the circumstances the respondents were entitled to ask for an order against the appellants under O. 45, r. 1, Cl. (*d*), the Assistant Registrar embarked upon an investigation into the accounts and

Venugopala Mudaliar v. Embaru Naidu.

Leach, C.J.

his conclusion was that the appellants were liable to the estate in the sum of Rs. 716-15-0. The Assistant Registrar did not hold that the appellants had this money in their hands. His order indicates that he accepted the appellants' statement that the money had been expended, but he found that they were liable for the Rs. 715-15-0 because the disbursements which they pleaded were wholly or partially unwarranted. For instance, the appellants said that they paid an advocate Rs. 300 for obtaining probate. The Assistant Registrar apparently did not doubt that the advocate had been paid, but he considered that a reasonable fee was Rs. 75, which was all that he allowed. Another sum of Rs. 300 was disallowed because the Assistant Registrar was not satisfied that this disbursement had been authorised by Balammal. The appellants had debited the estate with the sum of Rs. 560 as being costs incurred in a certain suit. The Assistant Registrar disallowed Rs. 130 out of this amount. There is no suggestion in the Assistant Registrar's report from beginning to end that the appellants had the Rs. 716-15-0 in their hands.

The Assistant Registrar's report was considered by Gentle, J., who accepted it and directed that the appellants should pay into Court the sum of Rs. 716-15-0. The learned Judge's order proceeds on the basis that the appellants had the money in their hands. He did not consider whether the respondents were entitled to an order in the circumstances. The failure to consider this question was no doubt due to the fact that the case was not put before him as it has been put before us.

The wording of Cl. (d) of r. 1 of O. 45 is free from any ambiguity. An originating summons may be taken out under its provisions for an order directing payment into Court of moneys *in the hands* of the executors, administrators or trustees. The clause does not refer to moneys which ought to be in their hands. This rule corresponds to O. 55, r. 3, Cl. (d) of the rules of the Supreme Court in England. The wording is almost identical. The meaning to be attached to O. 55, r. 3, Cl. (d), was considered by the Court of Appeal in *Nutter* v. *Holland*[1]. There Lindley, Lopes and Davey, L., JJ., had no hesitation in holding that money cannot be ordered to be paid into Court by executors, administrators or trustees under O. 55,

1. (1894) 3 Ch.D. 408.

Venugopala Mudaliar *v.* Embaru Naidu.

Leach, C.J.

r. 3, Cl. (d) unless the money is actually in their hands. It is not sufficient that it has been in their hands and they are responsible for it.

Lindley, L.J., said:

"I think that rule means what it says. It applies only to money actually in the hands of the trustee, executor or administrator, and if it is not in his hands, although he is responsible for it and ought to have it, that rule does not apply."

Lopes, L.J. said:

"I agree that the rule means what it says, and that it is confined to money which is actually in the hands of the executors, administrators or trustees."

Davey, L.J., said:

" . . . . that before an order is made under it for payment into Court it must be shown that the trustee has money belonging to the trust actually in his hands; it does not apply to money which may or may not be found due from him on the result of an investigation."

Mr. T. S. Venkatesa Aiyar has drawn our attention to a passage in Williams on Executors, 12th Edition, Vol. II, page 1286 where it is said that

"when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorised application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor."

The learned authors are here referring to the position before the passing of the Judicature Act when there was no O. 55, r. 3, Cl. (d). This statement is based on decisions arising out of administration actions. There can be no doubt whatever that the appellants can be made to refund to the estate all moneys which they have improperly expended; but that is not what the Court is now concerned with. The Court is concerned with the question whether there can be an investigation into accounts and a consequential order passed on an originating summons taken out under the provisions of O. 45, r. 1, Cl. (d), of the Rules of the Original Side of this Court. It seems to me that the only conclusion which can legitimately be arrived at is that the respondents misconceived their remedy. In the circumstances the remedy is by suit and not by an originating summons under O. 45. The Court is not considering a case where an executor has denied possession of funds and it is clear that his denial is false. Moreover it must be remembered that O. 45 is intended to provide a summary remedy in specified circumstances and not an alternative remedy to an administration action.

Venugopala Mudaliar v. Embaru Naidu. — Leach, C.J.

In *Nutter* v. *Holland*,[1] the Court was able to deal with the matter without relegating the plaintiffs to a regular suit, but that was because Cl. (c) of r. 4 of the English O. 55 provides that any of the persons named in r. 3 may in like manner apply for and obtain an order for the administration of the trust. There is no corresponding rule in O. 45 of our rules. It is unfortunate that the matter has been allowed to go so far, but the respondents are mainly to blame for this. They applied for the issue of an originating summons in respect of an account which had been filed twelve years before and much could have happened in the meantime. It has been impressed upon us that the respondents are minors but that fact does not preclude them from bringing a suit nor does it in any way alter the position. If they have not the means to pay the necessary court-fee there is procedure by which they could be allowed to sue in *forma pauperis*. It may be that the matter of the court-fee was the factor which governed the procedure adopted. It has not been suggested that the allowing of the appeal will adversely affect the respondents but, even if it should, we have no option but to hold that O. 45, r. 1, Cl. (d) does not apply to a case like this. The appeal will be allowed but we will make no order as to costs.

It is said that the appellants have paid into Court Rs. 1,235. The respondents state that they will file a suit within a fortnight and by consent this money will remain in Court to the credit of the suit to be filed. If the suit is not in fact filed within that time, the appellants will be entitled to withdraw the money from Court.

K. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE HORWILL.

Ramaswami Reddiar v. Official Receiver of South Arcot.

Ramaswami Reddiar ... *Appellant* (2nd Respondent)*

v.

The Official Receiver of South Arcot and another. *Respondents (1st Respondent and Petitioner).*

Provincial Insolvency Act (V of 1920), S. 68—Sale by Official Receiver of property of insolvent—Public auction—After sale intimation to creditors

1. (1894) 3 Ch.D. 408.

* A.A.O. No. 264 of 1939. 4th April, 1941.

for offers of higher bids—Offers of higher bids—Not substantial—Original sale confirmed—Sale not irregular.

Ramaswami Reddiar *v.* Official Receiver of South Arcot.

The Official Receiver of the assets of an insolvent held a sale of a certain property of the insolvent and the highest bid was that of the appellant, in whose favour the property was knocked down. In accordance with the practice of the Official Receiver, he said that the sale in the appellant's favour would be subject to such further bids as might be offered by creditors. Subsequently there was an offer by the respondent to the Official Receiver which was only Rs. 7 higher than the appellant's purchase price. Not being fully aware of the various bids that had been made and the circulars he had issued, the Official Receiver confirmed the sale in the appellant's favour and executed a sale deed. The respondent thereupon moved the District Court in the matter under S. 68 of the Provincial Insolvency Act and prayed that the sale in appellant's favour should be set aside and that the sale should be confirmed in his own favour. That Court held the sale to be irregular in that the Official Receiver had made it clear that he had no intention to confirm the sale to the appellant if there were higher bidders among creditors.

Held, that in the circumstances the confirmation of the sale in the appellant's favour was not irregular, there being no contractual obligation on the part of the Official Receiver either to the respondent or to anyone else to accept their offers.

Held further, that there was no sufficient ground for setting aside the sale in favour of the appellant after the property had been legally conveyed to him.

The system of inviting bids from creditors after holding a public auction, condemned.

Appeal against the order of the District Court of South Arcot dated 7th November, 1938 and made in C.M.P. No. 284 of 1938 in I. P. No. 18 of 1936.

A. S. Srinivasa Aiyar and *S. Seshadri* for Appellant.

K. Venkataraghavachariar for Respondents.

The Judgment of the Court was delivered by

Horwill, J.

Horwill. J.—This is an appeal against the order of the District Judge of South Arcot setting aside a sale by the Official Receiver of items 1 to 10 of an insolvent's property on the 6th May, 1938.

The Official Receiver in the due course of his administration of the assets of the insolvent held a sale on the 30th August, 1937 which was duly advertised. The highest bidder was the appellant; and the sale was knocked down in his favour for Rs. 113, of which he deposited Rs. 32 at once and a further Rs. 81 on the 13th September, 1937. In accordance with the practice of the Official Receiver, he said that the sale in the appellant's favour would be subject to such further bids as might be offered by creditors. He appears to have sent notices to the other creditors telling them that if they did not make any higher bids, the sale would be confirmed in the appel-

Ramaswami Reddiar v. Official Receiver of South Arcot.

Horwill, J.

lant's favour. On the 4th September, 1937 the respondent sent an offer to the Official Receiver which reached him on the 6th September, 1937. The money should have been deposited within seven days of the 6th September, 1937, that is, on or before the 13th September, 1937. The money was not, however, paid, and the Official Receiver, apparently not fully aware of the various bids that had been made and of the circulars he had issued, confirmed the sale in the appellant's favour on the 30th November, 1937. On the 16th February, 1938, the respondent deposited the Rs. 120 which was the amount of the offer that he had made. The Official Receiver, on the 24th March, 1938, noted in Ex. A that Vasudeva Reddiar (respondent) had offered Rs. 120 and he added that notice should go to all creditors and bidders for them to show cause why the higher offer should not be accepted. He later made a note to the effect that Vasudeva Reddiar's offer was made for items 1 to 8, which had already been sold, that items 16 and 17 were not included in the list of assets disclosed by the insolvent, and that he would therefore take no further steps to call for higher bids. On the 6th May, 1938 he executed a sale deed in favour of the appellant. The respondent carried the matter to the District Court under S. 68 of the Provincial Insolvency Act and asked the Judge to set aside the sale to the appellant on the ground that there had been no confirmation of the sale, that the Official Receiver had called for offers, and that in accordance with the memo of the Official Receiver he had deposited Rs. 120. He asked that the sale should be confirmed in his favour. The learned District Judge, while concluding that the sale was really confirmed in the appellant's favour on the 30th November, 1937, held that that sale was irregular, in that the Official Receiver had made it clear that he had no intention to confirm the sale in the appellant's favour if there were higher bidders among the creditors. The appellant has therefore brought the present appeal against this order of the District Judge.

We find it difficult to understand how the confirmation of the sale in the appellant's favour can be said to be irregular. The Official Receiver was under no contractual obligation either to the respondent or to any other person to accept their offers; and he might well have refused to confirm the sale in some other person's favour unless his bid was substantially

Ramaswami Reddiar v. Official Receiver of South Arcot.

Horwill, J.

higher than that of the appellant. Actually, it would appear from the note to Ex. A, that the Official Receiver was ignorant of the fact that he had already sold the items to the appellant; but whether he was aware of it or not, he was justified in confirming the sale in favour of the appellant—especially as the bid of the respondent was only Rs. 7, higher than that of the appellant. Although the District Judge had power to set aside the sale and to pass an order in favour of the respondent yet he should not have done so lightly after there had been a legal conveyance of the property in favour of the appellant. We are of opinion that there was no sufficient ground for setting aside the sale in favour of the appellant.

It is unnecessary to discuss in detail the contention of the learned counsel for the appellant that the application of the respondent was time-barred. The petition, the order on which is appealed against, was filed on the 2nd July, 1938, which was the re-opening date after the summer vacation. The sale was on the 30th August, 1937, the confirmation on the 30th November, 1937, and the execution of the sale deed on the 6th May, 1938. All of these acts by the Official Receiver could be the subject of an application under S. 68; for they were the acts of the Receiver against which the respondent was aggrieved. He had a cause of action not only on the 30th November, 1937, therefore, but on the 6th May, 1938, also. 21 days after the 6th May, 1938 terminated during the summer vacation, and his petition was presented on the re-opening day. It was therefore in time.

Both the appellant and the respondent are innocent victims of a system which we do not consider to be in the best interests of creditors. The auction held by the Official Receiver should be final; but it would appear that after an auction is held, the Official Receiver circularises the other creditors, and if he then receives a higher bid, the creditors and the bidders are informed of that bid also. This process apparently continues until no higher bid is received. We consider this system to be objectionable. Clearly, persons will not come forward and bid for the property at a public auction if the highest bid is not to be accepted. This practice has led to the confusion which has resulted in injustice to both the parties in the present case.

The appeal is allowed with costs in both the Courts.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Mr. Mittinti Narasimhamurti and another .. *Appellants** (*Petitioners 1 and 3 Trustees*)

v.

Pandiri Satyanandam (judgment-debtor) and others .. *Respondents* (*Respondents 1 to 11 and 2nd Petitioner*).

Narasimhamurti *v.* Satyanandam.

Charge—Words creating charge—Decree charging 'movable and immovable property'—Words not vague—Charge enforceable.

In a suit under S. 92 of the Code of Civil Procedure and S. 6 of the Act XIV of 1920, after removing the trustee from office, the Court directed him to pay a certain amount with interest and also directed that all his property both movable and immovable should be charged for the amount due. In execution of that decree the appellants sought to enforce the charge given by the decree in respect of some money lying in Court to the credit of the judgment-debtor in another suit. The claim was objected to by rival decree-holders. The main ground of objection was that the charge was not enforceable in execution because the property charged was not specific.

Held, that the words used in the decree 'all the property of the judgment-debtor both movable and immovable' were sufficiently specific in the sense that the property charged by the decree could be ascertained at any moment. The words were neither ambiguous nor uncertain and the charge given by the decree was therefore executable.

Manickam Pillai v. *Audinarayana Pillai*, (1910) 20 M.L.J. 407: I.L.R. 34 Mad. 47 at 50 referred to.

Appeal against the order of the District Court of East Godavari at Rajahmundry dated 3rd March, 1938, and made in E.P. No. 114 of 1937 in O.S. No. 12 of 1934.

T. Satyanarayana for Appellants.

P. Panini Rao, B. V. Ramanarasu and *M. S. Ramachandra Rao* for Respondents.

The Judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—The appellants are the decree-holders in O. S. No. 12 of 1934 on the file of the District Court, East Godavari. That was a suit instituted under S. 92 of the Code of Civil Procedure and S. 6 of Act XIV of 1920. After removing the judgment-debtor from his office of trustee, the Court directed him to pay a certain amount with interest and also directed that all his property both movable and immovable should be charged for the amount due. In execution of that

* A.A.O. No. 547 of 1938. 14th March, 1941.

Narasimhamurti v. Satyanandam.

Pandrang Row, J.

decree the appellants want to enforce the charge given by the decree in respect of some money lying in Court to the credit of the judgment-debtor in another suit. The claim is opposed by some rival decree-holders who, it appears, were instrumental in getting this money into Court in execution of the decrees obtained by them. The main ground of objection has been that the charge was not enforceable in execution because the property charged was not specific. It is on this ground that the lower Court, although it held that so far as the claim to recover the amount from the judgment-debtor was concerned the decree was executable, decided that the decree was inexecutable so far as the charge was concerned because the property on which the charge was fixed was not specific. The decision of the lower Court on this particular point cannot in our opinion be sustained for the simple reason that the words used in the decree 'all the property of the judgment-debtor both movable and immovable' are in our opinion sufficiently specific in the sense that the property charged by the decree could be ascertained at any moment. There was nothing ambiguous or uncertain in the words used, though the words were general and wide. Some decisions have been brought to our notice by the advocate for the respondent but none of them except perhaps *Bheri Dorayya* v. *Maddipatu Ramayya*[1], says anything in his favour. The decision in *Bheri Dorayya* v. *Maddipatu Ramayya*[1], itself does not in terms say that the words "all my property" are not specific enough. What it decides is that the words found in the bond and in the decree which the learned Judges had to deal with and to which the case related were indefinite and could not create a charge because the properties were not specific. The correctness of that decision has been doubted subsequently. *Vide* in particular *Manickam Pillai* v. *Audinarayana Pillai*[2]. The authority quoted in support of the view arrived at in *Bheri Dorayya* v. *Maddipatu Ramayya*[1], namely *Deojit* v. *Pitambar*[3], throws some light on the considerations to be borne in mind in a case of this kind. In *Deojit* v. *Pitambar*[3], stress is laid on S. 29 of the Contract Act according to which an agreement is void if its meaning is not certain or capable of being made certain and on S. 93 of the Evidence Act to the effect that where the language of a deed is on its face

1. (1881) I.L.R. 3 Mad. 35.
2. (1910) 20 M.L.J. 407: I.L.R. 34 Mad. 47.
3. (1876) I.L.R. 1 All. 275.

Narasimhamurti v. Satyanandam. — Pandrang Row, J.

ambiguous or defective, no evidence can be given to make it certain. Applying the principles embodied in these provisions of law, we have no doubt that the words found in the decree with which we are concerned are neither ambiguous nor uncertain. There is no reason why description of property by survey number, extent, boundaries, etc., should be insisted upon on pain of the charge being held to be void for uncertainty. It cannot be contended that if a man creates a charge on his own house and all that it contains, it would be void for uncertainty or that any charge created on a person's property in a particular village would be void for uncertainty. Again, if a man says that his properties in all the villages should be charged with any particular liability, there is no reason why the charge should be declared to be void for uncertainty. Indeed we are not able to find any good reason for regarding cases of this kind as being open to the objection of uncertainty or indefiniteness. As pointed out in *Manickam Pillai* v. *Audinarayana Pillai*[1], there is a good deal of difference between wideness of language and vagueness or indefiniteness of language. We are of opinion that in this case there is no real force in the objection that the charge created by the decree is void for uncertainty or that the property to which the charge relates is not specific. That being the case, it follows that the charge given by the decree was executable and the petition ought not to have been dismissed by the Court below on the ground that the charge was not executable. No other objection appears to have been pressed in the Court below to the prayer of the appellants being granted. The appeal is therefore allowed with costs in both the Courts.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Nellore Permanent Fund Ltd. v. Subba Rao.

The Nellore Permanent Fund Limited by its President, C. Malakondaiya .. *Petitioner* (Respondent)*

v.

Kondapi Subba Rao and another ... *Respondents (Petitioners).*

Madras Agriculturists' Relief Act (IV of 1938), S. 10, (2) (iii)*—Mortgage in favour of public company—Interest at less than 8 per cent. but default interest at 12½ per cent. per annum—Decree on mortgage adopting 12½ per cent. interest—Effect on exemption under S. 10* (2) (iii).

1. (1910) 20 M.L.J. 407: I.L.R. 34 Mad. 47.

*C. R. P. No. 1409 of 1938. 30th July, 1940.

Nellore Permanent Fund Ltd. *v.* Subba Rao.

Where a public company has got a decree on a mortgage providing interest at something under 8 per cent with a default rate of 12½ per cent. per annum and the default rate of 12½ per cent. has actually been adopted in the decree, the debt is not exempted from the operation of Ss. 8 and 9 of Act IV of 1938. Interest "payable in respect of the liability" in S. 10(2) (iii) of the Act refers to the interest on the basic debt and not the subsequent interest on the decree amount.

Petition under S. 115 of Act V of 1908, and S. 224 of the Government of India Act praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Kavali dated 15th July 1938 and made in I. A. No. 297 of 1938 in O. S. No. 70 of 1937.

Facts:—The respondent had executed a mortgage in favour of the petitioner (Fund) on 10—6—1927 for a sum of Rs. 200 carrying interest at Rs. 0-10-5 per cent. per mensem with a further provision that in default of payment of each year's interest at the end of that year, the debt should carry interest at 12½ per cent. per annum. A suit on the mortgage resulted in a decree for Rs. 303-15-3, the balance of principal and interest due up to the date of suit, Rs. 11-3-0 interest on the principal sum of Rs. 200 at 12½ per cent. per annum from the date of suit till 23—12—1937 and Rs. 49-5-0 costs. The decretal amount was to carry interest at 6 per cent. per annum.

The respondent preferred an application under S. 19 of Act IV of 1938 to have the amount scaled down. The Bank resisted the application claiming exemption under S. 10 (2) (iii). The lower Court rejected the Bank's contention on the ground that though a public company, interest had been claimed by it in the mortgage suit at more than 9 per cent. and a decree had been passed on that footing.

K. Kuppuswami for Petitioner.

P. S. Raghavarama Sastri for Respondents.

The Court delivered the following

JUDGMENT:—Petitioner is a public company which has got a decree on a mortgage providing interest at something under 8 per cent. with a default rate of 12½ per cent. The latter rate has actually been adopted in the decree, so that it is not open to the petitioner to base an argument on the theory that the 12½ per cent. is not a rate of interest payable but a penal rate which could not be recovered. Nor can it be argued that the rate of interest "payable in respect of the liability" in S. 10 (2) (iii) of Act IV of 1938 means the rate of subsequent interest on the decree amount. Clearly the sub-clause is dealing with an exemption from the operation of Ss. 8 and 9, which are con-

Nellore Permanent Fund, Ltd. *v.* Subba Rao.

cerned with the scaling down of the debt whether or not it has ripened into a decree. It must, therefore, be interest on the basic debt to which this rather cumbrously worded clause refers. The order of the lower Court is correct and there are no grounds for interference in revision. The petition is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Natesa Naicker ... *Appellant* (1st Respondent)*

v.

Sambanda Chettiar ... *Respondent (Appellant-Petitioner).*

Natesa Naicker *v.* Sambanda Chettiar.

Civil Procedure Code (V of 1908), O. 47, r. 1—Decision overlooking leading authority—How far ground for review.

The decision in *Murari Rao* v. *Balavanth Dikshit,* (1923) 45 M.L.J. 309: I L.R. 46 Mad. 955 is not an authority for the view that whenever a Judge has over-looked a ruling he has power to review his decision; nor is it authority for the view that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. Where however the legal position is clearly established by a well-known authority and by some unfortunate oversight the Judge has gone wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground for review coming within the category of an error apparent on the face of the record.

Appeal against the order of the District Court of Chingleput dated 8th July, 1940 and made in C. M. P. No. 616 of 1940 in C. M. A. No. 31 of 1939 etc.

R. Thirumalai Thathachariar and *R. V. V. Thathachariar* for Appellant.

S. Panchapagesa Sastri and *A. K. Muthuswamy Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—These two matters arise out of an application for the filing of a complaint under S. 206 of the Indian Penal Code in respect of the cutting of trees alleged to be under an attachment at the instance of the District Munsif's Court, Poonamallee. The application was rejected by the District Munsif mainly on the ground that the attachment covered trees described as Palavrukshangal which the learned District

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* A.A.O. No. 436 of 1940 and C.R.P. No. 491 of 1941. 21st July, 1941.

Natesa Naicker v. Sambanda Chettiar.

Munsif interpreted as fruit bearing trees, not including casuarina trees such as were cut. The applicant appealed to the District Judge of Chingleput who differed from the District Munsif as to the interpretation of the phrase he translating it as 'various trees' not as "fruit bearing trees" and considering that the attachment was intended to cover all the trees on the land and not merely fruit bearing trees. But the learned District Judge came to the conclusion that the materials on the record of the District Munsif's inquiry were not sufficient to justify the filing of a complaint by the appellate Court and he also came to the conclusion that he had no power under S. 476-A of the Code of Criminal Procedure to remand the petition for the taking of additional evidence; nor had he the power to take additional evidence in appeal. The appeal was therefore dismissed with the observation that it was open to the decree-holder to move the High Court in revision. After the disposal of this appeal it was brought to the notice of the District Judge that there was ample authority for the view that the Court hearing the appeal against an order of a Civil Court declining to file a complaint under the powers conferred by S. 476-A of the Code of Criminal Procedure acted as a Civil Court and could employ all the powers conferred by the Code of Civil Procedure on a Court of Appeal, and the attention of the learned District Judge was also drawn to *Kumaravel* v. *Shanmugha*[1], the Full Bench decision pronounced subsequent to the District Judge's original judgment and establishing the correctness of the view that the appellate Court in such a case was a Civil Court and not a Criminal Court. The learned District Judge therefore reviewed his previous order and remanded the matter to the trial Court for further evidence and a specific finding on the facts. It is against this order of review that the present appeal has been preferred. After the remand under the order of review there was a finding and a further hearing before the District Judge as a result of which the District Judge directed a complaint to be filed. Against the order for the filing of a complaint the Civil Revision Petition has been preferred.

Dealing with the latter first, it seems to me that there are no grounds upon which this Court's revisional jurisdiction can be invoked in this case. The question of the precise scope of

1. (1940) 1 M.L.J. 719: I.L.R. (1940) Mad. 762 (F. B.).

Natesa Naicker v. Sambanda Chettiar.

the attachment is one upon which two views were taken by the two Civil Courts which had to deal with the matter and one upon which the decision of the Criminal Courts will be final. But certainly the learned District Judge on the view which he took of the order of attachment had ample jurisdiction to direct the filing of the complaint and it is not possible for this Court sitting in revision to reverse the District Judge's order merely on a consideration of the comparative merits of the two interpretations which have been given of the order of attachment.

The appeal against the review order deserves more serious consideration. It was held in *Murari Rao* v. *Balavanth Dikshit*[1] that an error apparent on the face of the record under O. 47, r. 1, Civil Procedure Code might be an error of law and in that particular case the error of law which was the ground for review was the failure to take note of an established authority reported in the Indian Law Reports finally deciding a matter of succession. That is to say, the Bench recognised the power of the Court in an appropriate case to review its order because it had overlooked a leading authority on a clear matter of law. So far as I am aware, this decision is still good law. I have followed it myself in a case, *Venkatarayulu* v. *Rattamma*[2] and though it has been criticised by a single Judge of this Court in a case, *Opporti Padhi* v. *Paila Ujjulla*[3] it has not, so far as I am aware, been dissented from by any subsequent Bench. Certainly the decision in *Murari Rao* v. *Balavanth Dikshit*[1] should not be taken any further than it goes. It is not authority for the view that whenever a Judge has overlooked a ruling he has a power to review his decision; nor is it authority for the view that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case, in the light of *Murari Rao* v. *Balavanth Dikshit*[1] be a ground coming within the category of an error apparent on the face of the record. That seems to me to be the position, so far as this Court is concerned, in the light of *Murari Rao* v. *Balavanth Dikshit*.[1]

1. (1923) 45 M.L.J. 309: I.L.R. 46 Mad. 955.
2. (1939) 1 M.L.J. 120: A.I.R, 1939 Mad. 293.
3. A.I.R. 1927 Mad. 998.

Natesa Naicker v. Sambanda Chettiar.

Now turning to the legal question which caused the difficulty of the learned District Judge in the present case, there was before the matter was settled by the Full Bench in *Kumaravel* v. *Shanmugha*[1] a considerable divergence of judicial opinion, not only in other Courts but in this Court, on the question whether proceedings taken by a Civil Court under S. 476 of the Code of Criminal Procedure and the following sections were properly to be regarded as civil proceedings governed for the purposes of appeal and revision by the Code of Civil Procedure or as criminal proceedings in respect of which the Criminal Procedure Code would decide the powers of the Court of Appeal or Revision. It is not necessary to discuss the cases in which the two rival views were adopted. They are set forth in the decision of the Full Bench to which I have just referred. It is sufficient to say that there was very considerable doubt on this matter. The decision actually quoted before the District Judge was a decision of 1916 in a case in which two Judges of a Bench differed and the matter came before three Judges who decided by a majority that the proceeding in revision against the sanction order under S. 476 of the old Criminal Procedure Code was a civil proceeding. But other Judges have taken other views since that case was reported and I doubt whether it can be said that at the time of the District Judge's review order there was a clearly established rule laying it down finally and with authority that a Court sitting in appeal against a decision of a civil Court under S. 476 of the Code of Criminal Procedure was governed by the Civil Procedure Code and not by the Code of Criminal Procedure. There is in fact a Full Bench decision of 1933, *Janardana Rao* v. *Lakshminarasamma*[2], which assumes that the procedure is covered by the Code of Criminal Procedure. But the point to notice is that at the time when the learned District Judge reviewed his order, whichever Code applied to the proceedings, the authority of this Court was clear that he had the power of remand which he thought that he had not. The Full Bench decision in *Janardana Rao* v. *Lakshminarasamma*[2], decides that a Court acting under S. 476 (*b*) of the Code of Criminal Procedure has the power by the application of S. 423 of the Code to remand the matter for fresh disposal.

1. (1940) 1 M.L.J. 719: I.L.R 1940 Mad. 762 (F.B.).
2. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).

Natesa Naicker v. Sambanda Chettiar.

It seems to follow that at the time when the District Judge dismissed the appeal, thinking that he had no power of remand, that order was quite definitely and obviously wrong on the established authorities whichever view might be taken as to the Code applicable to the proceedings. No doubt the learned District Judge in reviewing his order does not rely upon the Full Bench decision in *Janardana Rao* v. *Lakshminarasammal*[1], but founds himself on the decision that the proceedings are civil and fortifies that view by the subsequent Full Bench ruling. If the matter rested solely on the existence of the power of the appellate Court under the Code of Civil Procedure to remand, I should have had some hesitation in upholding the order in review which to some extent depends upon a subsequent ruling of this Court. But as the order which the District Judge reviewed was clearly and demonstrably wrong on the established authorities of this Court, whichever Procedure Code was applicable, I do not think that I should be justified in reversing the review order and restoring the wrong decision merely because the reasoning of the review order is open to criticism. The District Judge ought to have remanded the case on the view he took of the attachment order and had he been fully appraised of the authorities he would certainly have done so. He reviewed the order on the basis of a decision which was perhaps at that time not as authoritative as he thought it to be and he fortified himself by quoting a decision pronounced subsequent to his original order, which in my opinion he had no power to rely upon for the purpose of review. But as the original order was demonstrably wrong, even though the decision upon which he relied in review, was not at the time of the original order unchallenged, I decline to interfere with that review order in appeal.

The appeal and the revision petition are therefore dismissed with costs in the civil revision petition.

K. S. *Appeal and Petition dismissed.*

1. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Kallepalli Subbayya .. *Petitioner* (1st Plaintiff)*

v.

Kurra Venkatadri and others .. *Respondents (Defendants 1 to 3 and 2nd Plaintiff).*

Subbayya *v.* Venkatadri.

Civil Procedure Code (V of 1908), Sch. II—rr. 8 and 15—Order under r. 8 cancelling reference—Arbitrator giving award in spite of it—Court setting aside order under r. 8 and passing decree on award—Validity of decree—Remedy.

Even when an award is made by arbitrators whose powers have been revoked it is not void *ab initio* but has to be set aside under r. 15 of Sch. II. Where however no application to set aside the award has been made the High Court will not interfere in revision with a decree passed in terms of the award by the trial Court after cancelling its earlier order cancelling the reference to arbitration.

Petition under S. 115 of Act V of 1908 and S. 223 of the Government of India Act praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Bapatla in O.S. No. 134 of 1936.

K. Krishnamurthi for Petitioner.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the first plaintiff in a suit. The following is the history of the case. On 8th October, 1937, a reference was made through the Court to arbitration, the time for the award being fixed for the 15th November, 1937. There was much delay and time was finally extended to the 25th January, 1938. On that day an order was made adjourning the suit to the 11th February. On the 5th March, the Court passed an order cancelling the reference to arbitration. That is an appealable order under S. 104 (*a*) of the Civil Procedure Code, but no appeal has been filed against it. On 12th March, 1938, the arbitrators submitted an award notwithstanding the order of the 5th March and on the 25th March, the lower Court in a brief order cancelled its order of the 5th March, that is, the order cancelling the reference. No civil revision petition was filed against that order and no further action taken by the petitioner except that on 3rd June, 1938, objections were filed by the petitioner. On 30th July, 1938, the District Munsif passed an order, "Decree in terms of

*C. R. P. No. 101 of 1939. 4th February, 1941.

the award", ruling that the objections of the petitioner were out of time. This civil revision petition is now directed towards the order of the 30th July, and not against any other order.

The position, therefore, is that notwithstanding the order made under r. 8 of Schedule II an award was made and that later the order under r. 8 was cancelled. Whichever way the facts are regarded, there is no doubt that this was a case where the award was made after the issue of an order by the Court superseding the arbitration. Now r. 15 states that no award shall be set aside except on the grounds specified in that rule and one of them is as follows:

"The award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit . . . . [r. 15 (*c*)]."

It is true that the award has been made after the issue of the order of the Court superseding the arbitration. But the Court did not proceed with the suit because it cancelled its order cancelling the reference. What the precise reason for the introduction of the words "and proceeding with the suit" is I confess I have difficulty in appreciating but in those circumstances the remedy of the person aggrieved is to apply to the Court to set aside the award. There is no provision in the Code for circumstances such as those before me, unless it can be said that they are comprised in the words "or otherwise being invalid" which occur at the end of sub-r. (*c*) to r. 15. The authorities have been of little assistance. I have been referred to a judgment of a Full Bench of the High Court of Allahabad, *Ibrahim Ali* v. *Mohsin Ali*[1], which dealt with the Code before it was amended and the words "or being otherwise invalid" are not included in the original framing of the section. S. 521 states that no award shall be set aside except on one of the following grounds:

"(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit."

R. 15 in Sch. II is much more comprehensive. The learned Judges of the Allahabad High Court say that "if the power of the arbitrator is revoked as for example by the Court passing an order superseding the arbitration under Chap. 37, of the Code or the period fixed for making the award has expired before the award is made, the arbitrators have no

1. (1896) I.L.R. 18 All. 422.

longer seisin of the reference, they are *functus officio* and they cease to have any more power to make an award than the man in the street and in such a case any award which they made or purported to make would be void *ab initio*." I do not however find that there was any discussion before the learned Judges of the procedure found in S. 521 which implies that such an award should go through the formality of being set aside. One is tempted to say that an award made by persons who have been superseded must be bad, but in view of the explicit words of Sch. II, I think that I am bound to be against the petitioner in this case on procedural grounds. I think he had many remedies; he could have filed a civil revision petition against the order of the 25th March, 1938. I find it difficult to believe that on an affidavit alleging that such an order had been made, it would not have been possible to have directed the lower Court to send a copy of that order to this Court for revision. I have had a most interesting argument from the counsel on both sides but I have come to the conclusion that even when an award is made by arbitrators whose powers have been revoked, it is not void *ab initio* but has to be set aside under r. 15 of Sch. II. I am satisfied that the words "or being otherwise invalid," even if construed on the *ejusdem generis* principle must apply to a case like this which only differs from the case envisaged in r. 15 in that the suit is no more to be proceeded with. That being so, no application to set aside the award having been made, I have no alternative except to dismiss this civil revision petition with costs.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Rex ... *Petitioner* (Complainant)*

v.

Jaggopal Prasad and others .. *Respondents (Accused 1 to 3).*

Rex v. Jaggopal Prasad.

Madras City Police Act (III of 1888), S. 47—Money found in the pockets of persons found to be guilty of betting on horse races in a gaming house—When liable to forfeiture.

Where money found in the pockets of the persons found guilty of betting on horse races within certain premises had also been seized by the police under S. 47 of the City Police Act,

* Crl. R. C. No. 373 of 1941.
(Crl. R. P. No. 354 of 1941.) 30th July, 1941.

Rex *v.* Jaggopal Prasad.

Held, that the Court is to consider whether the money is likely to have been used in connection with the gaming and if it is likely to have been so used the Magistrate should order forfeiture, otherwise not.

Petition under Ss. 435 and 439 of the Criminal Procedure Code 1898, praying that the High Court will be pleased to revise the judgment of the Special Honorary Presidency Magistrate, Egmore, of the Court of the Presidency Magistrates, Egmore, Madras dated 4th February, 1941 and passed in C. C. No. 2040 of 1940 regarding the disposal of the money seized in the case.

The Crown Prosecutor (*P. Govinda Menon*) for Petitioner.

A. S. Veeraraghavan for Respondents.

The Court made the following

ORDER.—The first respondent has been found guilty of running a gaming house and the other respondents of gaming within the house.

The only question that arises in this petition is whether the money found in the pockets of the three respondents should be confiscated. Under S. 47 of the City Police Act the Magistrate may order all or any of the articles seized or the proceeds thereof to be forfeited. Various articles were found about the premises, and the police also seized the money that was in the pockets of the three respondents. The Magistrate has declined to forfeit the money that was on their person, and the question that arises in this revision petition—which has been filed by the Crown—is whether the Magistrate's order was a right one.

There can be no doubt that the general principle to be adopted by a Magistrate in considering a question of this kind is whether the money is likely to have been used in connection with the gaming. If so, he should order its forfeiture. If not, he should refrain from doing so. The Magistrate has not really considered this question at all; but has said that he intends following the practice of his Court to declare forfeited such money as may be found on the floor, and no more. The gaming of which the respondents were guilty was betting on horse races. When bets are made, money is taken and betting slips written in duplicate, one kept by the owner and one by the client. The point on which the Crown rely is that the sum of money found on the persons of the accused roughly corresponds with the value of the betting slips. It is not to be expected, the learned Crown Prosecutor says, that money should be lying about on the floor. One would expect, when a bet is made,

that the person conducting the betting would put the money in his pocket—not elsewhere. From the first respondent was recovered a sum of Rs. 443-11-0. The value of the betting slips on his person amounted Rs. 188. In a tin box belonging to him were found betting slips amounting to Rs. 272. Thus the total value of betting slips found in his possession was Rs. 460-14-0, a little over Rs. 17 more than the value of the money found in his pockets. On the person of the second accused was cash to the value of Rs. 19-4-0 and betting slips of the value of Rs. 24-8-0. On the person of the third accused cash was found to the value of Rs. 35-8-0 and betting slips of the value of Rs. 52-6-0. It is a question of fact in each case whether money found on the person of a person convicted under this Act was used for gaming. The close similarity between the sums found and the sums noted on the betting slips seems to be more than a coincidence, and I have little doubt in mind that the money found on the persons of the three accused was money used by them for gaming. The learned Magistrate's *rule of thumb* may do well enough in the average case, where there is no evidence one way or the other to indicate whether the money found on the person has been used for gaming or not; but where there is evidence pointing one way or the other the Magistrate is bound to take that evidence into consideration and not to rely entirely on his rough rule of practice.

Rex *v.* Jaggopal Prasad.

The petition is, therefore, allowed and the money seized by the police ordered to be forfeited.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY BURN, OFFICIATING *Chief Justice*, AND MR. JUSTICE HAPPELL.

Sorimuthu Pillai .. *Prisoner* (Accused).*

Sorimuthu Pillai, *In re.*

Commutation of sentence of death—Circumstances shown for lesser punishment—No need for recommendation to Government—Sessions Judge himself entitled to give lesser punishment.

Where in a case of murder, the circumstances are such as to justify the imposition of the lesser penalty the Sessions Judge himself can do so and it is not necessary to pass a sentence of death and to recommend that in the circumstances of the case, the Government might commute the death penalty.

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* R. T. No. 211 of 1940
(Crl. Appeal No. 859 of 1940). 3rd February, 1941.

Sorimuthu Pillai, *In re.*

Trial referred by the Court of Session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 106 of 1940 on 15th November, 1940 and appeal by the said prisoner against the said sentence.

V. T. Rangaswami Aiyangar for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

Burn, O.C.J

The Officiating Chief Justice.—The appellant has been convicted by the learned Sessions Judge of Tinnevelly for the murder of his sister Parvathi and for attempting to murder his sister's daughter Gomathi. He has been sentenced to death for the offence of murder and the learned Sessions Judge has quite properly not passed any separate sentence for the offence of attempting to murder.

The case was a simple one and there was a large number of eye-witnesses. The appellant's daughter Valli (P.W. 10) had been married to Rangayya, a son of the appellant's sister Parvathi. Rangayya died on the 25th June, 1940, and his body was cremated before the appellant and his daughter Valli could reach the village. The appellant's brother Avadiappa Pillai (not examined as a witness) appears to have said that since Rangayya's body had been cremated, Valli's tali ought to be taken off at once. Valli and her father both objected to this. There were further troubles caused by the fact that Parvathi who was a woman of some means had made a will in which she had expressed her intention of leaving her property in equal shares to her three sons. After the death of Rangayya the accused wanted his sister to make a gift to Valli of the share that would have been given to her husband under the will. Parvathi herself, according to the evidence of P.W. 3, refused to comply with this request.

In these circumstances very early in the morning of the 1st July, the appellant began to beat the women of the house with a short but heavy rice pounder or pestle (M. O. 1). He struck his sister Lakshmi (P.W. 11). He hit his daughter, P. W. 10. He hit P.W. 5 the daughter of the deceased, Gomathi. He hit his wife Kali (P.W. 9). Then his sister (the deceased) cried out from the kitchen and he went into the kitchen and struck her on the head fracturing her skull. Parvathi died at about 6 P.M. the same night. There were five eye-witnesses (P. Ws. 3, 4, 5, 7 and 8) and the learned Sessions Judge has

Sorimuthu Pillai *In re.*

Burn, O.C.J.

left out of account the evidence of P.Ws. 3 and 5, thinking it doubtful whether they could have seen exactly what happened. But he has found no reason to disbelieve the evidence of P.Ws. 4, 7 and 8. Relying upon their evidence the learned Sessions Judge convicted the appellant for the murder of his sister and for attempting to murder Gomathi. We think that the conviction arrived at by the learned Sessions Judge in which he agreed with two of the assessors and disagreed with the other two was correct. But this we think is a case in which we can accede to the plea finally made by learned counsel for the appellant in the matter of sentence. The learned Sessions Judge in paragraph 18 of his judgment has stated circumstances which, we think, do afford sufficient ground for mitigating the punishment in this case. He has pointed out that the murder was not premeditated, that there were reasons for disagreement which might very well have provoked a quarrel on the morning of the 1st July, and that the unfortunate plight of his daughter Valli must have caused the appellant a considerable amount of pain. These circumstances have moved the learned Sessions Judge to recommend that in this case the Government might commute the death penalty. It is not necessary in such a case to make a recommendation to the Government. If there are circumstances which justify the imposition of the lesser penalty, the Sessions Judge can do so. Confirming the conviction of the appellant for murder, we set aside the sentence of death and sentence him instead to transportation for life. The conviction for attempt to murder also is confirmed.

K.C. *Sentence varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Palayan ... *Petitioner* (Accused).*

Palayan, *In re.*

Criminal Procedure Code (V of 1898), S. 350—Accused recalling witnesses not willing to examine all of them—Discretion of magistrate to examine all of them.

There is nothing in S. 350, Criminal Procedure Code, which prohibits a Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused who has recalled them has exercised his right under proviso (*a*) to S. 350. Though the accused who has recalled witnesses has a right to say that no more witnesses should be examined that right is subject to a limitation, namely, the privilege of the Magistrate under S. 350 (1) of the Code, to examine all.

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* Cr. R. C. No. 675 of 1941
(Cr. R. P. No. 635 of 1941. 8th August, 1941.

Palayan, *In re.*

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate, Egmore, Madras, dated 29th July, 1941 and passed in C. C. No. 926 of 1941.

Pais, Lobo and *Alwares* for Petitioner.

K. V. Ramaseshan for *The Crown Prosecutor* for the Crown.

The court made the following

ORDER.—The petitioner was an accused in C. C. No. 926 of 1941 on the file of the Chief Presidency Magistrate, Egmore. Upon a transfer of the Magistrate, the petitioner invoked the provisions of proviso (*a*) to S. 350 of the Criminal Procedure Code and asked the Magistrate to recall the prosecution witnesses for fresh examination. The learned counsel for the petitioner found, after cross-examining certain prosecution witnesses, that they were saying more than they had before, and he thought that it was not in the interests of his client to examine any more prosecution witnesses. He therefore asked the Magistrate not to examine the remaining witnesses. The Magistrate insisted and said:

"It is not open to the accused to say after some of the witnesses were examined, that the other witnesses need not be examined. Even if he does not want the other witnesses to be examined the Court can in the interests of proper appreciation of evidence and in the interests of justice examine all the witnesses again. I therefore decide that all the witnesses will be summoned and heard again."

It is argued on behalf of the petitioner that both the reasons given by the learned Magistrate are not valid.

Two decisions of this Court, In re *Vudigalapudi Gadu*[1], and *Veerappa* v. *Emperor*[2], make it clear that even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined.

The other question is whether, after the accused has said that he does not wish to examine all the witnesses, it is open to the Magistrate to examine them. The argument of the learned counsel for the petitioner is that once proviso (*a*) to S. 350 (1) of the Criminal Procedure Code has been invoked, the Magistrate has lost his power to summon witnesses under S. 350 (1). I should be reluctant to hold so unless the wording

1. (1924) 20 L.W. 916. 2. 1935 M.W.N. 179.

Palayan, *In re.*

of S. 350 of the Criminal Procedure Code itself made that clear. Although a Magistrate might be content to decide the whole of the case on the record, yet there are obvious disadvantages in deciding the case partly on the record and partly on the witnesses heard by him; and a Magistrate might well be desirous, for a proper appreciation of the case by himself, to hear all the witnesses again if he is obliged to examine some of them. I do not find anything in S. 350 of the Criminal Procedure Code which prohibits him from exercising his discretion of examining all the witnesses again merely because the accused has exercised his right under proviso (*a*) to S. 350. The judgment of Burn, J., in *Veerappa* v. *Emperor*[1], has been quoted in support of this contention; but I do not think that Burn, J., was of that opinion. The purport of his judgment is that the accused has a right to say that no more witnesses should be examined; but that his right to stop a further examination of witnesses is subject to a limitation, that limitation being the privilege of the Magistrate under S. 350 (1) of the Criminal Procedure Code, to examine all. In the particular case before him, there was nothing on the record to show whether the Magistrate had invoked his privileges under S. 350 (1) or not; and so the learned Judge dismissed the revision case on the ground that it was not "certain that the learned Magistrate committed any error when he re-heard two prosecution witnesses whom the accused did not want him to rehear."

The petition is, therefore, dismissed. I would like to add that the Magistrate before examining the other witnesses in the case against the wishes of the accused should consider whether he himself feels the need to examine them. Only if he does, should he re-summon and re-hear them.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Examiner of Local Fund Accounts, Madras. *Petitioner* (Respondent)*

v.

Sp. Rm. Rm. Ramaswami Chettiar. *Respondent (Petitioner).*

Examiner of Local Fund Accounts, Madras *v.* Ramaswami Chettiar.

Madras Local Boards Act (XIV of 1920), S. 199—President of Panchayat Board paying in anticipation of sanction by Board amounts in excess of the

1. (1935) M.W.N. 179.

* C. R. P. Nos. 1634 and 1635 of 1937 14th August, 1940.

Examiner of Local Fund Accounts, Madras *v.* Ramaswami Chettiar.

scale to advocates engaged in a criminal case—Ratification of payments by Board—Effect—Surcharge order, validity.

In two criminal cases in which subordinates of a Union Panchayat Board were concerned, the president acting under his emergency powers made payments to advocates in anticipation of the Board's sanction in excess of the scale which the Board itself could sanction. The Panchayat Board duly ratified the payments. When objection was taken by the auditor because of the failure to obtain the Government's sanction as required by the rules, an application was made to the Government to sanction the payments, but it was rejected. The auditor therefore surcharged the president. The District Judge set aside the surcharge orders against the president on the ground that though the president can be legally surcharged, the members of the Board who voted in ratification of the president's action were equally responsible and it was inequitable to place the whole burden upon the president alone. On revision,

Held, that there is no limitation put upon the powers of the Court in dealing with an application to set aside a surcharge under rule 6 of the Surcharge Rules and the Court has jurisdiction in a proper case to remit the surcharge, which though legally recoverable, should equitably have been made upon others than the persons surcharged. Though it would have been better if the District Judge had upheld the surcharge to the extent of the president's proportionate share as a member of the Board, it was not desirable to interfere with the decision in revision.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the District Court, Ramnad dated 29th September, 1937 and made in O. P. Nos. 34 and 35 of 1937.

The Government Pleader for Petitioner.

A. C. Sampath Aiyangar and *T. K. Subramania Pillai* for Respondent.

The Court delivered the following

JUDGMENT.—These two revision petitions arise against an order of the District Judge setting aside two surcharge orders passed by the auditor under rules framed under S. 199 of the Madras Local Boards Act, against the president of a Union Panchayat Board.

The facts are not in dispute. In two criminal cases in which subordinates of the Board were concerned, the president made payments to advocates in excess of the scale which the Board itself could sanction. The fees were paid by the president in anticipation of the Board's sanction under the emergency powers conferred upon the president by S. 22 of the Madras Local Boards Act. The payments were reported to the Panchayat Board which duly ratified them though they were beyond its sanctioning power. Objection was taken by

Examiner of Local Fund Accounts, Madras *v.* Ramaswami Chettiar.

the auditor because of the failure to obtain the Government's sanction as required under the rules. Thereupon, an application was made to the Government to sanction these payments but it was rejected. The auditor therefore surcharges the president who had made the payments.

Rule 5 of the Surcharge Rules framed by the Local Government empowers the auditor to disallow an item of expenditure which is contrary to law and to surcharge it upon "the person making or authorising the making of the illegal payment." Clearly this rule permits the auditor to surcharge either the person who makes the payment or the person who authorises the payment to be made. It seems to follow therefore that the surcharge made by the auditor upon the president in this case is not illegal and the decision in *Secretary of State for India* v. *Sivasankaram Pillai*[1], which proceeds upon the second portion of r. 5 (1) and deals with an act causing loss for which the Board is corporately responsible has no clear relevance. At the same time it is certainly arguable on the facts of the present case that though the president who made this payment can be legally surcharged for it, the members of the Board who voted in ratification of the president's action are equally responsible and it is somewhat inequitable to place the whole burden upon the president alone. This seems to be the view taken by the learned District Judge and I doubt whether in revision the correctness of that view can be canvassed. R. 6 of the surcharge rules empowers the person aggrieved to apply to the civil Court to set aside the surcharge and a Court is empowered after taking such evidence as is necessary to confirm, modify or remit the surcharge. There is no limitation put upon the powers of the Court in dealing with such an application and I am not prepared to say that the civil Court has no jurisdiction in a proper case to remit a surcharge, which, though legally recoverable, should equitably have been made upon others than the persons surcharged. It would of course have been better had the learned District Judge in view of his conclusion upheld the surcharge to the extent of the president's proportionate share as a member of the Board. But I do not think it is desirable in revision to interfere with the decision on this ground. If it was the intention of the framers of the rules to limit the jurisdiction of the civil Court merely to ascertaining

1. (1935) 70 M.L.J. 404: I.L.R. 59 Mad. 876.

Examiner of Local Fund Accounts, Madras *v.* Ramaswami Chettiar.

whether a surcharge is in accordance with law or not and to give the civil Court no power to go into the merits of the surcharge and its equity, that should have been clearly expressed in the rules.

In the result, therefore, the petitions are dismissed with costs. (Advocate's fee one set.)

K.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

T. Srinivasa Rao and another .. *Appellants** (*Plaintiffs*)

v.

Annadhanam Seshacharlu and another. *Respondents* (*Defendants 3 and 2*).

Srinivasa Rao *v.* Seshacharlu.

Hindu Law—Daughter in possession of property before death of her mother—Alienation to meet marriage expenses of grand-daughter—Purpose if binding—Adverse title if can be perfected after inheritance.

A daughter inheriting property on her mother's death may alienate a reasonable portion of such property for defraying the marriage expenses of her daughter's daughter (the mother of the girl being dead and her father being poor), as the purpose is a pious and meritorious one from the religious point of view of the Hindus which would conduce to the spiritual benefit of the parents of the alienor.

A person claiming to be in adverse possession of property, on subsequently inheriting the same before the expiry of 12 years from the commencement of such possession, cannot perfect the title by adverse possession as the legal consequence of the vesting by inheritance is to put an end to the adverse possession running against the owner.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 1 of 1936 (A. S. No. 201 of 1934, District Court, Chittoor) preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 310 of 1932.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellants.

S. V. Venugopalachariar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for a declaration that the sale of a house and lands (Ex. X) executed by defendants 1 and 2 in favour of the 3rd defendant is not binding on the plaintiffs beyond the lifetime of the 1st defendant. The 1st defendant is the daughter of one Tirupati

* S. A. No. 970 of 1937. 14th March, 1941.

Srinivasa Rao v. Seshacharlu.

Ramarao who died without any male issue leaving him surviving his widow Janaki Bai and his daughter the 1st defendant. The case for the plaintiffs is that the suit properties belonged to Ramarao and devolved on Janaki Bai by right of inheritance and on her death, on the plaintiffs and that the said alienation by the 1st defendant was not for any legal necessity. The case for the defendants is that the property was the absolute property of Janaki Bai, that she gifted it to the 1st defendant in or about 1904, that ever since the said date she had been in absolute possession and enjoyment of the property and acquired title thereto by adverse possession. The 1st defendant also pleaded that the said sale was made for discharging a prior mortgage which was executed for a necessary purpose, namely, for discharging certain debts incurred for repairs to the house, for medical treatment and for obsequial ceremonies of her mother and for the marriage expenses of her daughter's daughter. She also denied that plaintiffs are the reversioners. The learned District Munsif found that the plaintiffs are the reversioners of Ramarao and also of Janaki Bai, that the property belonged to Janaki Bai, that though the property was gifted to the 1st defendant in 1904, she did not acquire title thereto by adverse possession because Janaki Bai died within twelve years before succession opened, that the mortgage for the discharge of which the sale was executed was valid only to the extent of Rs. 600 on the ground that that sum must be deemed to have been spent towards the necessary expenses binding on the estate and that the balance of Rs. 1,200 spent for the marriage expenses of her daughter's daughter was not a legal necessity and that the said sale was therefore binding upon the plaintiffs only to the extent of Rs. 600. On appeal the learned Subordinote Judge confirmed the finding as to the status of the plaintiffs as the reversioners of Janaki Bai and also in regard to the question of adverse possession. He upheld the sale in its entirety on the ground that the amount borrowed for the marriage of the daughter's daughter of the 1st defendant was for a necessary purpose. He took the view that the marriage of the daughter's daughter was a proper religious object which would conduce to the spiritual benefit of the 1st defendant's father Rama Rao and her mother Janaki Bai.

This appeal is preferred by the plaintiffs and on their behalf their learned counsel Mr. Bhujanga Rao contended that

Srinivasa Rao v. Sesha-charlu.

the view taken by the learned Subordinate Judge in regard to the expenses incurred towards the 1st defendant's daughter's daughter's marriage was wrong and that, in any event, the amount borrowed was excessive. The questions therefore to be decided are, (1) was the amount borrowed for the expenses of the said marriage for a necessary purpose so as to bind the estate, and (2) was the amount of Rs. 1,200 spent in connection therewith proper and justifiable if not, what is the reasonable amount that can be allowed?

Before dealing with these questions, I shall deal with the argument of Mr. Venugopalachari on the finding of the lower Court in regard to the question of adverse possession. He contended that the finding was wrong and if it was decided in his favour, the decree of the lower Court could be supported on that ground. He put his argument thus: long before succession opened the property was gifted away by Janaki Bai to the 1st defendant and from the date of the gift the 1st defendant was dealing with the property in her own right and when Janaki Bai died she did not take the property as her heir but continued to hold it adversely to the estate and no suit having been filed within 12 years from the date of the gift, she acquired title thereto by adverse possession after the lapse of the said period. In support of his contention he relied on the decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*[1], and a decision of this Court reported in *Alagiri Chetty* v. *Muthusami Chetty*[2]. On principle it seems to me that the contention is untenable. On the death of Janaki Bai the property vested in the 1st defendant by right of inheritance. Under the Hindu law, succession cannot remain in abeyance and whether the heir at law wills or not, the property will vest in him. Before the title to the suit property was perfected by adverse possession by the first defendant, the property vested in her. The legal consequence of that vesting is that the adverse possession which was running against the owner came to an end. The first defendant became the owner and adverse possession could not run against herself. In *Varada Pillai* v. *Jeevarathnammal*[1], the facts were as follows. Gopalakrishna Pillai and Parthasarathi Pillai owned mitta in equal shares. Gopalakrishna died leaving his widow Rajammal

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1. (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
2. (1940) 50 L.W. 571.

Srinivasa Rao v. Sesha-charlu.

and Parthasarathi Pillai died leaving his widow Alangarammal to whom he bequeathed absolutely his share in the said mitta. The whole mitta was registered in the names of both Rajammal and Alangarammal. On 10th October, 1895 two petitions were presented to the Collector of Chingleput, one by Alangarammal and the other by Rajammal, stating that each had gifted away the share in the mitta to which each was entitled to Duraisani Ammal on the 8th October, 1895 and that therefore the mitta might be transferred in her name. This was accordingly done and ever since that date until the date of her death in 1911, Duraisani Ammal enjoyed the property and was in receipt of rents and profits solely. Rajammal died in 1901 and Alangarammal died in 1912, a year after Duraisani Ammal's death. Duraisani left a daughter Jeevarathnammal who succeeded to her property. The plaintiffs who were the reversioners of Parthasarathi Pillai and his widow Alangarammal sued to recover a half share of the mitta. Among other pleas Jeevarathnammal pleaded that Duraisani Ammal acquired title to that share by adverse possession. This plea was upheld by their Lordships of the Privy Council. They took the view that the gift was invalid on the ground that it was not made in conformity with the provisions of the Transfer of Property Act but Duraisani must be deemed to have enjoyed the property adversely to both Rajammal and Alangarammal from the date of the gift and that as by the date of her death in December, 1911, twelve years had elapsed, the claim of Alangarammal and therefore of her heirs, the plaintiffs, was barred by adverse possession. It was contended before their Lordships that when Rajammal died in 1901 Duraisani succeeded to her moiety by right of inheritance and therefore her possession from that date must be deemed to have been as a co-owner and that the possession of Duraisani as such co-owner could not be adverse to Alangarammal or her heirs. This contention was negatived by their Lordships and they remarked thus:

" In the present case it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal throughout. This contention therefore also fails."

Srinivasa Rao v. Sesha-charlu.

It will thus be seen that their Lordships dealt only with the adverse possession regarding the share of Alangarammal. The possession of Duraisani even of the share of Rajammal during her lifetime was not as co-owner and therefore it was *prima facie* adverse to Alangarammal in respect of her share. Thus on the death of Alangarammal as against her heirs the character of this possession would continue. She was not an heir of Alangarammal and therefore had no interest in her share. But their Lordships did not decide the question that if Rajammal had left a co-heir along with Duraisani Ammal whether Duraisani could plead adverse possession in respect of Rajammal's moiety. In *Alagiri Chetty* v. *Muthuswami Chetty*[1], this question pointedly arose and my learned brother Patanjali Sastri, J., took the view that the principle of the decision in *Varada Pillai* v. *Jeevarathnammal*[2], would apply to it. In that case there were two brothers, Servaraya Chetti and Alagiri Chetti. Servaraya died in 1891 leaving him surviving his widow who also died in the same year. Alagiri was therefore the person who became entitled to the property. But on the date of the death of the widow, one of the sons of Alagiri (Alagiri had five sons) was in possession of the house and continued to be in sole possession thereof until the date of Alagiri's death in 1900. The plaintiffs who were the grandsons of Alagiri by two of his sons Annasami and Kandasami sued to recover the share of their fathers. The first respondent resisted the claim on the ground of limitation and his plea was upheld on the ground that under Art. 141 of the Limitation Act the suit should have been filed within twelve years from the date of the widow's death. It would seem to me that *prima facie* on the death of Alagiri Chetti the property having vested in all the heirs of Alagiri Chetti as tenants in common the adverse possession which was running against Alagiri Chetti must be deemed to have come to an end. In the case of a tenancy in common each tenant has the entire possession as well of every part as of the whole. It cannot be said that one tenant in common who is in possession of the property can be held to be exclusively in possession of that whole because the principle is each has got an undivided moiety of the whole and not the whole of the undivided moiety. Therefore on the death of Alagiri Chetty all the

1. (1940) 50 L.W. 571.

2. (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.).

Srinivasa Rao v. Seshacharlu.

heirs became entitled to the property and there was thus unity of title. The question is whether there was unity of possession. It cannot be denied that so far as possession of the first respondent was concerned, he cannot be said to be holding adversely to himself in respect of any portion of the property because the character of possession must necessarily change in consequence of the vesting in himself as part owner. As the possession of one tenant in common is *prima facie* possession of the other, the possession therefore of the first respondent must only be held to be adverse after the date of the death of Alagiri. There must be distinct evidence of ouster after that date because it cannot be said that at the moment of vesting there was ouster. In order to constitute ouster, there must be assertion of a hostile title after vesting and notice thereof to the other co-heirs, direct or indirect, inferable from acts and circumstances which would warrant such an inference. It may be possible for the Court to infer that the possession of the first respondent from the date of the death of Alagiri cannot be said to be on behalf of all the heirs of Alagiri having regard to the prior hostile possession of the first respondent. Whether *Alagiri Chetty* v. *Muthuswamy Chetty*[1], was correctly decided or not, the present case is distinguishable. The property vested solely in the first respondent on the death of Janaki Bai. The person to sue and the person to be sued being one and the same person, the owner must be deemed to have regained possession thus putting an end to any prior hostile title. I am therefore of the opinion that the view taken by the lower appellate Court that the 1st respondent did not acquire title by adverse possession as against reversionary heirs is correct.

I shall now deal with the question regarding the validity of the mortgage in so far as it was executed for borrowing moneys for the expenses of the daughter's daughter's marriage of the 1st defendant. Under the Hindu law the daughter as heiress of her father or mother takes a restricted interest similar to that taken by a widow with a similar power of disposal. The power of disposal of a Hindu widow inheriting her husband's property is thus defined by the Privy Council in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[2]:

"For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger

1. (1940) 50 L.W. 571.
2. (1861) 8 M.I.A. 529 at 551.

Srinivasa Rao v. Sesha-charlu.

power of disposition than that which she possesses for purely worldly purposes".

Dealing with this passage Benson and Krishnaswami Aiyar, JJ., in *Tatayya* v. *Ramakrishnamma*[1], remarked thus:

"Their Lordships did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary".

The learned Judges further pointed out that:

"If the expenditure by the daughter is for the spiritual needs of the father's soul, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband".

I would add that in the case of an alienation by a daughter of her mother's stridhanam, if the expenditure by the daughter was for the spiritual needs of the soul of her parents, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband. The views expressed in *Tatayya* v. *Ramakrishnamma*[1], have received the approval of the Privy Council in *Sardar Singh* v. *Kunj Bihari Lal*[2]. Their Lordships of the Judicial Committee also cited with approval the observations of Mukherjee, J., in *Khub Lal Singh* v. *Ajodhya Misser*[3], namely that

"it was absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, 'because it must depend upon the circumstances of the disposition whenever such disposition shall be made, and must be consistent with the law regulating such disposition' ".

Their Lordships further pointed out in that case that the necessity for the alienation need not be of the same character as in the case of alienations for secular purposes, that the Hindu system recognises two sets of religious acts, one obligatory and the other optional, and that the alienation for both the sets of acts would be binding on the reversionary heir but only in regard to acts which are optional, the alienation must relate only to a reasonable portion of the property. Their Lordships upheld the gift of a small portion of the property for the offerings to the deity and for the maintenance of the priest charged with the performance of that duty on the ground that it was a pious act in the Hindu system.

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1. (1910) 20 M.L.J. 798: I.L.R. 34 Mad. 288.
2. (1922) 44 M.L.J. 766: L.R. 49 I.A. 383: I.L.R. 44 All, 503.
3. (1915) I.L.R. 43 Cal. 574.

Srinivasa Rao v. Sesha-charlu.

The question in the present case is whether the marriage of a daughter's grand-daughter could be said to be a pious and meritorious act which would conduce to the spiritual benefit of the deceased parents of the 1st defendant. Judicial decisions have upheld alienations made for the marriage of a daughter's daughter or a daughter's son of a prepositus. If in this case the marriage expenses had been incurred for the expenses of the daughter of the 1st respondent and the mother of the girl whose marriage is the subject of consideration, there could be no doubt as to the validity of the mortgage. (Vide *Chudammal* v. *Nadamuni Naidu*[1], following *Rustam Singh* v. *Moti Singh*[2], and *Venkatasubba Rao* v. *Ananda Rao*[3], and *Mallayya* v. *Bapi Reddi*[4]. In the case of the daughter's daughter's marriage of the prepositus the alienation was upheld on the ground that the husband of the daughter and the father of the girl was indigent and the prepositus, if he had been alive, would be under a moral duty to perform her marriage. In the case of a daughter's son, Venkatasubba Rao, J., in *Mallayya* v. *Bapi Reddi*[4], took the view that a Hindu would be morally bound to give support to the marriage of his daughter's son. In that same case he observed that so far as the marriage of a daughter's daughter is concerned, there could be no question that the costs incurred for her marriage would be a proper legal necessity to justify an alienation. In *Venkatasubba Rao* v. *Ananda Rao*[3], the learned Judges upheld an alienation made by a Hindu widow for debts contracted for the thread marriage ceremonies of one of her daughter's sons even in a case where the father was not indigent. The learned Judges took the view that the expenditure incurred must be said to be for purposes connected with the husband's spiritual welfare. In disapproving the contrary view taken by the lower Court, the learned Judges remarked thus:

> "The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may for aught we know in its result fall short of her intention; but so long as she acted with piety and in consonance with prevalent notions we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol."

The *ratio decidendi* of these cases appears to be that if the acts for which alienations were made can be considered to

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1. (1909) 3 I.C. 77.
2. (1896) I.L.R. 18 All. 474.
3. (1934) 67 M.L.J. 204: I.L.R. 57 Mad. 772.
4. (1931) 62 M.L.J. 39.

Srinivasa Rao v Sesha-charlu.

be pious and meritorious according to the prevalent Hindu notions, the alienations, provided the quantum is reasonable, should be upheld.

The question in this case is whether the marriage of a daughter's grand-daughter would satisfy this test. It is recognised by Hindu Shastras that the gift of a virgin in marriage is a very pious and meritorious act that will confer spiritual benefit. (c. f. *Ramaswami Aiyar* v. *Vengidusami Aiyar*[1].) In Danachandrika Anukramanika by Divakara Bhatta we find the following:

हेमाद्रौ—

सहस्रमेव धेनूनां शतं वाऽनडुहां समम् ।
दशानडुत्समं यानं दशयानसमो हयः ॥
दशवाजिसमा कन्या भूमिदानं च तत्समम् ।
तस्मात्सर्वेषु दानेषु कन्यादानं विशिष्यते ॥ इति

अग्निपुराणे—

श्रुत्वा कन्याप्रदानं च पितरश्च पितामहाः ।
विमुक्ताः सर्वपापेभ्यो ब्रह्मलोकं व्रजन्ति ते ॥ इति

"Then the gift of a Kanya—in Hemadri (it is said) :—The gift of a thousand cows or that of a hundred is equal to that of a bull. The gift of a vehicle (vahanam) is equal to that of ten bulls. The gift of a horse is equal to that of ten vehicles. The gift of a Kanya is equal to that of ten horses or to that of land. Hence gift of Kanya is highly praiseworthy. In Agni Purana (it is said) :—

Hearing about the gift of a Kanya (by a descendant) one's parents and grandparents are liberated from all sins and attain heaven (the abode of Brahman)."

In Samskara Ratnamala of Bhatta Gopinatha (1st canto of Grihya Sutras edited by V.S.R. Kasinatha Sastri Bahu Sastri Padke, 1899 Edition) it is stated thus: Page 499:

अनाथायाः कन्याया धर्मार्थविवाहकरणं तत्फलं चोक्तं पुराणान्तरे—

आत्मीकृत्य सुवर्णेन परकीयां तु कन्यकाम् ।
धर्म्येण विधिना दातुमसगोत्रोऽपि युज्यते ॥
अनाथां कन्यकां दृष्ट्वा यो दद्यात्सदृशे वरे ।
द्विगुणं फलमाप्नोति कन्यादाने यदीरितम् ॥

सालंकारकन्यादाने फलविशेषमाह संवर्तः—

1. (1898) 8 M.L.J. 170: I.L.R. 22 Mad. 113 at 115.

कूकुदश्चाश्वमेधी च प्राणदाता भयेषु च
समं यान्ति रथा एषां त्रयो वै नाऽत्र संशयः ॥ —p. 501

[Note: सत्कृत्यालंकृतां कन्यां यो ददाति स कूकुदः]

" The benefits accruing from the Shastraic gifting of a destitute Kanya are told thus in Puranas. It is advisable to make one's own, another's daughter (Kanya) in exchange for gold, even though the Kanya does not belong to one's own Gotra and gift her away according to Shastraic injunctions—he who on perceiving a destitute girl makes a gift of her to a proper bridegroom obtains twofold the benefits accruing from the gift of a Kanya.

The benefits accruing from the gifting of a Kanya—bejewelled and with ornaments, Kookuda *i.e.*, a person making such a gift mentioned above, a man performing Asvameda sacrifice, a man who protects another in peril, all three are invited to Indra's abode in his car".

In Mahabharatham Anusasana Parvam XIII, Chap. 235, stanzas 67 to 73 the spiritual benefit of Kanyadhanam is thus described:

उमोवाच—

भगवन् कानिदेयानि धर्ममुद्दिश्य मानवैः ।
तान्यहं श्रोतुमिच्छामि तन्मेशंसितुमर्हसि ॥ Sl. 1

ईश्वरः उवाच —

अतःपरं प्रवक्ष्यामि कन्यादानं यथाविधि ।
कन्यादेया महादेवि परेषामात्मनोऽपि वा ॥ Sl. 68
कन्यां शुद्धव्रताचारां कुलरूपसमन्विताम् ।
यस्मै दित्सति पात्राय तेनापि भुजकामिताम् ॥ Sl. 69
प्रथमं तत्समाकल्प्या बन्धुभिः कृतनिश्चयः ।
कारयित्वा गृहं पूर्वं दासीदासपरिच्छदैः ॥ Sl. 70
गृहोपकरणैश्चैव पशुधान्येन संयुताम् ।
तदर्थिने तदर्हाय कन्यां वा समलंकृताम् ॥ Sl. 71
सविवाहं यथान्यायं प्रयच्छेदग्निसाक्षिकम् ।
वृत्त्यायतां यथाकृत्वा सद्गृहे तौ निवेशयेत् ॥ Sl. 72
एवं कृत्वा वधूदानं तस्य दानस्य गौरवात् ।
प्रेत्यभावे महीयेत स्वर्गलोके यथासुखम् ॥
पुनर्जातस्य सौभाग्यं कुलवृद्धिं समाप्नुयात् ॥ Sl. 73

"Goddess Uma said to Iswara, 'Oh Lord, what are the things that can be given as gifts with a view to Dharma. Please explain them to me. I wish to hear the same".

Srinivasa Rao v. Sesha-charulu.

The Lord said:

* * * * *

(68 to 73):

"After this, I shall say about Kanyadhanam (gift of a maiden). Oh Mahadevi, one must give a girl with clean vratams, good conduct, good caste and good looks, either his own girl or *another's girl,* to a good boy who has an affection for her, after first coming to a decision himself, on the propriety of the boy and then in consultation with the relations, the gift is to be made according to Shastras. That girl is to be gifted with house, with all jewels, maid servants, man servants, gifts, household articles, cattle, grains etc., to one who is fit for her and who loves her, before Agni (fire) and the marriage celebrated according to Shastras. The couple must be provided with means of livelihood and they both must be settled in a good house. If Kanyadhanam is done in this manner, by virtue of that dhanam, the giver after death will reach Swarga, be praised there and be happy. Even in the next birth, he will acquire wealth and progeny."

Thus the gift of a destitute virgin in marriage is a pious and meritorious act from a religious point of view. Much more so, it must be in the case of a daughter's grand-daughter whose parents are indigent. According to prevalent Hindu notions the prepositus would be morally bound to perform her marriage. It is clear from the evidence in this case that the mother of the girl was dead and the father was poor and not possessed of any means to perform the marriage. The girl and her parents lived with the first defendant and she was being brought up by her. I would therefore hold that the marriage of this girl is a pious and meritorious act according to the Hindu system and the expenses incurred therefor must be deemed to be expenses incurred for charitable or religious purposes within the meaning of the rule laid down by the Privy Council and that it was open to the 1st defendant to mortgage the property for the expenses in connection therewith.

The question is whether the sum of Rs. 1,200 spent towards the expenses of the marriage was justifiable; if not, what is the reasonable amount to be allowed? The property was sold for Rs. 2,700. It appears to me that a sum of Rs. 1,200 towards marriage is a little excessive. Having regard to the fact that the girl was given away to a well educated bridegroom, I would hold that the widow would be justified in this case to alienate a third of her property and I would therefore uphold the mortgage to the extent of Rs. 900.

The result of my finding is that the sale in favour of the 3rd defendant must be upheld subject to the obligation of refunding a sum of Rs. 300 to the next reversioner. I accord-

Srinivasa Rao v. Sesha-charlu.

ingly hold that the sale is valid and binding on the reversioners but I direct the 3rd defendant to refund after the death of the 1st defendant a sum of Rs. 300 with interest at 6 per cent. per annum to the plaintiffs from that date if they happen to be the next reversioners or to the persons who happen to be the next reversioners on the date of her death. Parties will bear their own costs in this appeal.

K.C. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VENKATARAMANA RAO.

The General Agencies and Trades Ltd. by its Managing Director, V. Dharma Rao. *Appellant** (*Applicant*)

v.

K. N. Viswanathan as Official Liquidator representing the abovenamed Company in liquidation *Respondent* (*Respondent*).

General Agencies and Trades Ltd. v. Viswa-nathan.

Indian Companies Act (VII of 1913), *Ss.* 171 *and* 230-*A* (5)—*Claim application of creditor—Time granted to prove claim—Claimant's request to file separate suit—Time given—No action taken—Dismissal of claim—Later application for investigation of claim in the liquidation proceedings—Whether permissible.*

In the winding up proceedings of a company the appellant was directed to prove by the 15th July, 1938, his claim for a sum of Rs. 25,313-8-2 alleged to be due by way of commission and advances made to the company, and this he failed to do. He was given further time and he eventually asked to be allowed to prove his claim in a suit against the Official Liquidator. The application was granted on terms which were not fulfilled. Extension of time having been applied for and refused that order amounted to a dismissal of the appellant's claim. No appeal was however preferred against that order, but the claimant obviously as a result of the publication of the judgment in *Bhide* v. *The Travancore National and Quilon Bank Ltd.*, (1940) 2 M.L.J. 697: I.L.R. (1941) Mad. 328, took out a Judge's summons calling upon the Official Liquidator to show cause why his claim should not be looked into in the liquidation proceedings. The summons was dismissed. On appeal,

Held, that the application was properly dismissed. If the appellant had at the beginning insisted on the Court adjudicating his claim without recourse to a suit, he might have got the adjudication, but, in the circumstances of the case, it was too late for him to turn round and ask the Court to change the procedure which he himself had considered to be proper.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated the 28th November, 1940, and passed

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* O.S.A. No. 6 of 1941. 21st April, 1941.

General Agencies and Trades Ltd., v. Viswa nathan.

in exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2609 of 1940 in O.P. No. 77 of 1938.

K. Kameswara Rao for Appellant.

K. Narasimha Aiyar for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant was the managing agent of the Garland Petroleum Company (Madras) Limited which is being wound up by this Court under a compulsory winding up order passed on the 2nd April, 1938. The Court directed that all claims against the company should be presented by the 15th July, 1938. The appellant presented a claim for Rs. 25, 313-8-2, which was said to be due by way of commission and advances made to the company. The appellant's claim together with others were mentioned to the Court (Gentle, J.) on the 16th September, 1938. The Official Liquidator then informed the Court that he required the appellant to prove the claim in detail. The learned Judge decided that he would not enter upon an adjudication of the matter at that stage, and adjourned the matter for one month in order to allow the appellant to take such steps as he might deem necessary to enforce the claim. Apparently nothing was done, and when the matter came before Mockett, J., on the 14th March, 1940, he gave the appellant two weeks in which to prove his claim. The learned Judge directed that if no action was taken within the period the appellant would be excluded from the benefit of any distribution which might be made. On the 11th April, 1940, the appellant asked that the Judge's summons which he had taken out should be treated as an application for leave to file a suit against the Official Liquidator under S. 171 of the Indian Companies Act in order to prove his claim. The learned Judge pointed out that the appellant had been very slow in prosecuting his claim, which was in amount equal to almost the entire assets of the company. The learned Judge, however, decided to grant on terms the application for leave to file a suit. He directed that the suit should be filed before the 24th April, 1940, and that the appellant should give security for costs to the satisfaction of the Registrar in the sum of Rs. 1,500. The learned Judge also ordered that if the suit was not filed within the period allowed the application should be reposted for orders on the 25th of that month.

General Agencies and Trades Ltd., *v.* Viswanathan.

Leach, C.J.

The suit had not been filed by the 25th April, but on that date the appellant asked that further time be allowed to him in which to file the suit. This application was dealt with by Gentle, J., who granted further time until noon on the 1st May, 1940. The learned Judge stated that his order was to be regarded as being "final and peremptory". The appellant presented his plaint on the 1st May, 1940, but did not tender the security until three-quarters of an hour after the time allowed, and Gentle, J., refused to grant a further extension. The consequence was that that the appellant had failed to prove his claim within the time granted by the Court. He had undoubtedly been guilty of great procrastination, and in the circumstances it is perhaps not surprising that no appeal was filed against the order of Gentle, J., of the 1st May, 1940, refusing to condone the delay of three-quarters of an hour. The result was that the order of Gentle, J., became final.

On the 19th October, 1940, the judgment of this Court, *Bhide* v. *The Travancore National and Quilon Bank Ltd., in Liquidation*[1], was published in the "Law Weekly." It was there held that the general law of insolvency applies to the winding up of an insolvent company and that when an application is made under S. 230-A (5) of the Indian Companies Act for an order rescinding a contract with the company and for an award of damages to the applicant, the applicant is entitled to have his application heard without being relegated to a regular suit. On the 5th November, 1940, obviously as the result of the publication of this judgment, the appellant took out a Judge's summons calling upon the Official Liquidator to show cause why the claim should not be inquired into and adjudicated on in the liquidation proceedings. This summons came before Gentle, J., on the 28th November, 1940, and the learned Judge dismissed it on the ground that it did not lie, because the appellant had failed to prove the claim within the time allowed.

We consider that the decision of the learned Judge must be confirmed. The appellant was required to prove his claim by the 15th July, 1938, and this he failed to do. He was allowed further time and he eventually asked to be allowed to prove his claim in a suit. This application was granted on terms which were not fulfilled. The suit not having been filed

1. (1940) 2 M.L.J. 697 : I.L.R. (1941) Mad. 328 : 52 L.W. 635.

General Agencies and Trades Ltd., *v.* Viswanathan.

Leach, C.J.

within the time allowed by the Court and the Court having refused to grant a further extension, the order amounted to a dismissal of the appellant's claim. The appellant accepted the justice of this order until the idea was conceived of taking advantage of the judgment in *Bhide* v. *The Travancore National and Quilon Bank Ltd., in Liquidation*[1]. If the appellant had at the beginning insisted on the Court adjudicating on his claim without recourse to a suit the case might have fallen within that judgment, but he preferred to have his claim decided in a suit and it is far too late in the day to allow him to turn round and ask the Court to change the procedure which he himself had considered to be proper. Ample time was given to him to prove his claim and he failed to take advantage of it. The present application is merely an after-thought.

For these reasons the appeal fails and will be dismissed with costs. *Appeal dismissed.*

K.C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Perianna Mudali and others .. *Petitioners* (Accused).*

Perianna Mudali, *In re.*

Criminal trial— Jurisdiction — Aggravating facts making offence one triable by a Magistrate with higher powers—Effect on Magistrate's jurisdiction to try only the lesser offence.

Where a Sub-Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him (a lesser offence which he had jurisdiction to try) and had not deliberately overlooked any aggravating facts with a view to securing for himself jurisdiction over the offence, his proceedings would be proper and the High Court will not interfere.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Second Class Magistrate of Vellore dated 10th March, 1941, and made in C. C. No. 54 of 1941.

V. T. Rangaswami Aiyangar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The prosecution case was that the Deputy Tahsildar saw a number of goats grazing in the forest and that

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1. (1940) 2 M.L.J. 697: I.L.R (1941) Mad. 328: 52 L.W. 635.

*Crl. R. C. No. 493 of 1941. 6th August, 1941.
(Crl. R. P. No. 464 of 1941).

Perianna Mudali, *In re.*

finding that the owner had no license for so grazing them, he proceeded to drive them to the cattle pound. On the way, the Deputy Tahsildar was met by the first and second accused, who are brothers and owners of the goats, and by the third accused, their friend. Without disclosing the fact that the first and second accused were the owners of the goats they told the Deputy Tahsildar that they would assist him in driving the goats to the pound and they led him not to the pound but to their own pen. The Deputy Tahsildar duly drove the goats into the pen and upon entering the village to inform the village magistrate, he was told that the enclosure into which he had driven the goats was not a cattle pound but a private pen of the owners of the goats. The Deputy Tahsildar thereupon filed a complaint in the Court of the local Sub-Magistrate, and in due course a charge was framed against all the three accused under Ss. 417 and 379, Indian Penal Code. The case has not yet ended; but this revision petition was admitted because it was contended on behalf of the accused that the offence actually committed was one under S. 420, Indian Penal Code, an offence punishable only by a First Class Magistrate.

The leading case on the question as to the effect of trying persons for an offence less serious than was actually committed is to be found in *King Emperor* v. *Ayyan*[1], a decision of a Bench of this Court. The argument of the learned advocate for the petitioners is that the act of the Magistrate, whether the framing of the charge for a lesser offence was deliberate or not, makes his proceedings void; because S. 530-p of the Criminal Procedure Code says that if any Magistrate, not being empowered by law in this behalf, tries an offender, the proceedings shall be void. What that really means is pointed out in the case above referred to in these words:

"The meaning of this is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under S. 193, Indian Penal Code, that is, for an offence triable by a First Class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the Magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He

1. (1901) I.L.R. 24 Mad. 675.

Perianna Mudali, *In re.*

is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction . . . . . . It would also, in our opinion, be open to the revising and appellate authorities to set aside the Magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void *ab initio*, but because they were improper and the interests of justice required them to be set aside."

A similar question came up before Jackson, J., in *Kattuva Rowther* v. *Suppan Asari*[1]. The learned Judge draws from *King Emperor* v. *Ayyan*[2], the following proposition:

"If a Magistrate entirely overlooks some fact which would carry, the case beyond his jurisdiction and tries the accused for a lesser offence, he is not held to have acted without jurisdiction. The question whether he has or has not entirely overlooked the circumstances would be one of fact. If on the other hand, he does not overlook the circumstance, but after his attention has been drawn to it he deliberately ignores it, his proceedings would be improper, though not void."

Venkatasubba Rao, J., in *Setti Rangayya* v. *Somappa*[3], does not refer to *King Emperor* v. *Ayyan*[2], but his attention was drawn to 2 Weir's Criminal Rulings No. 517 dated 26th October, 1885, which was a case where the Magistrate had charged an accused under S. 417, Indian Penal Code, although the offence committed was one punishable under S. 420, Indian Penal Code. In this case it was laid down that as the accused had committed an offence under S. 417, as well as under S. 420, he could be legally convicted of both and therefore the conviction of the minor offence was not absolutely illegal. But the learned Judges added:

"But the doctrine that no tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation, which make the offence really cognisable only by a higher tribunal still holds good, and where the accused has himself objected to the jurisdiction, it is possible that the High Court would feel itself bound to interfere."

Venkatasubba Rao, J., who was dealing with a very similar question, followed that authority. It will therefore appear from the above decisions that whether or not the High Court should interfere would depend upon whether the Magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If

1. (1926) 25 L.W. 86. 2. (1901) I.L.R. 24 Mad. 675.
3. (1924) 20 L.W. 919.

the Sub-Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him, and he had in fact jurisdiction to try the lesser offence, his proceedings would be proper and the High Court would not interfere.

On the facts of the present case, I am inclined to think that the accused would not have been guilty of an offence punishable under S. 420, Indian Penal Code; for even after the Tahsildar had driven the goats into the pen of the accused, he still retained control over them; and he would lose that control only if the accused did some act which would have prevented the Tahsildar from removing them again if he had so wished. Whether that view is correct or not, I do not think that there is any ground here for believing that the Sub-Magistrate clutched at jurisdiction. The learned advocate for the petitioners points out that the fact that the accused were also charged with theft indicates that both the prosecution and the Sub-Magistrate seemed to have realised that there was a constituent in the offence which was rather more than was required for a charge under S. 417, a constituent which showed that the Tahsildar had parted with possession in favour of the accused because of the deceit that had been practised on him. On the facts as narrated to me by the learned advocate for the petitioners, it is difficult to see how there was an offence of theft. There might have been, if the accused afterwards took the goats away to some other place without the Tahsildar's permission—or perhaps if they had prevented the Tahsildar from having access to the goats. The evidence however is not before me; and so I do not wish to express any opinion as to whether the offence of theft was committed or not. If there was, it was probably not a part of the same transaction which led to the offence of cheating. On the facts before me, I am not prepared to say that the Magistrate is wrong or that any interference is called for from this Court.

The petition is accordingly dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Thekke Mannengath Ittichiri *alias* Ammu Poduvalssiar. *Appellant** (*Plaintiff*)

v.

Vengalur Naduvilepat Poozhi Kunnath Karnavan Appu Menon and others. *Respondents* (*Defendants 12, 5, 6, 7, 8, 2 and 3*).

Mannengath Ittichiri *v.* Appu Menon.

Malabar Tenancy Act (*XIV of* 1930), *S.* 17—*Right of kanomdar to call upon his immediate landlord for renewal—Property belonging to public temple—Madras Hindu Religious Endowments Act* (*II of* 1927), *S.* 76—*Necessity for sanction of lease or mortgage for over* 5 *years—Effect on right of renewal under Malabar Tenancy Act, S.* 17.

Where the kanomdar is entitled to call on his immediate landlord for renewal of his kanom for 12 years, the fact that the properties belong to a public temple cannot affect the right of renewal. The bar enacted in S. 76 of Madras Act II of 1927 cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25 of the Malabar Tenancy Act.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 35 of 1936 preferred against the decree of the Court of the District Munsif of Ponani in O. S. No. 571 of 1931.

D. A. Krishna Variar and *Ravi Varma* for Appellant.

P. Govinda Menon and *D. H. Nambudiripad* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant brought the suit out of which this appeal arises for redemption of a kanom and for other reliefs. The first defendant is the kanomdar whose mortgage was sought to be redeemed. He died after the action and his legal representative is the first respondent in this appeal. The property in suit is trust property and defendants 2 and 9 in the action were the urallars or the trustees of the devaswom.

The main defence is that in proceedings under the Malabar Tenancy Act the first defendant got a renewal under S. 25 of the Act that the renewal which he obtained was still subsisting and that therefore the suit for redemption was premature. Both the lower Courts upheld this contention and dismissed the plaintiff's suit. Hence this appeal.

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* S. A. No. 309 of 1938. 18th July, 1941.

Mannengath Ittichiri v. Appu Menon.

It appears that the jenmis, that is, defendants 2 to 9 as representing the devaswom of which they are the urallars, filed O. S. No. 556 of 1931 for redemption of the mortgages of both the present plaintiff and of the present first defendant. In that suit the present plaintiff, the melcharthdar, was the second defendant and the present first defendant was the third defendant. The present first defendant filed an application under S. 22 of the Malabar Tenancy Act asking for a renewal of his kanom. Notice was given to the other parties and the Court registered this application as an independent application, I. A. No. 884 of 1932, and passed an order, Ex. IV, on the 5th of January, 1934, upholding the applicant's right to obtain a renewal. Time was granted for the payment of certain monies which had to be paid under S. 24 of the Act and the matter was adjourned to the 26th of that month. The money was paid a few days beyond the time fixed but the Court evidently excused that delay and accepted the deposit made by the applicant and passed an order under S. 25 directing the execution of a renewal deed, the effect of which under sub-S. 3 of S. 25 is that the tenant shall be entitled to enjoy the holding for 12 years. In this case the Court directed that the renewal should operate for a period of 12 years from the 1st of Vrichigam 1103 which corresponds to 16th November, 1927. If this order is binding on the plaintiff it is clear that the renewal in favour of the first defendant was operative till 1939 at any rate, and the present suit filed in 1931 is liable to be dismissed.

Mr. Krishna Variar, the learned advocate for the appellant, urges two objections against the validity of the proceedings in O. S. No. 556 of 1931 just mentioned. The chief objection is that a renewal which under S. 25 of the Malabar Tenancy Act is to operate for 12 years is either a mortgage or a lease for over 5 years and that therefore it is bad under S. 76 of the Hindu Religious Endowments Act, II of 1927. That section provides:

"No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples".

So the point urged is that, as the suit property is property belonging to a public temple and is therefore governed by S. 76 of the Hindu Religious Endowments Act, II of 1927, a renewal which is a lease for a term exceeding five years or a mortgage

Mannengath Ittichiri v. Appu Menon.

is invalid because admittedly the sanction of the Board or of the temple committee was not sought or obtained in this case. The wording of S. 76 appears to my mind to apply to voluntary transfers by the trustees or persons in charge of public religious institutions. It cannot, for instance, apply to the case of a forced sale in execution of a money decree against the temple. In the present case, S. 17 of the Malabar Tenancy Act confers a right upon a kanomdar to call upon his immediate landlord for a renewal for 12 years on conditions and the landlord is bound to grant such a renewal. The section says:

" A kanomdar shall on the expiry of the kanom under which he holds be entitled to claim and his immediate landlord shall be bound to grant a renewal enuring for a period of 12 years.........".

If the jenmi or the immediate landlord does not grant the renewal which he is bound to do under S. 17, the kanomdar is given the right of applying to the Court under S. 22 of the Act, and on receipt of that application, the Court calls upon the land lord to state in writing what objections he has. Under S. 24 the Court determines the amount payable as renewal fee and under Cl. (2) of that section it makes an order for deposit within a time to be fixed in the said order, of the amount directed to be paid and also of all arrears with interest thereupon at the contract rate. Under S. 25, if the amount ordered under S. 24 is deposited, then the Court has to execute a renewal deed containing such terms as it determines to be the terms of the expiring transaction and as are in accordance with law. It is obvious that in such a case the immediate landlord or the jenmi has no option but to grant a renewal; else he will be mulcted with costs as provided by S. 25 (2) (*iii*). It therefore appears to me that the bar enacted in S. 76 of the Madras Act II of 1927 cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25 of the Malabar Tenancy Act.

There are some other minor points raised in this connection—that the person from whom the renewal was to be obtained was the immediate landlord and not the original landlord. It is said that the present plaintiff who had obtained a melcharth was the immediate landlord. In the present case in the application under S. 22, both the original jenmi, that is, the temple represented by its trustees, and the present plaintiff, the melcharthdar were all made parties and the 1st defendant asked for a renewal in accordance with the provisions of the Act. In fact paragraph 4 of Ex. P, the petition filed under S. 22, refers to the melkanom

demise granted in favour of the present plaintiff. The present plaintiff was the third respondent in that application. Paragraph 12 stated that the third respondent was impleaded as she was the melkanom holder and prayer (*b*) in that application is 'directing that, on the petitioner paying the fees by the time fixed, a renewed demise be executed to him and got registered by the Court in accordance with law on the terms of the prior demise'; and ultimately the demise was actually executed by the Court. The third respondent having been made a party and the order under S. 25 made in her presence she is bound by the order and she is not entitled to go behind that order now. If an order was not made in her favour allowing her to draw the amount deposited by the present first defendant but the Court allowed the jenmi to take it away, that is a matter with which we are not now concerned. What is important is that in a proceeding under S. 22 to which the present plaintiff was also a party a request was made that a proper renewal should be executed in accordance with law and under S. 25 it is the Court that grants the renewal, which means that the Court does it on behalf of the person who is bound to grant the renewal. If, as Mr. Variar contends, the present plaintiff is the person who was entitled to grant the renewal, then the Court, in executing the renewal under S. 25 of the Act, must be taken to have done so on behalf of the present plaintiff. So far as the grantee the first defendant is concerned there is a valid renewal obtained in the presence of the plaintiff. The suit for redemption therefore fails.

In the view taken by me on this question the other points discussed by the lower appellate Court become immaterial.

Mr. Variar then says that his client paid certain arrears of rent due on the property when his client took the melcharth and that his client is entitled to all the rent that was unpaid. He says that the melcharth in his favour operates at least as an assignment of a right to recover rent payable by the first defendant, that the first defendant did not pay the rents for certain years and that his clients should be given a decree for that amount. This right is not part of the redemption which the plaintiff sought in the present suit. It is a right which is now put forward as an alternative or additional right, that is, even if the renewal in favour of the first defendant is right and therefore a suit for redemption does not lie, still, as the assignee of the right to collect certain rents, the plaintiff is

Mannengath Ittichiri v. Appu Menon.

entitled to claim those arrears in the suit. I do not find this question mooted in the Courts below. The lower appellate Court does not say anything about it. In fact when the Appeal Examiners pointed out that court-fee had to be paid on the arrears of rent that was claimed by the plaintiff, the plaintiff took up the stand that there was only one claim, namely redemption, and that the claim for arrears of rent and for accounts were part of the redemption right. It is not admitted on the other side that there were any arrears unpaid. In fact Mr. Govinda Menon says that his client paid up all the arrears which were payable in respect of this holding, which, he points out, is a condition precedent for his obtaining the renewal. On the other hand, Mr. Variar says that what the jenmi claimed in the other suit was the arrear outstanding after giving credit to the amount paid by the present plaintiff and that the present plaintiff was therefore entitled to recover from the first defendant what he the first defendant did not pay to the jenmi. These are questions of fact which ought to have been investigated and would have been investigated if a proper claim had been made for such arrears. The claim made is one for arrears and right through it was treated as one for redemption and when the Appeal Examiners pointed out that it was more than a suit for redemption the position was contested and the Court agreed with the plaintiff in saying that it is only a suit for redemption. In these circumstances I do not think it right to allow the plaintiff to advance this claim at this stage. If she has any such right, she is of course entitled to claim the same in a separate suit. This appeal is therefore dismissed with costs, one set to be divided among all the respondents.

Leave to appeal is refused.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

V. Ranga Rao .. *Appellant**

v.

The Collector of Trichinopoly .. *Respondent.*

Ranga Rao v. Collector of Trichinopoly

Village Courts Act (I of 1889), Ss. 8, 73 and 74—Village Munsif's misconduct—Small Cause Judge reporting matter to District Judge—Recommendation of District Judge to the Collector for action being taken under S. 8—Removal of Village Munsif by Collector—Appeal to High Court—Appel-

* A. A. O. No. 419 of 1938. 31st March, 1941.

lant should have opportunity to show cause before recommendation to Collector by District Judge.

Ranga Rao v. Collector of Trichinopoly.

A Village Munsiff proceeded with a suit on his file in spite of an order from the Court of Small Causes for stay of trial of the same. The decree of the Village Munsif was set aside in revision by the Court of Small Causes under S. 73 of the Village Courts Act and the Court further reported the Munsif to the District Judge for his misconduct. The District Judge thereupon sent a requisition to the Collector for taking action against the Village Munsif under S. 8 of the Act, and the Collector removed the Village Munsif from his office. On an appeal to the High Court against the order of removal,

Held, that the order of the Collector could not be sustained. There being nothing in the Act regarding the procedure to be followed by the District Judge on receipt of a report under S. 74, before making a requisition to the Collector to act under S. 8, the District Judge ought to have acted according to the principles of natural justice, which require that no person shall be subject to a final judgment or punishment without an opportunity of being heard unless the Legislature has expressly or impliedly given authority to act without that preliminary. The District Judge ought to have given notice to the Village Munsif to show cause why he should not recommend him to the Collector for action being taken under S. 8. The fact that an appeal is provided against the order of suspension or removal shows that there should be a judicial determination of the question of misconduct to which the appellant must be a party.

Appeal against the order of the Court of the District Collector of Trichinopoly dated 21st April, 1938 and made in D. Dis. No. 2055 of 1938.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Appellant.

The Government Pleader (K. Kuttikrishna Menon) for Respondent.

The Judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.:—The question for decision in this appeal is whether the order of the Collector of Trichinopoly removing the appellant from the office of the Village Munsif of Bikshandar Koil is valid. The relevant facts are few and not in dispute. On 3rd November, 1937 an application was made to the Judge of the Court of Small Causes, Trichinopoly, for a transfer of Suit 1 of 1937 on the file of the Bikshandar Koil Village Court filed by Mookka Nadar against Lakshmayi Ammal. The application for transfer was made by Lakshmayi Ammal and she obtained a stay order on 4th November, 1937 directing the Village Munsif not to proceed with the trial of the suit which was posted for 5th November, 1937. In spite of the stay order which is alleged to have been communicated to him on the 5th, the appellant went on with the suit and decreed it. Thereupon an application was made for revi-

Ranga Rao v. Collector of Trichinopoly. — Venkataramana Rao, J.

sion of the decree and the learned Judge of the Court of Small Causes, Trichinopoly, set aside the decree of the Village Munsif under S. 73 of the Village Courts Act holding that the appellant in spite of the notice of the stay order went on with the suit and passed the decree. He also came to the conclusion that the Village Munsif was guilty of misconduct and reported the matter to the District Judge of Trichinopoly under S. 74 of the Village Courts Act. On 4th April, 1938 the learned District Judge wrote a letter to the Collector of Trichinopoly observing that he saw no reason to differ from the Judge of the Court of Small Causes and requesting him to take necessary action against the Village Munsif under S. 8 of the Act. On receipt of that letter the Collector gave notice to the appellant to show cause why he should not be removed for misconduct. Before the Collector the appellant tried to argue that the finding of the Court of Small Causes was wrong. The Collector, having regard to the provisions of S. 8 of the Act, thought that he could not go behind that finding and all that he was required to do under the Act was to assess the punishment and the proper punishment he could award was removal of the appellant from his office. It is against this order that the appellant has preferred this appeal.

It is contended by Mr. Muthukrishna Aiyar on his behalf that the order of the Collector was wrong and that in any event the appellant should have been heard either by the Collector or by the District Judge and an opportunity should have been given to him to vindicate his innocence. S. 8 of the Village Courts Act runs thus:

"The Collector of the District may suspend or remove a Village Munsif for incapacity, neglect of duty, misconduct or other just and sufficient cause, and shall do so, on a requisition passed by the District Judge for like cause appearing in the judicial proceedings of a Village Court.

From every order (of suspension or removal) an appeal may be made within three months to the Board of Revenue, if the order was passed by the Collector without orders from the District Judge, or to the High Court, if passed upon such orders. The decision of the Board of Revenue or High Court as the case may be, on all such appeals shall be final."

Giving the language of the section its plain and grammatical meaning, the view taken by the Collector is correct. Once the Collector receives a requisition from the District Judge calling upon him to act under the section, the power vested in him under the section is only in regard to the punishment whether in the circumstances of the case he should pass an order of suspension or removal. This view is strengthened by the use of

Rang Raoa v. Collector of Trichinopoly. — Venkataramana Rao, J.

the words "orders from the District Judge" occurring in the second clause of the section. The use of the word 'may' in regard to an action taken by the Collector himself as contrasted with the use of the word 'shall' in regard to an action taken on a requisition from the District Judge clearly indicates that in the one case he has got a discretion, whereas in the other, he has not. But it seems to us nevertheless that the order of the Collector cannot be sustained. When a report is made by a District Munsif under S. 74 to the District Judge, the Act does not provide what the District Judge should do before making a requisition to the Collector to act under S. 8 of the Act. In the absence of such a procedure, having regard to the nature of the requisition, he must act according to principles of natural justice. They require that no person shall be subject to a final judgment or punishment without an opportunity of being heard unless the Legislature has either expressly or impliedly given authority to act without that necessary preliminary. There is nothing in the provisions of the Act which dispenses with that necessary preliminary. Before the District Judge makes up his mind to send a requisition, it is his duty to give notice to the Village Munsif to show cause why he should not recommend to the Collector that action should be taken against him under S. 8 of the Act and hear him, and if he offers any evidence, receive and consider it. In this case there was no doubt a petition submitted to him by the Village Munsif to the effect that the finding of the Court of Small Causes was not proper. The learned District Judge also says that he considered the grounds alleged in the petition. But that is not enough. Having come to the conclusion that he must take action, he must have given notice to the Village Munsif and called upon him to urge what he could against the finding of the Court of Small Causes. The fact that an appeal is provided against the order of suspension or dismissal shows that there should be a judicial determination of the question of misconduct to which the appellant must be a party. The finding in this case of the Judge of the Court of Small Causes with which the District Judge agreed was arrived at in a proceeding to which the appellant was not a party.

We are therefore of the opinion that the order of the Collector must be set aside and that the learned District Judge should be directed to give notice to the Village Munsif, Bik-

Ranga Rao v. Collector of Trichinopoly. — Venkataramana Rao, J.

shandar Koil, to show cause why he should not recommend to the Collector to take action against him under S. 8 of the Act. The learned District Judge will hear and examine witnesses whom the appellant, if he thinks necessary, may produce. We accordingly set aside the order of the Collector, send the papers back to him directing him to forward the same to the learned District Judge for necessary action in the light of the observations contained in the judgment; we make no order as to costs.

K.C. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Prativadi Bhayamkaram Singaracharyulu and another .. *Appellants* (1st Plaintiff's L.R. and nil).*

v.

Addala Sesharao and others .. *Respondents (Defendants 1, 3 and 2).*

Singaracharyulu v. Sesharao.

Landlord and tenant—Suit for ejectment and recovery of rent in Civil Court—Plea that Civil Court has no jurisdiction as concerned land was inam—Burden of proof.

The grantee of a certain land from a Zamindar sued in a Civil Court for the ejectment and recovery of rent from the defendant, who pleaded that the Civil Court had no jurisdiction to try the suit as he had occupancy rights in the land concerned, the grant having passed the land to the plaintiff as an inam and not by way of a permanent lease.

Held, that the defendant's plea being one of denial of the jurisdiction of the Civil Court, the burden of proof lies upon the defendant.

Ramayya v. *Lakshminarayana*, (1934) 67 M.L.J. 1: I.L.R. 57 Mad. 443: L. R. 61 I.A. 177 (P.C.), relied on.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 24th October, 1938, and made in Appeal No. 159 of 1937, preferred against the decree dated 25th August, 1937, and made in O. S. No. 100 of 1936 D. M. C. Peddapuram.

V. Govindarajachari and *K. Mangachari* for Appellants.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff to eject the defendants and recover arrears of rent from them, and the subject-matter is a certain land in the village of Dontamuru, measuring 5 acres in extent. That land

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*A. A. O. No. 259 of 1939. 22nd August, 1940.

Singara-charyulu v. Sesharao.

he agrees with the learned District Munsif—in holding that Ex. F, which though not the title deed in itself recites what must have been the terms of the title deed, is inconclusive. It uses the expression, "Nimebadi Kattubadi", which suggests that the land is an inam; it also uses the expression 'permanent patta', which suggests that the land was granted on lease. But when we come to an examination of certain accounts of recent years, which have been filed, to show in what way this land was regarded by the successor of the Zamindar of Kirlampudi, we find clear indications that the estate regarded it not as an inam at all but as a lease. The documents in question are Exs. H, J and K. In all these documents, the land in question is no doubt, described as land with favourable rate of cist (Rayiti cist bhumulu) and this is also undoubtedly a third classification of land—the first kind of land is jeroyithi land in which the ryot pays full cist on the estate; the second is dharmilla inam and we find in this village in the case of dharmilla inam, no kattubadi at all is payable; and this expression, land with favourable rate of cist, forms as I have said, a third classification. The learned Subordinate Judge thinks that as it is distinct from both jeroyithi and dharmilla inams, the ambiguity created by Ex. F still remains. The learned Subordinate Judge has overlooked certain columns in these documents which seem to me to be conclusive. In Ex. H for instance, which is the 'amarakam register' or rent-roll for the village, we find columns 8 and 9 deal with the amount of money which must be annually paid to the estate. Column 8 is headed kattubadi and column 9 jeroyithi cist, and it is under this column (9) that the amount due on the land in dispute has been entered. Having regard therefore to the payment of the annual dues, the estate does not recognise three kinds of payment but only two kinds, and although this land may be called 'with favourable rates of cist', when it comes to a decision as to whether it is kattubadi or cist which is payable, the documents make it clear that it is cist and not kattubadi. Similarly, in Exs. J and K, the amount due for this land, Rs. 8, is recorded in the column headed 'jeroyithi cist'. It seems to me therefore that the learned Subordinate Judge might well have held that Exs. H, J and K were clear on the question of the treatment of this land by the estate, and might have rejected the contention that because as a matter of fact there was no payment on any of the lands specifically

described as dharmilla inam, there might be dharmilla inams on which kattubadi was payable included by the estate under the heading of lands with favourable rates of cist.

I am of opinion, therefore, that both on the question of law regarding the burden of proof and on the issue of fact depending upon the interpretation of important documents, the learned Subordinate Judge was in error in allowing the appeal before him. This appeal is allowed and the decree of the learned District Munsif restored with costs throughout.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

The Dhanalakshmi Weaving Works carrying on business at Kakkat, Malabar. *Appellant** (*2nd Defendant*)

v.

Hajee Mohammad Abdul Azeez Sahib .. *Respondent* (*Plaintiff*).

Trade mark—Infringement—Name associated with particular goods—Use in connection with similar goods—Intention to deceive public—Injunction whether justified.

Where a particular name has been associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin.

Where it was shown that the word "Diamond" had become associated in the public mind with the white cotton twill shirtings which the plaintiff was dealing in and the defendant recently used the word "Diamond" with reference to certain coloured striped shirtings with the deliberate object of inducing the public to believe that the goods they were selling were connected with the goods of the plaintiff's company,

Held, that it was a proper case for restraining the defendant from using the trade name "Diamond" or any other colourable imitation of that word in relation to cotton shirtings manufactured and sold by the defendant.

Appeal against the decree of the Additional Judge of the City Civil Court, Madras dated 2nd October, 1939 and passed in O. S. No. 261 of 1939.

G. Ramakrishna Aiyar and *K. Govindan* for Appellant.

C. Srinivasachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff for restraining the defendants from using the trade

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* C. C. C. App. No. 74 of 1939. 30th April, 1941.

Dhana-lakshmi Weaving Works v. Abdul Azeez Sahib

name "Diamond" or any other colourable imitation of that word in relation to cotton shirtings manufactured and sold by the second defendant. The learned City Civil Judge decreed the suit in favour of the plaintiff and it is against this decision the second defendant has preferred this appeal.

The finding of the lower Court is that the word 'Diamond' has become associated in the public mind with the cotton twill shirtings which the plaintiff was dealing in since the last 13 years. This finding has been canvassed by Mr. Ramakrishna Aiyar on behalf of the appellant but the evidence justifies the finding. The evidence of the plaintiff's witnesses was believed by the learned Judge and I see no reason to differ from his estimate of it. The main defence is that the plaintiff has no doubt been using the word 'Diamond' with reference to twill shirtings but it is only with reference to plain white mull; whereas the goods on which the second defendant imprinted the word 'Diamond' are coloured striped shirtings and therefore he does not infringe the trade name of the plaintiff. It seems to me that this defence is not a valid defence at law. Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin. There can be no doubt in this case that the goods sold by the defendant are so similar to that of the plaintiff that the purchaser might infer a common origin. The goods sold by the second defendant are certainly twill shirtings; only he says that his goods are coloured and striped. I would refer in this connection to the case of the *Dunlop Pneumatic Tyre Co., Ltd.* v. *The Dunlop Lubricant Co*[1]. In that case the Dunlop Pneumatic Tyre Co., used the word 'Dunlop' in connection with the goods manufactured by them which goods consisted of pneumatic tyres for cycles and other accessories such as pumps, inflators etc, but they never sold burning oil or lubricants. The defendant started a company as the Dunlop Lubricant Company and used the word 'Dunlop' in connection with the oils and lubricants sold by them. Romer, J., remarked that though the plaintiff did not sell the same class of goods as the defendant, it would be wrong to allow the defendant com-

1. 16 Reports of Patent, Design and Trade Mark Cases 12.

Dhanalakshmi Weaving Works *v.* Abdul Azeez Sahib

pany to use the word 'Dunlop' because that would induce the public to believe that the goods are those of the plaintiff company. In meeting the argument that the goods were of a different description the learned Judge remarked as follows:

"They (the plaintiff company) themselves are sellers of cycle accessories, though as a matter of fact up to the present time they have not sold burning oil or lubricants. But they may do so, and in the meantime it appears to me that they are entitled to come into Court and say that a name substantially identical with theirs ought not to be allowed to be used by the defendant in the way in which he is using it."

The same learned Judge gave an injunction in a similar case reported in *Eastman Photographic Materials Co., Ltd.* v. *(John) Griffiths Cycle Corporation, Ltd and the Kodak Cycle Co., Ltd*[1], where the plaintiff company invented the word 'Kodak' and applied it to certain of its cameras sold by them and the Kodak cameras were especially available for use on cycles and they were much used by cyclists. The defendant company began to use the word 'Kodak' in connection with the sale of their cycles. It was found by the learned Judge that the word 'Kodak' had become associated in the public mind as the goods manufactured by the plaintiff company in connection with the cycle trade though the plaintiff company were not selling cycles. In the course of the judgment the learned Judge observed thus:

"Many shops sell and deal in both bicycles and photagraphic cameras and materials. To a certain extent the plaintiff company is identified with the name 'Kodak' as connected with cycles, and so great is the connection between the two classes of business, that in all probability, I may say, the plaintiff company may wish hereafter to manufacture and sell cycles specially adapted to carry their Kodaks. That was the position of affairs when the defendant began to do what I am going to call attention to. . . . In my opinion, it (the defendant company) wanted to use the word "Kodak" and acquire a monopoly of it, as applied to cycles, in the hope and intention of, in some shape or other, identifying their company with the plaintiff company whose 'Kodaks' were so well known in the market to cause the public to suppose either that the defendant company, under its own name or under the name of the Kodak Cycle Company Ltd., was the plaintiff company, or was, at any rate, connected with the plaintiff company, or to lead the public to suppose that the goods which the defendant company was going to sell were the goods of the plaintiff company, and so to obtain the benefit of the large reputation, and the benefit also of the expenditure of the plaintiff company".

He also remarked that:

"No intelligible reason has been or can be suggested why the defendants took the term 'Kodak' to be applied to their cycles".

The facts in this case are similar. The plaintiff has been using the word 'Diamond' for the last 15 years and it was not until 1937 the 2nd defendant mill conceived the idea of putting

1. 15 Reports of Patent, Design and Trade Mark Cases, 105.

the word 'Diamond' on their goods and from the evidence given by the 2nd defendant's witness it is clear that they chose the word 'Diamond' with the deliberate object of inducing the public to believe that the goods they were selling were connected with the goods of the plaintiff's company. I am giving here an extract of his deposition which clearly shows what the object of the defendant company was in using the word 'Diamond'.

"Q. Did you make any enquiry in the markets what trade names or trade mark have a good reputation in?

A. I made no enquiry.

Q. Is there any reason for your using the word "Diamond"?

A. No. I say I never saw the Diamond trade name or trade mark of the plaintiff. I say also I never heard about it.

Q. If you remove the 'Diamond' from the words "Diamond Standard" imprinted on your goods, your goods would not find a good market?

A. I cannot tell—how do I know".

He is unable to give any intelligible reason why he used the word 'Diamond' and the inference is irresistible that he has done it for the purpose of connecting himself with the plaintiff and his business. In *Warwick Tyre Company, Limited* v. *New Motor and General Rubber Co. Ltd.*,[1] the same principle was applied by Neville, J. In that case the plaintiffs manufactured and sold tyres for cycles and motor cycles under the name of 'Warwick'. They never used that name in connection with motor tyres. The defendant company began to advertise the sale of motor tyres under the name of 'Warwick'. The plaintiffs sought to restrain the defendant company from doing so. It was held that they were entitled to the injunction. The learned Judge found that:

" Having regard to the name 'Warwick' upon the market, a motor tyre introduced as a Warwick motor tyre would lead to the supposition that the persons who were dealing with it were the same persons as those who had for many years past been dealing with the Warwick cycle tyre".

In dealing with the argument that the plaintiff company never sold motor tyres, the learned Judge remarked as follows:

"It is also said that since the plaintiffs are not dealing in the article which the defendants are putting upon the market in their name there can be no damage for the loss of the sale of the goods, and therefore this action will not lie. Now I do not think that that argument is tenable. It seems to me that the question is, are the defendants putting their goods upon the market in such a way as to lead to the supposition that they are the goods of

1. (1910) 1 Ch.D. 248.

Dhana-lakshmi Weaving Works *v.* Abdul Azeez Sahib

the plaintiffs? If so I think the plaintiffs are entitled to an injunction restraining the defendants from so acting..........As I understand it, practically the sole asset possessed by the plaintiffs is the goodwill which attaches to the name 'Warwick' in the tyre market".

In my view the learned City Civil Judge has approached the decision of the case from a correct standpoint and it has not been shown that his application of the principles of law to the facts of the case is in any way wrong.

I, therefore, confirm the decree of the learned City Civil Judge and dismiss the appeal with costs.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Rentala Narasimha Rao ... *Appellant**

v.

Rentala Venkataramana Rao .. *Respondent.*

Narasimha Rao *v.* Venkata-ramana Rao.

Madras Hereditary Village Offices Act (III of 1895), Ss. 10 (2), 13 and 21—Scope—Suit in Civil Court for declaration that a person has been appointed in contravention of S. 10 (2)*—Jurisdiction of Civil Court.*

Where the plaintiff claimed a right of succession under the Madras Hereditary Village Offices Act and alleged that the defendant was appointed by the Revenue authorities in alleged violation of his right, his remedy is to sue under S. 13 of the Act in the Revenue Court for recovery of his office from the person alleged to have been wrongfully appointed. S. 21 of the Act bars the Civil Court from entertaining such a suit. The plaintiff by merely confining his relief as one for a declaration of the invalidity of defendant's appointment cannot be permitted to agitate the matter before a Civil Court. The granting of a mere declaratory relief is discretionary and the Civil Court will refuse to grant it when the remedy which he asks is unnecessary and where the relief which he really wants is to be sought in the Revenue Court.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 40 of 1938 preferred against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 271 of 1936.

K. Kameswara Rao for Appellant.

K. Venkatarama Raju for Respondent.

The Court delivered the following

JUDGMENT.—The respondent, a minor, filed the suit out of which this second appeal arises for a declaration that the order appointing the appellant as the Karnam of the village of Kapavaram is illegal and *ultra vires*, to register him as the Karnam and to appoint a deputy for him.

* S. A. No. 278 of 1939. 31st July, 1941.

Narasimha Rao *v.* Venkataramana Rao.

The plaintiff's case is that his grandfather Rentala Achyutharamayya who was the holder of the office in question died in 1928 leaving two sons, the first and second defendants, that the plaintiff's father the second defendant who was the elder of the two sons was then holding the Karnam's office of another village, that the Revenue Divisional Officer appointed the first defendant the younger son ignoring the senior line of the plaintiff and that the first defendant's appointment is contrary to the provisions of S. 10 (2) of the Madras Hereditary Village Offices Act.

The first defendant contended that the plaint should have been filed in the Revenue Courts under S. 13 (1) of the Act and that the Civil Courts have no jurisdiction to try the suit. The plaintiff then withdrew the reliefs regarding the registry of the office in his name and the appointment of a deputy and confined the suit to one for a declaration of the invalidity of the defendant's appointment.

The question is whether the Civil Courts ought to entertain such a suit. In the plaint, the defendant is said to have been illegally appointed ignoring the plaintiff's right by succession under the Act. It is the Madras Hereditary Village Offices Act that confers the right by succession claimed by the plaintiff. If a third party was appointed by the Revenue Divisional Officer in violation of his right, his obvious remedy was to sue in a Revenue Court for the recovery of the office from the person who according to him was wrongfully appointed. In such a case the question whether the plaintiff or the defendant was under the Act entitled to be appointed would be decided. Indeed, in most of the suits under S. 13 of the Act, that would be the main question arising for decision.

Ordinarily, when a right is created by a special statute and a remedy is provided by that very statute for cases of violation of that right, the party aggrieved must pursue the remedy given by the statute. In fact S. 21 bars the Civil Courts from entertaining such a suit. In this case, the plaintiff wants to recover the office; in fact, the plaint started as such. Can the plaintiff be permitted to have the matter agitated before the Civil Courts by merely confining the relief to one for a declaration of the invalidity of the defendant's appointment?

A suit in the Revenue Court for recovery of the office will give the plaintiff adequate and complete relief. In such a

Narasimha Rao v. Venkata-ramana Rao.

suit the plaintiff will necessarily get an adjudication whether the defendant's appointment can prevail over his rights.

It is not as if he is suing for establishing a right on behalf of his family where the only remedy available is a declaration of the invalidity of the defendant's appointment which suit does not lie under S. 13 of the/Act. In this case, the plaintiff seeks to enforce his own personal right to succced to the office which is expressly provided for by S. 13. He cannot, therefore, be permitted to do indirectly what he cannot do directly. If the plaint is for recovery of the office which is the relief arising on the plaint allegations, he must file the suit in the Revenue Court; and that Court will as it is bound to do, decide the question whether the defendant or the plaintiff was entitled to be appointed.

By a mere trick in pleading and framing the relief as one for a declaration of the invalidity of the defendant's appointment, the plaintiff is really trying to get behind the plain provisions of Ss. 13 and 21 of the Act.

Further, such a declaration is really unnecessary to ask; if the plaintiff files the suit under S. 13 asking for recovery of the office, the Court will in adjudicating his claim, decide whether the appointment of the defendant was illegal. The plaintiff need not ask for a separate relief by way of a declaration that the defendant's appointment is illegal. By asking for a declaration that the defendant's appointment is illegal which really is unnecessary he cannot have a trial in the Civil Courts.

The granting of a mere declaratory relief is discretionary; the Court is not bound to grant it in every case even when the plaintiff proves a right. The Civil Courts should refuse to entertain a suit of this kind where the remedy which the plaintiff asks in the Civil Court is unnecessary and where the relief which he really wants is to be sought in the Revenue Courts. Otherwise, the provisions of Ss. 13 and 21 of the Act will be rendered useless in the vast majority of the cases for which they are intended. The plaintiff has only to confine the prayer to one of a declaration that the defendant's appointment is invalid; and he can always file such a suit in the Civil Court.

The decisions of the lower Courts are reversed and the suit is dismissed with costs throughout.

No leave.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Namburi Subbayya and another ... *Appellants** (*L. Rs. of Plaintiff*)

v.

Chaganti Chandrayya (deceased) and others. ... *Respondents* (*Defendants*).

Subbayya *v.* Chandrayya.

Hindu law—Brahmin widow dying leaving stridhana property—Succession—Illegitimate daughter, if excludes illegitimate son—Written statement whether could be amended in appellate Court so as to permit inconsistent case—Propriety.

On the death of a Brahmin widow leaving her surviving an illegitimate son and an illegitimate daughter, the latter will succeed to her mother's stridhanam in preference to the illegitimate son of her mother.

There is nothing in principle to draw any distinction for this purpose between the status of degraded women according to their castes.

The reason permitting a legitimate daughter to take her mother's stridhanam in preference to the legitimate son of the mother applies with equal, if not greater force, to illegitimate daughters when they compete with illegitimate sons.

Nammaiya Chetty v. *Thiruvengadathan Chetty*, (1912) 24 M.L.J. 223, *Meenakshi Ammal* v. *Ramaswami Josier*, (1937) 1 M.L.J. 28: A.I.R. 1937 Mad. 640, *Meenakshi* v. *Muniandi Panikkan*, (1914) 27 M.L.J. 353: I.L.R. 38 Mad. 1144, referred to.

Leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Where however an amendment sought to be made in a written statement raises a plea not only new but inconsistent with the allegations contained therein and introduces a new and inconsistent case it ought not to be allowed. It might have been possible for a defendant to raise an inconsistent or an alternative case when he filed his written statement in the beginning, but he could not be permitted to advance new positions at the time of arguments before the trial Court or ask for the written statement to be amended before the appellate Court.

Accordingly leave to amend the written statement so as to set up a plea of *jus tertii* in answer to the plaintiff's claim for recovery of possession of property ought not to be granted on an application preferred to the appellate Court.

Appeals against the decrees of the Court of the Subordinate Judge of Nellore dated the 14th December, 1935 and passed in A. S. Nos. 209 and 210 of 1934, respectively (A. S. Nos. 19 and 20 of 1932, respectively, District Court, Nellore) preferred against the decree of the Court of the District Munsif of Kanigiri dated the 14th November, 1931 and passed in O.S. No. 66 of 1931.

B. V. Subramaniam for Appellants.

* S.A. Nos. 41 and 42 of 1937. 18th April, 1941.

T. Tyagaraja Aiyar and *K. Kuppuswami* for Respondents.

The Court delivered the following

JUDGMENT.—Kotamma, a Brahmin girl, became a widow while she was very young. When she grew older, she fell into evil ways and had two illegitimate children one of whom Namburi Subbamma is the present plaintiff and the other Sundararamayya is the seventh defendant in the present litigation. Kotamma, died on the 12th October, 1919 and left some stridhanam property at the time of her death which forms the subject matter of the present suit.

The property left by Kotamma, was sold by her son Sundararamayya to six defendants (defendants 1 to 6) under several sale deeds. Namburi Subbamma brought a suit out of which the present appeals arise for the recovery of their possession. If the children were not illegitimate, Kotamma's stridhanam property would, under the ordinary rule of Hindu law devolve on her daughter Namburi Subbamma in preference to her son. But it was contended that as Kotamma was an outcaste and lived in a degraded condition, the plaintiff would be no heir to her mother and the seventh defendant would succeed to her property (paragraph 5 of the written statement). This plea did not prevail and the suit was decreed by the District Munsif of Kanigiri. Defendants 4 to 6 did not appeal against the decree and the decree as regards the properties purchased by them has become final. Two appeals were preferred against that decree to the Court of the Subordinate Judge at Nellore one by the first defendant and the other by the second and third defendants (A. S. Nos. 209 and 210 of 1934). With these appeals, the defendants filed two petitions for permission to amend their written statements by including an allegation that there were other heirs of Kotamma in the legitimate line who would take precedence over her illegitimate daughter in respect of succession to Kotamma's stridhanam properties. These were accepted by the learned Subordinate Judge on the ground that it was for the plaintiff to establish her title to the property and that it would not be enough for her to show merely that she had a better title than that of the defendants. But he overlooked the important fact that the plea that was being attempted to be advanced by these applications in his Court was not only a new one but inconsistent with the allega-

Subbayya *v.* Chandrayya.

tions contained in the written statements. Mere delay would not have been a ground for refusing an amendment; but when the amendment was being proposed with the object of introducing an entirely new and inconsistent case, it could not have been possibly allowed. It is indisputable that leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Nor can it be disputed that once a discretion has been exercised by a Court in favour of a party, the appellate Court would not lightly interfere with that discretion; but when the Court disregards the first principles and does something which is wholly unjustifiable, it is equally the duty of an appellate Court to interfere and set the wrong right. The defendants, in their written statements, as observed by me before, came to Court with the allegation that the 7th defendant was the heir to his mother's stridhanam properties and not the plaintiff. It might have been possible for them to raise an inconsistent or an alternative case when they filed their written statements in the beginning; but not having done so, they could not be either permitted to advance new positions at the time of arguments before the trial Court or to ask for their written statements to be amended before the lower appellate Court so as to enable them to plead that although the 7th defendant was not entitled to deal with his mother's property, yet there was somebody else in the legitimate line who would take precedence over both the plaintiff and the 7th defendant and the plaintiff's suit must for that reason fail. There is no reference in the whole of the written statements to the existence of any person in the legitimate line and this plea was undoubtedly inconsistent with the one raised by these defendants that the 7th defendant was the sole owner of his mother's stridhanam property. Moreover, the person who was alleged to be in existence in the legitimate line was not impleaded as a party to the suit but the defendants were authorised by the Court to show that such a person did exist in fact and would take precedence in law over the plaintiff. This was not quite the right thing to do and is bound to raise further complications and increase multiplicity of proceedings. Since the order passed by the lower appellate Court permitting the defendants to set up a new and inconsistent case in appeal cannot be sustained, it must be quashed.

The next question to decide is whether the plaintiff was entitled to succeed to her mother's stridhanam properties *in*

spite of her illegitimacy in preference to the 7th defendant who was also, as stated before, an illegitimate son. There is no competition in this case between an illegitimate daughter and an illegitimate son in regard to the stridhanam property of the mother. The decision by a Division Bench of this Court in *Arunagiri Mudali* v. *Ranganayaki Ammal*[1], is a clear authority for the proposition that the illegitimate daughters were entitled to succeed to their mother's property in preference to an illegitimate son of their mother. The only distinguishing feature of that case was that the putative father of the illegitimate son was different from that of the illegitimate daughters but the fact that the illegitimate daughters and the illegitimate son were the offspring of two different persons is, in my opinion, immaterial. It was contended that an illegitimate daughter was entitled to succeed to her mother's stridhanam property amongst Sudras alone and that no decision has gone to the extent of making the same rule applicable to the illegitimate daughters of a Brahmin degraded woman as Kotamma was. But I see nothing in principle to draw any distinction between the status of degraded women whether they belonged to one caste or the other—at least so far as the capacity of their illegitimate daughters to inherit their stridhanam is concerned. It may be that the illegitimate sons in the higher classes do not inherit their father's estate as heirs and that the illegitimate son of a Sudra may, in certain circumstances, do so; but this is surely no ground for holding that an illegitimate daughter in the three higher classes may be deprived of her mother's stridhanam and that an illegitimate son may be entitled to succeed to that property in preference to his unfortunate sisters. The reason which existed for permitting the legitimate daughters to take their mother's stridhanam property in preference to her legitimate sons applies with equal, if not greater, force to illegitimate daughters when they are competing with illegitimate sons. I am drawing support in this conclusion from the decision of a Bench of this Court in *Nammaiya Chetty* v. *Thiruvengadathan Chetty*[2], where the degraded woman was a Vysia by caste. It is true that the observations in *Dundappa* v. *Bhimawa*[3], were in respect of Sudras and were guarded; but there is nothing in that decision to suggest that a different rule of law would have

Subbayya
v.
Chandrayya.

1. (1897) I.L.R. 21 Mad. 40. 2. (1912) 24 M.L.J. 223.
3. (1920) I.L.R. 45 Bom. 557.

Subbayya v. Chandrayya.

been applicable if the woman was not a Sudra by caste. The observations in *Meenakshi Ammal* v. *Ramaswami Josier*[1], and *Meenakshi* v. *Murugayya*[2], are general and do not confine the right of illegitimate daughters to succeed to their mothers' stridhanam properties amongst Sudras alone. There are certain *obiter dicta* in *Meenakshi* v. *Muniandi Panikkan*[3], but since the competition in this case is between illegitimate children *inter se*, the observations in that decision do not call for any comment. Had it been necessary for me to consider the case attempted to be put forward on behalf of the defendants before the lower appellate Court in their applications for leave to amend their written statements, the statement of law in *Meenakshi* v. *Muniandi Panikkan*[3], would have to be closely examined. But in view of the order granting the amendment having been set aside, the question does not arise for decision.

For the above reasons, the appeal must be accepted and the decision of the first Court restored. The plaintiff will be entitled to her costs throughout, half from each set of respondents in each case. The court-fee to be paid on the appeals will be realised from the respondent in each appeal in regard to the items in each appeal—the valuation in the memorandum in appeal being incorrect.

(Leave refused).

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Karuppannan .. *Accused**

Karuppannan, *In re.*

Penal Code (XLV of 1860), S. 67—Imprisonment in default of payment of fine—Limits.

S. 67 of the Penal Code, refers to fines actually imposed and not to fines which the Court might have imposed.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the District Magistrate of Salem in his letter dated 9th May, 1941.

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1. (1937) 1 M.L.J. 28.
2. (1940) 1 M.L.J. 288: I.L.R. (1940) Mad. 739.
3. (1914) 27 M.L.J. 353: I.L.R. 38 Mad. 1144.

* Crl. R. C. No. 477 of 1941
Case Referred No. 25 of 1941. 18th August, 1941.

Karuppannan, *In re.*

Accused not represented.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—This is a reference by the District Magistrate of Salem.

The accused was convicted under S.6 of the Fisheries Act and sentenced to pay a fine of Rs. 30. The fine was not paid, and so the Magistrate sentenced him to three months simple imprisonment in default. The District Magistrate has referred this matter to this Court under S. 438, the District Magistrate being of opinion that it was not within the power of the Sub-Magistrate to sentence the accused to such a severe term in default.

S. 67 of the Indian Penal Code, says:

" If the offence be punishable with fine only . . . . . . the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees. . . . . ."

The explanation of the Sub-Magistrate was called for. He seemed to be of the opinion that the scale mentioned referred not to the actual fine imposed but to fines that were permissible under the section under which the accused was convicted. That cannot be correct; because S. 67 refers to fines imposed and not to fines which the Court might have imposed if it had so pleased.

The reference is, therefore, accepted and the sentence reduced from three months simple imprisonment to six weeks simple imprisonment.

K. S. —— *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

P. R. M. P. L. R. M. Palaniappa Chettiar. *Appellant* (Plaintiff—Appellant)*

v.

K. Periaswami Konar and another. *Respondents (Respondents and defendants).*

Palaniappa Chettiar *v.* Periaswami Konar.

Mortgage—Covenant to redeem after paying mortgagee's money—If personal covenant to pay—Suit on mortgage—If sustainable.

* L. P. A. No. 76 of 1939. 14th November, 1940.

Palaniappa Chettiar *v.* Periaswami Konar.

A deed of usufructuary mortgage stated: "In any year after giving you notice in *Panguni*, and after paying your money in *Chitrai* I shall redeem the properties". On the question whether there was a personal covenant by the mortgagor to pay,

Held, that there was no enforceable covenant to pay and the suit for enforcing the mortgage by sale of the mortgaged property was unsustainable.

Decision of Wadsworth, J., affirmed.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Wadsworth dated 27th September, 1939 and passed in S. A. No. 640 of 1935 preferred against the decree of the Court of the Subordinate Judge of Devakottai in A. S. No. 64 of 1935 (O. S. No. 275 of 1934 on the file of the Court of the District Munsif of Devakottai).

A. C. Sampath Aiyangar and *T. K. Sundararaman* for Appellant.

T. E. Ramabhadrachariar for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The only question that arises for consideration in this appeal is whether the mortgage deed sued upon contains a personal covenant on the part of the mortgagor enforceable by the mortgagee. On the 9th October, 1926 the first respondent executed in favour of the appellant a deed of *othi* (usufructuary mortgage) for a consideration of Rs. 1,000 received by the mortgagor. The 2nd respondent is the purchaser of the suit property subject to the mortgage. The document contains the following covenants:

"Therefore, in lieu of interest for the said amount, you shall enter upon the undermentioned properties and enjoy the same for a period of seven years from this date, under the right of usufructuary mortgage with possession being entitled to both the varams. In any year after the expiry of the stipulated period I shall redeem by giving notice in *Panguni*, and paying money in *Chitrai*."

The appellant instituted the suit out of which this appeal has arisen for enforcing the mortgage by sale of the mortgage property. In the absence of a personal covenant, an usufructuary mortgagee as such has no right to ask for such a relief. The District Munsif of Devakottai, who tried the suit, was of opinion that the mortgage deed did contain a personal covenant and accordingly decreed the suit. The respondents preferred an appeal to the Subordinate Judge of Devakottai. The Subordinate Judge differed from the District Munsif and held that the mortgage did not import a personal covenant. In this view he

Palaniappa Chettiar *v.* Periaswami Konar.

Krishnaswami Aiyangar, J.

reversed the decision of the District Munsif and dismissed the suit. The appellant then filed a second appeal to this Court, and it was heard by Wadsworth, J. The learned Judge concurred in the decision of the Subordinate Judge and accordingly dismissed the second appeal. On leave granted under Cl. 15 of the Letters Patent, this appeal has been preferred by the appellant. On his behalf, his counsel has once again urged that on a true construction of the deed it must be held to include a personal covenant. This as we said is the only question that has to be decided.

The deed is in Tamil and the words which are alleged to contain the personal covenant are set out in the opening paragraph of the judgment under appeal. Its effect may be expressed as follows. The mortgagee was to have the right of enjoying the property undisturbed for a period of seven years certain. During that period, the mortgagor was not to have the right to redeem. After the expiry of the period the mortgagor could, if he chose, redeem in any subsequent year. But this option cannot be exercised except by giving notice of redemption in the *Panguni* previous and paying the mortgage money in the *Chittrai,* following.

There are no words in the deed casting an obligation on the mortgagor to pay and redeem, capable of being enforced at the instance of the mortgagee. The language employed, only reserves an option to the mortgagor but if he desires to exercise it, he can do so only by following the procedure indicated, and not otherwise. If he does not however choose to exercise the option the deed will remain an ordinary usufructuary mortgage, and the mortgagee must be content with retaining possession of the mortgage property until redemption by payment of the mortgage money. In this type of mortgage there is ordinarily no personal covenant imported and the mortgagee has no right to sue for sale. If therefore in any case it is contended that there is such a covenant, it lies upon the party so contending to make it out from the language used in the document. That is not the case here. We are therefore of opinion that the judgment of Wadsworth, J., is correct.

In the result the appeal fails and is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

K. P. Kesavalu Naidu .. *Petitioner* (Plaintiff)*

v.

A. R. Venkatarama Chettiar and another *Respondents (Defendants).*

Kesavalu Naidu *v.* Venkatarama Chettiar.

Civil Procedure Code (V of 1908), S. 35 and O. 7, r. 10—Returning plaint for presentation to proper Court—No jurisdiction to make payment of costs to defendants a condition precedent to presentation in proper Court.

When passing an order under O. 7, r. 10, Civil Procedure Code, returning a plaint for presentation to the proper Court, the Court has no jurisdiction to impose a condition that the plaintiff should before re-presenting the plaint pay the costs of the defendants as a condition precedent. Though S. 35, Civil Procedure Code states that the fact that the Court had no jurisdiction to try a suit should be no bar to the exercise of the power to award costs, there is no power to make payment of costs a condition precedent to the filing of the suit in the proper Court.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Kumbakonam in S. C. S. No. 218 of 1937.

K. S. Rajagopala Aiyangar and *K. S. Ramaratnam* for Petitioner.

N. Rajagopala Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This is a civil revision petition filed against the decree of the Subordinate Judge of Kumbakonam passed in S. C. S. No. 218 of 1937. The plaintiff whose suit was dismissed in the lower Court is the petitioner before me.

The suit is for the recovery of a sum of Rs. 941-11-4 against the defendants. The suit was originally filed in the Presidency Town Small Cause Court, Madras. That Court held that it had no jurisdiction to try the suit and passed an order returning the plaint to be presented to the proper Court. When making that order, it is admitted that there was a condition attached to it, namely, that the costs of the defendants should be paid before the suit was presented in the proper Court. Without paying the costs so directed, the plaintiff presented the plaint in the Court of the Subordinate Judge of Kumbakonam. Objection was taken that such institution is improper and the amount was tendered in December, 1937. The cause of action

* C. R. P. No. 567 of 1939. 4th February, 1941.

Kesavalu Naidu v. Venkatarama Chettiar.

is said to have arisen in the beginning of 1935. So even taking it that the suit itself was re-presented in the Kumbakonam Court on the day when the amount was tendered, the suit would be within time and the Court might well have treated the suit as having been presented on that day. In this view, the dismissal of the suit appears to me to be improper.

But that apart, I do not see what jurisdiction the Court has in passing an order under O. 7, r. 10 to impose a condition that the plaintiff whose plaint is returned for presentation to the proper Court shall, before presenting it to that Court, pay the costs as a condition precedent. O. 7, r. 10 imposes the duty on every Court that it shall at any stage of the suit return a plaint to be presented to the proper Court. If O. 7, r. 10 had stood alone, it would be open to argument that the Court making such an order would have no jurisdiction even to direct that the plaintiff should pay the costs to the defendants. But S. 35 which provides for the jurisdiction of a Court to award costs says that the fact that the Court had no jurisdiction to try the suit shall be no bar to the exercise of the power. This only means that when directing a plaint to be presented to the proper Court, the Court making that order may also direct the plaintiff to pay the costs of the other side. It has no power to add a further rider that the payment of costs should be a condition precedent to the filing of the suit in the proper Court. When the Legislature wants to give such power to the Court, it has made express provision. In O. 23 where the Court allows the plaintiff to withdraw the whole or any part of his claim with liberty to file a fresh suit, there is the rule that the Court may allow the suit to be withdrawn with liberty to institute a fresh suit on such terms as it thinks fit and it has been held under that rule that the Court may impose a condition that the payment of costs ordered should be a condition precedent for the filing of a fresh suit in respect of the same subject matter. O. 33, r. 15 provides that where an application for leave to sue *in forma pauperis* is rejected, it shall be a bar to any subsequent application of the like nature and that the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs, if any, incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. In considering this provision (O. 33, r. 15) a Bench of this Court has

Kesavalu Naidu *v.* Venkatarama Chettiar.

held in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1], that the suit must be taken to have been instituted the next moment after the payment of the costs. The suit was instituted without paying the costs but the costs were paid afterwards. Then they say:

"We think it will be sufficient to say that the suit must be treated as one instituted on the 2nd of March, 1932 and dealt with on that basis".

In this case on the date when the amount was tendered the suit was well within time.

The decree of the lower Court is set aside and the suit is remanded to be disposed of on the merits. The respondents will pay the costs of the petitioner in this Court. The amount of costs that was tendered by the plaintiff and was refused to be accepted by the defendants will be paid to the respondents' counsel here within a fortnight. The other costs will abide the result.

K.S. *Petition allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

T. V. Ranga Rao Naidu (died) and others .. *Petitioners**

v.

Seth Balaksonlal Janaki Prasad—represented by his Power of Attorney holder Pannalal Fomra and others. *Respondents.*

Ranga Rao Naidu *v.* Janaki Prasad.

Civil Procedure Code (V of 1908), S. 152—Mistake or error in document —Mortgage deed—Mistake copied in the plaint and decree—Whether could be corrected.

S. 152 of the Civil Procedure Code is applicable also to cases where the mistake or error occurred in the document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction. *Satyanarayana* v. *Purnayya* (1930) 61 M.L.J. 805, followed. *Shujaatmand Khan* v. *Govind Behari* A.I.R. 1934 All. 100, not approved.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order dated 4th February, 1939 of the Court of the Subordinate Judge of Ellore in I. A. No. 1167 of 1938 in O. S. No. 11 of 1933.

P. V. Rajamannar and *K. Subba Rao* for Petitioners.

P. V. Subramanian for Respondents.

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1. (1935) 69 M.L.J. 791.

*C. R. P. No. 776 of 1939. *14th February, 1941.*

The Court delivered the following

Ranga Rao Naidu *v.* Janaki Prasad.

JUDGMENT.—There is no ground in my opinion for restricting S. 152 of the Civil Procedure Code to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court. This Court has applied S. 152 also to cases where the mistake occurred earlier in the document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction (see *Satyanarayana* v. *Purnayya*[1]). The Allahabad High Court has taken the view that the section is inapplicable to such cases (see *Shujaatmand Khan* v. *Govind Behari*[2]), but with all respect I am of opinion that the view taken by this Court is the sounder one and I have no hesitation in following it in preference to that of the Allahabad High Court.

On the merits, the Court below has clearly found that the extent mentioned in the mortgage deed which was subsequently copied in the plaint and the preliminary and final decrees was a mistake and this finding cannot be questioned in revision.

The civil revision petition is dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. M. Rangiah Chettiar ... *Petitioner* (Plaintiff)*

v.

Syed Karim Sahib ... *Respondent (2nd Defendant).*

Rangiah Chettiar *v.* Syed Karim Sahib.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8, 9 and 10 (2) (ii)—*Endorsement of promissory note to vendor of immoveable property in part payment of price—Suit on note—Endorser if precluded from eligibility to benefits of the Act by reason of S. 10* (2) (ii).

A promissory note executed by the first defendant in favour of the second defendant was subsequently endorsed to the plaintiff in part payment of price of immoveable property due to him. In a suit on the promissory note, on the question of the endorser's (2nd defendant) right to have the debt scaled down,

Held, that since on the date of the endorsement the second defendant promised to pay the amount of the promissory note to the plaintiff and at the inception of the 2nd defendant's liability there was a charge provided under S. 55 (4) (*b*) of the Transfer of Property Act, S. 10 (2) (*ii*) of Act IV of 1938 excluded that liability from the operation of Ss. 8 and 9 of that Act.

1. (1930) 61 M.L.J. 805. 2. A.I.R. 1934 All. 100.

* C.R.P. No. 2044 of 1939. 16th April, 1941.

Rangiah Chettiar *v.* Syed Karim Sahib.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Tirupattur dated 27th March, 1939, and made in S. C. S. No. 531 of 1938.

A. Ramakrishna Aiyar for Petitioner.

W. S. Krishnaswami Naidu for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition arises out of a Small Cause suit on a promissory note executed by the first defendant in favour of the second defendant who endorsed the note to the plaintiff. The present petitioner, who is the plaintiff, does not object to the decree passed against the first defendant who has been given the benefit of Act IV of 1938. But as against the second defendant he contends that by reason of S. 10 (2) (*ii*) of Act IV of 1938, the liability of the second defendant—the endorser—is one in respect of which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act and that therefore cannot be reduced. It was held in *Poovanalingam Pillai* v. *Nagaratnam Pillai*[1], that the liability of the endorser of a promissory note is a personal liability incurred on the date of the endorsement. This Court has also held in a number of cases that S. 10 (2) (*ii*) of Act IV of 1938 protects any liability for which at its inception a charge was provided regardless of whether the charge could actually have been enforced in the particular suit. It is contended for the respondent that when the promissory note was executed, it had nothing to do with a sale of immovable property and therefore it was not a liability in respect of which at its inception a charge was provided. This contention seems to me to rest on a confusion of ideas. When this promissory note was executed, the second defendant was not the debtor but the creditor. His liability arose when in partial payment of the price of the sale of immoveable property he endorsed the promissory note to the plaintiff. The effect of this endorsement was that he made himself liable for a promissory note debt in respect of which upto that date he was under no liability at all; that is to say, on the date of the endorsement, the second defendant promised to pay the amount of the promissory note to the plaintiff and at the inception of this liability, that is, the liability of the second defendant, there was a charge provided under S. 55

1. (1940) 2 M.L.J. 575.

(4) (*b*) of the Transfer of Property Act. It follows therefore that S. 10 (2) (*ii*) of Act IV of 1938 excludes the liability of the second defendant from the operation of Ss. 8 and 9 of that Act. Rangiah Chettiar *v.* Syed Karim Sahib.

The petition is therefore allowed with costs and the plaintiff will be given a decree as against the second defendant for the full amount claimed and full costs in the Court below. The decree as against the first defendant is not modified.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Narikkal Chathan of Muthuvannacha Amsom and Desom. *Appellant** (*Defendant*)

v.

Veethiyottillath Kesavan Namboodiri Karnavan and manager of his illom of Muthuvannacha Amsom and Desom. *Respondent* (*Plaintiff*).

Malabar Tenancy Act (XIV of 1930), S. 20 (5)—"Landlord requires the holding bona fide*"—Interpretation.* Narikkal Chathan *v.* Veethiyottillath Kesavan.

The words "the landlord requires the holding *bona fide* for his own cultivation", *etc.*, in S. 20 (5) of the Malabar Tenancy Act mean that the landlord should have a genuine intention to cultivate the land and not that he should show a real need to do so.

Achuthan v. *Katheeja Bi*, (S.A. No. 538 of 1939), approved; *Raman Nayar* v. *Kesavan Embrandri*, (S. A. No. 42 of 1939), disapproved; *Rekhabchand Doogar* v. *D'Cruz*, (26 C.W.N. 499), distinguished.

Appeal against the decree of the District Court of North Malabar dated 13th November, 1937 and made in A. S. No. 103 of 1937 preferred against the decree of the Court of the District Munsif of Payyoli in O. S. No. 704 of 1936.

P. Govinda Menon for Appellant.

D. H. Nambudripad for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.:—This second appeal has been placed before a Bench because there are conflicting decisions of Judges sitting alone with regard to the interpretation of S. 20, Cl. (5) of the Malabar Tenancy Act, 1929. S. 20 opens with these Leach, C.J.

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* S. A. No. 580 of 1938. 31st July, 1941.

Narikkal Chathan *v.* Veethi-yottillath Kesavan.

Leach, C.J.

words:

"No suit for eviction of a customary verumpattamdar, kuzhikanamdar or kanamdar shall lie at the instance of his landlord except on the following grounds."

There are six clauses in which the grounds are set out and clause (5) is in these terms:

"That the period of the verumpattam, kanam or kuzhikanam, as the case may be, has expired and there has been no renewal and the landlord requires the holding *bona fide* for his own cultivation or for that of any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein."

The question which falls for decision is whether the words "requires the holding *bona fide*" mean that the jenmi may, in the circumstances stated at the beginning of the clause, resume occupation if there is a genuine intention to cultivate or whether he must show a real need to do so.

In *Raman Nayar* v. *Kesavan Embrandri*[1], an unreported case, Venkataramana Rao, J., held that a mere desire on the

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1. S. A. No. 42 of 1939. The Judgment of Venkataramana Rao, J., of 3rd April, 1941, was as follows:—

The only question argued by Mr. Govinda Menon in this Second Appeal is that the finding of the learned District Judge that the plaintiff requires the land *bona fide* for his cultivation is wrong because it is based on a wrong interpretation of clause (5) of S. 14 of the Malabar Tenancy Act. After listening to the learned counsel on both sides I am of opinion that the contention of Mr. Govinda Menon should prevail and that the case should be sent back for a revised finding. S. 14 so far as it is material for the decision in the appeal runs thus:

"S. 14: "No suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the following grounds: Clause (5): that, at the end of an agricultural year, the landlord requires the holding *bona fide* for his own cultivation or for that of any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein"

In construing this section it must be borne in mind that the object of the Malabar Tenancy Act is to confer a right of permanent occupancy on the tenant. It is with this object that the rule has been enunciated that no suit for eviction shall lie except on certain specified grounds. Therefore these exceptions must be strictly construed and the landlord who relies on a particular ground must satisfy the Court beyond reasonable doubt that that ground exists. Clause (5) has been enacted in the interest of the landlord to preserve to him the right to have the land for his own cultivation in cases where there is a real need or necessity for the landlord. The language used is "requires the holding *bona fide*". A mere desire on the part of the landlord even if *bona fide*, to have the land for his own cultivation is not enough and in coming to a conclusion on the question of the landlord's need being *bona fide*, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad. The real test is the

Narikkat Chathan v. Veethi-yottillath Kesavan.

Leach, C.J.

part of the landlord to have the land for his own cultivation, even if *bona fide* is not enough. The learned Judge said that in coming to a conclusion on the question of the landlord's need being *bona fide*, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad, the test being the need of the landlord. In forming this opinion the learned Judge placed reliance on the decision of the Calcutta High Court in

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need of the landlord. In this connection I may refer to the observations of Buckland, J., in *Rekhabchand Doogar* v. *J. R. D'Cruz*, (1922) 26 C.W.N. 499, a decision on S. 11 of the Calcutta Rent Act. The said section so far as it is relevant for the present discussion runs thus:

" Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872 no order or decree for the recovery of possession shall be made so long as the tenant pays the rent to the full extent allowable by the Act and performs the conditions of the tenancy.

Provided nothing in this section shall apply * * * where the premises are *bona fide* required by the landlord either for purposes of building or re-building or for his own occupation or the occupation of any person for whose benefit the premises are held."

The learned Judge observed thus:

" I do not think it is enough that a plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises *bona fide* for his occupation. The word in the Act is not "desires" but "requires". This in my opinion involved something more than a mere wish and it involves an element of need to some extent at least."

I would place the same interpretation on the words "requires the holding *bona fide*" in clause (*v*) of S. 14 of the Malabar Tenancy Act. The learned District Judge seems to have fallen into an error in interpreting "requires" as meaning "desires". This is how he observes:

" It is stated by the learned District Munsif that he has got a better land which he could have cultivated instead of this. But he has to begin cultivation of one of the two lands and if he chose to begin with this how could it be considered that it was not a *bona fide* desire? That the plaintiff has a *bona fide* desire to cultivate is apparent from the fact that even as early as 1934 in Ex. A the notice sent by him he had stated that he required the lands for his cultivation."

Therefore the view of the learned District Judge that a *bona fide* desire is enough to entitle the landlord to evict the tenant is not sound.

I accordingly set aside the finding of the learned Judge and call upon the Subordinate Judge of Calicut to submit a revised finding on the first issue in the suit in the light of the observations contained in this judgment. The finding will be submitted within four weeks of the receipt of this order by the lower Court. Time for objections is one week.

* * * * *

[After receipt of the finding the Court dismissed the suit and refused leave to appeal.]

Narikkal Chathan v. Veethiyottillath Kesavan.

Leach, C.J.

Rekhabchand Doogar v. *J. R. D'Cruz*[1]. That was a case under the Calcutta Rent Act, S. 11 of which prohibited a landlord from recovering possession from a tenant so long as the tenant paid the rent to the full extent allowable by the Act and performed the conditions of the tenancy. The section incorporated a proviso giving the landlord the right to resume possession if the premises were required by him *bona fide* for purposes of building or rebuilding or for his own occupation or the occupation of any person for whose benefit the premises were held. A landlord wished to get possession of the premises from his tenant. The evidence disclosed that the landlord had let out the premises in which he was living to tenants and that the reason which he gave for requiring possession of the premises in suit, namely his wife's health, was not the real reason. We do not regard that decision as being really applicable. The Calcutta Rent Act was a measure designed to prevent profiteering in houses, the war of 1914-18 having resulted in a shortage of residential accommodation. The measure was merely intended to meet a position which was of a temporary nature. It is true that the Malabar Tenancy Act has the object of creating permanent tenancies but the circumstances are in no way analogous and we are unable to read the Malabar Tenancy Act in the same way as the Calcutta Rent Act was read in the case just referred to.

The same question arose in this Court in the case, *Eerayi Achuthan* v. *Poochakkandi Panakat Khatheeja Bi*[2], which was

1. (1922) 26 C.W.N. 499.

2. S. A. No. 538 of 1939. The Judgment of King, J., of 9th April, 1941, was as follows:—

The question at issue in this second appeal is whether the respondent, the jenmi, could evict the appellants, defendants 3 and 4, from certain property. According to the respondent, the actual tenant whose tenancy has been terminated by him is the first defendant to whom melcharth was granted, and the third and fourth defendants are holding under the first defendant. According to the appellants, the melcharth was never intended to take effect, there has been no change in the original tenancy of the third and fourth defendants and therefore as their tenancy has not yet been terminated they cannot be evicted in this suit.

The first point for decision was formulated by the learned District Judge of North Malabar thus: "whether defendants 3 and 4 hold under the melcharth marupat executed by the first defendant in favour of the plaintiff on 14th March, 1920". The finding is, "I am satisfied, on a careful consideration of all these facts, that Ex. A was executed by the first defendant for and on behalf of defendants 3 and 4 and these defendants are now holding

decided by King, J. This judgment is also unreported. King, J., in discussing the meaning to be attached to '*bona fide*' said:

"The expression '*bona fide*' cannot apply to a state of circumstances but only to the statements or intentions or actions of a human being. All therefore that is necessary in my opinion is for the Court to decide whether, when the landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself, his statement that he wishes to cultivate it himself is a statement made *bona fide*".

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the property under it". There can be no doubt that this is a finding of fact on which no interference is possible in second appeal.

The second question is whether the plaintiff requires the holding *bona fide* for her cultivation. That is the reason given by the plaintiff in support of her suit for eviction and it comes within the provisions of sub-S. (5) of S. 20 of the Malabar Tenancy Act. The learned District Judge has held that there is evidence on behalf of the plaintiff that she does require the property *bona fide* for her cultivation, and there are no circumstances proved in the case to show that that evidence is false. It must therefore be accepted and therefore the learned District Judge holds that the appellants may lawfully be evicted.

In appeal, I have been referred to a recent decision of Venkataramana Rao, J., in interpreting S. 20 (5) contained in an order of remand in S. A. No. 42 of 1939. Venkataramana Rao, J., follows a decision of the Calcutta High Court reported in *Rekhabchand Doogar* v. *J. R. D'Cruz*, (1922) 26 C.W. N. 499 on the interpretation of a similar clause in the Calcutta Rent Act and lays stress upon that element in the meaning of the word 'requires' which involves need or necessity. He holds that it is not enough for the jenmi to *say* that he requires the land *bona fide* for his own cultivation but he must prove that he is in positive physical need of the land, or, in other words, that it is essential in his interests that he should cultivate the land. With great respect, I am unable to agree with this ruling. I find, on referring to the Oxford Dictionary, that the primary meaning of the word "require", as is indeed clear from its Latin derivation, is to ask for or demand something and in this primary meaning, there is no element of need necessarily present. It must be in this sense that the word "requires" is used in sub-S. (5) for, to my mind, if 'require' means, "is in actual positive need", the expression, *bona fide*, in this sub-section is superfluous and can have no reasonable meaning. What is meant by a landlord requiring the holding *bona fide* is that he asks for or demands it *bona fide*. The expression '*bona fide*' cannot apply to a state of circumstances but only to the statements or intentions or actions of a human being. All therefore that is necessary in my opinion is for the Court to decide whether when the landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself, his statement that he wishes to cultivate it himself is a statement made *bona fide*. In the present case, the learned District Judge has held that in making this statement the plaintiff made it *bona fide*. That is a finding of fact which, on the interpretation of S. 20 (5) which I have just given, is conclusive.

I, therefore, am of opinion that this appeal must fail and it is accordingly dismissed with costs of the 1st respondent.

As my decision thus conflicts with the one recently given by my learned brother, Venkataramana Rao, J., I grant leave to appeal.

Narikkal Chathan *v.* Veethi-yottillath Kesavan.

Leach, C.J.

We consider that this interpretation is the correct one. If the Court is convinced that the jenmi has really the intention of cultivating the land he is entitled to be put into possession of it. The fact that he has sufficient land under cultivation elsewhere to provide for the needs of himself and his family matters not. It is his land and if he really wants to cultivate it, he is entitled to regain possession when the kanom has expired and there has been no renewal.

In the present case both the Courts below have held that the jenmi had the *bona fide* intention of cultivating the land. That being so, the decree which has been granted to him cannot in our opinion be disturbed and the appeal will have to be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

The Official Assignee of Madras ... *Appellant* (2nd Plaintiff)*

v.

S. Natesa Achari and others ... *Respondents (Defendants).*

Official Assignee *v.* Natesa Achari.

Limitation Act (IX of 1908), S. 19—Usufructuary mortgage—Mortgagors covenanting "if we commit default you shall bring property to sale, take principal and interest and pay earlier mortgagee if any debts incurred for benefit of the family have to be paid to him in respect of the property and pay the balance to us"—How far acknowledgment of earlier mortgage debts to save limitation.

S, executed a mortgage of his property to *M*, on 9th August, 1921, to secure Rs. 5,000 and he executed on 6th January, 1923, a second mortgage of the property to *M*, to secure a further advance of Rs. 1,000. On 4th July, 1924, *S* executed a usufructuary mortgage of the property in favour of *R* for Rs. 1,000 in which the following passage appeared: "If we commit default in respect of any condition you shall bring the said property to a public or private sale take the principal and interest and also the auction expense as per account, pay *M* if any debts incurred for the benefit of our family has to be paid to him in respect of the said property and pay the balance, if any, to us".

Held, that this passage could not be read as an acknowledgment of the earlier mortgage debts within the meaning of S. 19 of the Limitation Act. For S. 19 to apply the words used must be words which clearly indicate an acknowledgment of liability of the particular debts.

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* O.S.A. No. 58 of 1939. 4th September, 1940.

Official Assignee of Madras *v.* Natesa Achari.

On appeal from the judgment of the Hon'ble Mr. Justice Somayya dated 8th August, 1939, and 6th September, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 209 of 1936.

K. Rajah Aiyar and *T. V. Srinivasan* for Appellant.

K. S. Rajagopala Aiyangar, K. Govindan and *V.S. Rangachari* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The sole question in this appeal is whether certain words used in a deed of mortgage dated 4th July, 1924, amount to an acknowledgment of liability in respect of two earlier mortgages within the meaning of S. 19 of the Limitation Act. One Sundaravela Achari mortgaged the property in the suit to one Manicka Chetty on 9th August, 1921, to secure a sum of Rs. 5,000. On 6th January, 1923, he executed a second mortgage of the property in favour of Manicka Chetty to secure a further advance of Rs. 1,000. On 4th July, 1924, Sundaravela Achari executed a usufructuary mortgage of the property in favour of one Rajagopala Chetty for the sum of Rs. 1,000. The first two mortgages fell to the share of one Kuppuswami on a partition. Kuppuswami is now an insolvent and is represented by the appellant, the Official Assignee. The creditors will be entitled to the benefit of the first two mortgages if they are still enforceable. The suit out of which this appeal arises was not, however, filed until 13th July, 1936, more than twelve years after the second of the two mortgages was executed, but the appellant says that the following passage in the usufructuary mortgage deed of 4th July, 1924, saves the earlier mortgages from being time-barred:

> "If we commit default in respect of any condition, you shall bring the said property to a public or private sale, take the principal and interest and also the auction expenses as per account, pay Kilanur Manicka Chetty if any debts incurred for the benefit of our family has to be paid to him in respect of the said property, and pay the balance, if any, to us."

Mr. Justice Somayya, who decided the case, held that this passage could not be read as an acknowledgment within the meaning of S. 19 of the Limitation Act. The learned Judge considered that the words might be read as indicating that some money was due on previous mortgages but it had not been shown that there were no other debts secured on the property and there-

Official Assignee of Madras v. Natesa Achari.

Leach, C.J.

fore the passage did not necessarily apply to the mortgages of the 9th August, 1921 and on the 6th January, 1923.

We are not disposed to agree with the learned Judge that the passage relied on to save limitation, ought to be read as indicating that the property was subject to earlier mortgages. The clause provides that in default of the condition of the mortgage, the usufructuary mortgagee is to sell the property, and out of the proceeds first pay himself and then pay Manicka Chetty, handing the balance to the mortgagor. Manicka Chetty's mortgages were earlier and therefore ought to come first, but Manicka Chetty comes second. Read alone the clause might be taken to refer to the possibility of subsequent advances by Manicka Chetty. We are, however, in agreement with the learned Judge that there is no evidence on record which identifies the word 'debts' used in this passage to the mortgage deeds of 9th August, 1921, and 6th January, 1923 and that in the words used there is no acknowledgment of these debts.

S. 19 will save limitation where before the expiration of the prescribed period, an acknowledgment of liability has been made in writing. Therefore, before that section can apply, the words used must be words which clearly indicate an acknowledgment of liability of the particular debt. The Legislature has decided that time shall be a bar to a mortgage claim and has fixed the period. It may seem hard that a person shall be deprived of his money because he has not filed a suit within a certain time, but that is the law and it is not for the Court to help him out of his difficulty by overstraining the meaning of the words used. And that is what we have been asked to do in this case. Mr. Rajah Aiyar, in support of this appeal, has gone so far as to say that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment of liability. This is an astonishing proposition and we are certainly not prepared to accept it.

The appeal will be dismissed with costs, one set.

K. S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kandaswami Thambiran .. *Appellant* (Plaintiff)*

v.

Vagheesam Pillai, wrongfully styling himself as Ponnambala Desikar.. *Respondent (1st Defendant).*

F.B. Kandaswami Thambiran *v* Vagheesam Pillai.

Specific Relief Act (I of 1877), S. 42—Suit for declaration of title to and possession of office of mahant—*Not maintainable without prayer for possession of* math *properties when plaintiff is not in possession of them.*

It is not possible to separate the office of a *mahant* or *Pandarasannadhi* of a *math* from the properties which form the endowments of the office and a suit by a person, not in possession of such properties for a declaration of his title to and possession of the office, is not maintainable by reason of S. 42 of the Specific Relief Act, where the plaintiff has failed to ask for possession of the *math* properties.

Case-law discussed.

Rathnasabapathy Pillai v. *Ramaswami Aiyar* (1910) 20 M.L.J. 301: I.L.R. 33 Mad. 452, approved.

Swaminatha Aiyar v. *Ramier,* (1924) 47 M.L.J. 671, overruled.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 27 of 1934.

A. C. Sampath Aiyangar for *S. Narasinga Rao* for Appellant.

K. Rajah Aiyar for *V. Ramaswami Aiyar* for Respondent.

The Court expressed the following

OPINION. *The Chief Justice.*—This reference arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Sivaganga to establish the title claimed by him to the office of *Pandarasannadhi,* or mahant, of the Tiruvannamalai math in the Ramnad District. In his plaint the appellant asked the Court to pass a decree in his favour for *inter alia* the following reliefs: Leach, C.J.

"(*a*) Declaring that the first defendant is not entitled to be the Pandarasannadhi of the Thiruvannamalai Athinam and (by way of consequential relief) ejecting him from the office of Pandarasannadhi of the Athinam and restoring its possession to the plaintiff as the only Thambiran of the Athinam qualified and entitled to its headship or at least to be in charge of the math and its properties till a new Pandarasannadhi comes."

"(*b*) Restraining the first defendant by a perpetual injunction from in any way interfering with the spiritual or secular affairs of the Athinam."

* Appeal No. 137 of 1938. 6th March, 1941.

F.B.

Kanda-swami Thambiran v. Vagheesam Pillai.

Leach, C.J.

The respondent was the first defendant, who claims to be the lawful holder of the office. It is admitted that he is in possession of the properties, but notwithstanding the terms of paragraph (*a*) of the prayer the appellant said that he was not asking for an order for possession because "the servants and tenants" on the lands were prepared to hand over possession and pay rent to the holder of the office. In addition to denying the right claimed by the appellant, the respondent, relying on the provisions of S. 42 of the Specific Relief Act, averred that the suit was not maintainable because the appellant had failed to ask for a decree directing that possession of the math properties be given to him. The Subordinate Judge held that this plea was well founded and dismissed the suit. The appellant appealed to this Court and in due course the case came on for hearing before a Division Bench consisting of King and Patanjali Sastri, JJ. In consequence of the conflict between the decisions of this Court in *Rathnasabapathi Pillay* v. *Ramaswami Aiyar*[1] and *Swaminatha Aiyar* v. *Ramier*[2], the learned Judges have referred to a Full Bench the issue whether the suit is barred by reason of the provisions of S. 42 of the Specific Relief Act.

When the case was before King and Patanjali Sastri, JJ., the learned advocate for the appellant applied for and obtained an order permitting the amendment of the plaint by the omission of the words, "or at least to be in charge of the mutt and its properties till a new Pandarasannadhi comes" from the prayer for a declaration. The prayer for a perpetual injunction stands, but Mr. Sampath Aiyangar has stated that he is willing to waive this relief also should it be deemed to be in the way of his client's success in the appeal. In these circumstances the Court will treat the appellant's claims to be for (1) a declaration of his title to the office and (2) possession of the office but not of the properties attaching to it.

In *Rathnasabapathy Pillai* v. *Ramaswami Aiyar*[1], a trustee of a temple who had been ousted by his co-trustees sued for a declaration that his dismissal from the trusteeship was invalid, and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as a trustee. There was no prayer for consequential relief in the nature of an order for possession against the co-

1. (1910) 20 M.L.J. 301: I.L.R. 33 Mad. 452.
2. (1924) 47 M.L.J. 671.

F.B.
Kanda-swami Thambiran v. Vagheesam Pillai.
Leach, C.J.

trustees. In these circumstances the Court (Sankaran Nair and Krishnaswami Aiyar, JJ.,) held that the suit was not maintainable. In that case the plea was raised that the lands of the temple were in the physical possession of the tenants and the plaintiff could not get such possession himself: but it was held that the fact that the lands were in the physical possession of the tenants did not excuse the plaintiff from suing for possession.

Swaminatha Aiyar v. *Ramier*[1], was decided by Spencer, J., who was then officiating as Chief Justice and Srinivasa Aiyangar, J. That was a suit for a declaration that the plaintiffs were the lawful trustees of a Hindu temple and its endowments, for a direction that the defendants who claimed to be trustees should be made to restore the office to them and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of the duties of the office. Relying on the decision of the Bombay High Court in *Kunj Bihari* v. *Keshavlal Hiralal*[2], (which Sankaran Nair and Krishnaswami Aiyar, JJ., had refused to follow) Spencer and Srinivasa Aiyangar, JJ., held that it was not necessary for the plaintiffs to sue for the consequential relief and therefore S. 42 of the Specific Relief Act was no bar to the suit. The learned Judges appear to have separated the office from the properties forming the endowments of the trust.

In *Kunj Bihari* v. *Keshavlal Hiralal*[2], the facts were these. The plaintiff brought a suit alleging that he had been installed on the *gadi* of the God Swaminarayan. He claimed that he was the gadipathi and that nobody else had a right to be installed on the *gadi*. He complained that the defendants were wrongly attempting to place some other person on the *gadi*. The reliefs asked for were: (1) A declaration that a will set up by the defendants was a fraudulent document but, if established it was not binding; (2) a declaration that the right to become the acharya was in the plaintiff and that he was the owner of the *gadi*; (3) a perpetual injunction restraining the defendants from offering any obstruction to his occupying the *gadi* and (4) a perpetual injunction restraining the defendants from placing anybody else on the *gadi*. The Court (Jenkins, C.J., and Batty, J.,) accepted the plaintiff's contention that the suit was not for possession of the trust properties but one to

1. (1924) 47 M.L.J. 671. 2. (1904) I.L.R. 28 Bom. 567.

F.B.

Kandaswami Thambiran v. Vagheesam Pillai.

Leach, C.J.

determine who was to occupy the *gadi* and considered that in these circumstances the plaintiff was entitled to ask for an injunction without any further relief. Jenkins, C.J., in delivering the judgment said:

"We do not say that the plaintiff might not in terms have asked for possession of the office he says is his; we will assume he could; but how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up?"

The defendants were in possession of the trust properties and therefore it was not open to the Court to grant the plaintiff an injunction when he was not asking for possession against those actually in possession. This was pointed out by Sankaran Nair and Krishnaswami Aiyar, JJ., in their judgment in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*[1]. We cannot regard *Kunj Bihari* v. *Keshavlal Hiralal*[2], as being correctly decided.

The judgment in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*[1], receives support from the decisions of this Court in *Ramanuja* v. *Devanayaka*[3], *Sonachala* v. *Manika*[4], *Kombi* v. *Aundi*[5], *Abdulkadar* v. *Mahomed*[6], *Srinivasa Aiyangar* v. *Srinivasa Swami*[7], *Srinivasa Swami* v. *Ramanujachariar*[8], *Ramaswami Aiyar* v. *Annasami Aiyar*[9] and *Appu Pillay* v. *Perumal Pillay*[10].

In *Ramanuja* v. *Devanayaka*[3], which was a suit by six plaintiffs for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal, Turner, C. J., and Muttuswami Aiyar, J., observed:

"Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under S. 42 as to whether the plaintiff is, or is not, able to seek further relief."

In *Abdulkadar* v. *Mahomed*[6], Muttuswami Aiyar, J., sitting with Parker, J., held that a suit was not maintainable by reason of S. 42 of the Specific Relief Act in these circumstances. The plaintiff claimed that he was entitled to the office of Sheik

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1. (1910) 20 M.L.J. 301: I.L.R. 33 Mad. 452.
2. (1904) I.L.R. 28 Bom. 567.
3. (1885) I.L.R. 8 Mad. 361.
4. (1885) I.L.R. 8 Mad. 516.
5. (1889) I.L.R. 13 Mad. 75.
6. (1891) I.L.R. 15 Mad. 15.
7. (1892) 2 M.L.J. 139: I.L.R. 16 Mad. 31.
8. (1898) 8 M.L.J. 190: I.L.R. 22 Mad. 117.
9. (1898) 8 M.L.J. 124.
10. (1912) 23 M.L.J. 118.

F.B.

Kandasawmi Thambiran v. Vagheesam Pillai.

Leach, C.J.

of Kallai and to the properties forming the endowments of the office. He did not sue for possession of the properties which were in the possession of the defendant. He merely claimed a declaration that the defendant had no right either to the office of Sheik of Kallai or to the properties and prayed for an injunction restraining the defendant from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office.

The cases of *Srinivasa Aiyangar* v. *Srinivasa Swami*[1], and *Srinivasa Swami* v. *Ramanujachariar*[2], concerned maths. In *Srinivasa Aiyangar* v. *Srinivasa Swami*[1], the plaintiffs were three disciples of a math. They sued under S. 539 of the Code of Civil Procedure of 1882, alleging that the defendant was in possession under a false claim of title as the successor to the last *Jeer* and praying that it be declared that he was not the duly appointed successor to the office and that an appointment to the vacant office be made by the Court. As no consequential relief was asked for it was held that the suit was not maintainable. *Srinivasa Swami* v. *Ramanujachariar*[2], was a case of a similar nature.

The same principle was applied in *Sonachala* v. *Manika*[3], which referred to a choultry and in *Kombi* v. *Aundi*[4], in which the plaintiff claimed a declaration of his title to the stanom of the fifth Raja of Palghat. *Ramaswami Aiyar* v. *Annasami Aiyar*[5], had reference to temple properties. It was there held that a person who was in joint possession of the temple properties with others who claimed to be joint trustees with him could not sue to exclude the other persons from management without suing for sole possession of the properties. A mere declaration that he was the proper trustee and the others were not was not sufficient in the circumstances. In *Appu Pillay* v. *Perumal Pillay*[6], Abdur Rahim and Sadasiva Aiyar, JJ., followed *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*[7].

In the face of these decisions it is not feasible to accept the judgment in *Swaminatha Aiyar* v. *Ramier*[8], in preference to that in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*[7]. Moreover,

1. (1892) 2 M.L.J. 139: I.L.R. 16 Mad. 31.
2. (1898) 8 M.L.J. 190: I.L.R 22 Mad. 117.
3. (1885) I.L.R. 8 Mad. 516.
4. (1889) 13 I.L.R. 75.
5. (1898) 8 M.L.J. 124.
6. (1912) 23 M.L.J. 118.
7. (1910) 20 M.L.J. 301: I.L.R. 33 Mad. 452.
8. (1924) 47 M.L.J. 671.

F.B.

Kandaswami Thambiran v. Vagheesam Pillai.

Leach, C.J.

it has to be borne in mind that it is not possible to separate the office from the properties which form the endowments of the office. This has been very clearly laid down by the Privy Council. In *Gnanasambanda Pandarasannadhi* v. *Velu Pandaram*[1], which concerned the right to the office of trustee of a certain temple, Sir Richard Couch in delivering the judgment of the Board said:

"Their Lordships are of opinion that there is no distinction between the office and the property of the endowment."

This was emphasised by Lord Shaw in delivering the judgment of the Board in *Ram Parkash Das* v. *Anand Das*[2]. When referring to the position of a mahant Lord Shaw said:

"He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself."

In delivering the judgment of the Privy Council in *Satish Chandra Giri* v. *Dharani Dhar Singha Roy*[3], Mr. Jayakar quoted this passage from the judgment of Lord Shaw and went on to say:

"The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The mahant must have authority over the funds and income of the institution to be able to discharge his religious duties efficiently, in conformity with the customary and traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties, on the mercy or caprice of another functionary, with separate or co-ordinate authority over the funds of the institution. Any division of the two capacities would lower his prestige, as also impair the efficiency of his religious functions."

Here the appellant is endeavouring to separate the office from its endowments. This he clearly cannot do and as he is asking for a declaration of his title to the office and is not in possession of its properties he must by reason of S. 42 of the Specific Relief Act ask for possession. His failure to do so vitiates his suit. It may be regrettable that a person who has been ousted wrongly from an office and the control of the properties attached to it should be required to pay a court-fee based on the value of the properties before he can file a suit to remedy the wrong, but the Court cannot take such hardship into

1. (1899) 10 M.L.J. 29: L.R. 27 I.A. 69: I.L.R. 23 Mad. 271 (P.C.).
2. (1916) 31 M.L.J. 1: L.R. 43 I.A. 73: I.L.R. 43 Cal. 707 (P.C.).
3. (1940) 1 M.L.J. 371; L.R. 67 I.A. 32: I.L.R. (1940) 1 Cal. 266.

F.B.

Kandaswami Thambiran v. Vagheesam Pillai.

Leach, C.J.

consideration when deciding the effect of S. 42 of the Specific Relief Act. When a court-fee fixed by the Court Fees Act is unfair, it is for the Legislature to interfere. The Court cannot do so.

We consider that *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*[1], was rightly decided and that *Swaminatha Aiyar* v. *Ramier*[2], was not. Consequently the answer which we give to the reference is that the present suit cannot be maintained by reason of the fact that the plaintiff has failed to ask for possession of the math properties.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

D. Vanjeeswara Aiyar ... *Petitioner** (*Plaintiff*)

v.

The District Board of South Arcot represented by its President and others .. *Respondents* (*Defendants*).

Vanjeeswara Aiyar v. District Board of South Arcot.

*Contract—Term that party is not entitled to be paid for work done if it was not check-measured or did not give satisfaction — Effect—*Quantum meruit *if applicable where party is not entitled to payment by reason of the term in the contract.*

Where by the terms of the contract the person who does the work agrees that he is not entitled to any remuneration unless the work has been check-measured, then, clearly he cannot claim for any work that has not been check-measured. There is no room for an implied contract, where there is an express contract in existence and in such a case the principle of *quantum meruit* cannot be applied.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree in S. C. S. No. 487 of 1936 on the file of the Court of the District Munsif of Vridhachalam.

P. Sridhara Rao for Petitioner.

S. Panchapagesa Sastri and *K. R. Krishnaswami* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner brought this suit against the President, District Board, Cuddalore, (the third defendant) the

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1. (1910) 20 M.L.J. 301: I.L.R. 33 Mad. 452.
2. (1924) 47 M.L.J. 671.

*C. R. P. No. 1492 of 1937. 6th September, 1940.

Vanjeeswara Aiyar *v.* District Board of South Arcot.

District Board being the successor to the Taluk Board, Vridhachalam, to enforce payment for certain work done by him in pursuance of a contract to remove prickly pear, to do certain earth work, and to plant mile and furlong stones. The suit was dismissed on the ground that according to the terms of the contract, he was not entitled to be paid for work done if it was not check-measured or did not give satisfaction. This petition has been filed by the plaintiff, who contends that even if he is not entitled to the money under the contract, the principle of *quantum meruit* should be applied and he should therefore be paid for such work as he has done.

With regard to the earth work, it appears that Rs. 15 remained unpaid and was carried over to the plaintiff's deposit account. Why actually it was transferred to the deposit account is not very clear; but the learned Munsif considers its carrying over to be a sufficient answer to the plaintiff's claim. The learned advocate for the District Board says that the money has probably been paid to the plaintiff by now; but if it has not been paid, the District Board is willing to do so. He says that the money was transferred to the deposit account because of some shortage of the deposit. I do not think that this matter calls for any interference in revision.

With regard to the prickly pear, the difficulty arose because after measurement (called advance measurement) by the overseer, the prickly pear was burnt by the plaintiff before it was check-measured. The plaintiff stated that he was told by the overseer that as the value of the work was below Rs. 50 check-measurement was unnecessary. Although this seems to be so under the P.W.D. Rules, there is no such rule in the Local Board Rules or in the contract by which the plaintiff and the District Board were bound. The object of check-measurement is a salutary one, it clearly being that the Local Board thinks it necessary that the work of the overseer should be checked and controlled by some engineer of higher standing, upon whose word it can rely. By the contract, the local body expressly stated that it would not be bound by any measurement that was not check-measured. A provision was no doubt made for advance payments as the work proceeded, upon measurements made by the overseer, subject to a deduction of 10 per cent; but that payment was provisional and was in no sense binding

on the parties. It was subject to proper accounting after check-measurement and after the work had been completed.

Vanjeeswara Aiyar *v.* District Board of South Arcot.

The principle of *quantum meruit* is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay the person who does work reasonably for the work done. There is no room, however, for an implied contract where there is an express contract in existence. Where, by the terms of the contract, the person who does the work agrees that he is not entitled to any remuneration unless the work has been check-measured, then clearly, he cannot claim for any work that has not been check-measured.

The work done by the plaintiff in redressing and replanting mile and furlong stones never met with the final approval of the Local Body, represented by the engineer authorised to pass the work. According to the terms of the contract, therefore, the plaintiff was not entitled to receive payment. How far the work of the plaintiff was of value to the District Board, in view of the circumstances that it failed to meet with the approval of the engineer, is not clear from the evidence. We cannot assume a benefit; but if there was, the terms of the contract gave rise to no claim by the plaintiff unless the conditions therein were fulfilled. In this case too, the principle of *quantum meruit* cannot be applied for the reasons given in the preceding paragraph.

While it is necessary to dismiss this petition, I cannot but observe that the conduct of the Local Board has been very reprehensible. The destruction of the prickly pear was probably due to a misapprehension on account of the rules of the Public Works Department which seem to permit payment without check-measurement. It is true that the Local Board could not be expected to pay for work unless it was satisfied that the work was done; but it is clear that work was done in connection with the prickly pear and I feel that the Local Board acted dishonestly in making no payment at all. Even with regard to the planting of mile stones and furlong stones, the Local Body could have and should have paid the plaintiff for any work from which it derived some benefit. Under the circumstances, there will be no order as to costs in this Court.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Puthur Veettill Krishnan Chettiar.. *Appellant** (*Plaintiff*)

v.

Ammalu Amma and others .. *Respondents* (*Defendants 4 to 6 and 1 to 3*).

Krishnan Chettiar *v.* Ammalu Amma.

Malabar law—Tarwad—Karnavan employed and living elsewhere—Karnavastri living in family house, plucking fruits from trees on the paramba and paying revenue or purappad due to jenmi*—Motgage by her—When binding.*

Where the *karnavan* of a tarwad was employed and lived elsewhere, and the mother of the karnavan who lived in the family house, plucked fruits from trees on the paramba and paid the *purappad* due to the *jenmi*, executed a mortgage of the tarwad property,

Held, that where there is a karnavan capable of acting and he has not renounced, either directly or by implication, he alone can bind the family. By the mere minor acts of management performed as a matter of course, a junior member does not acquire power to alienate the property of the tarwad even for necessary purposes of the tarwad.

Appeal against the decree of the District Court of South Malabar in A. S. No. 244 of 1934 preferred against the decree of the Court of the District Munsif of Tirur in O. S. No. 421 of 1932.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

This Appeal coming on for hearing on 15th April, 1940, the Court (*Krishnaswami Aiyangar, J.,*) made the following

ORDER OF REFERENCE.

The question raised in this Second Appeal relates to the power of a karnavastri to mortgage the property of the tarwad for what may be described as necessary purposes of the tarwad. The karnavan of the tarwad is alive but seems to have left the tarwad house for a considerable time. After he left, the tarwad property was in the management of the karnavastri who executed the mortgage in suit.

The facts referred to in the finding of the District Munsif in paragraph 9 seem sufficient to establish that the karnavastri was in the position of a *de facto* manager of the tarwad property. The learned District Judge is not apparently prepared to accept this view; but as the question is one of inference to be drawn from the facts found I should be prepared to accept the view of the District Munsif as correct.

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* S. A. No. 239 of 1937. 17th September, 1940.

Krishnan Chettiar *v.* Ammalu Amma.

But still the main point for consideration is as to whether a karnavastri has the powers of a *de facto* manager to bind the tarwad property by her alienation. If the rule in *Hanooman Pershad's case*[1] is applicable to Malabar families I see no reason why a karnavastri, though not the legal manager of the tarwad properties, should not have the powers which the Judicial Committee have recognised as vested in a *de facto* manager.

There is no direct decision of this Court brought to my notice. The only case cited namely *Rajah of Arakal* v. *Churia Kunhi Kannan*[2], seems rather to be confined to a situation where the karnavan is acting prejudicially to the interests of the tarwad, a situation in which the junior members are allowed to do what in other circumstances the karnavan alone can do.

In my opinion the question is sufficiently important for its being considered by a Bench of two learned Judges of this Court. The papers will accordingly be placed before the learned Chief Justice for his orders.

In pursuance of the Order of Reference the appeal came on for hearing before the Bench as constituted above.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—On the 11th October, 1928, the fourth respondent mortgaged certain property to the appellant and she purported to do so as the karnavastri of a tarwad. There was at the time a karnavan, who is the fifth respondent and the son of the fourth respondent. He was employed as a pointsman on the railway and by reason of his employment he was absent from the family house for the greater part of the year. The appellant filed in the Court of the District Munsif of Tirur the suit out of which this appeal arises for the purposes of enforcing the mortgage. Two defences were raised, namely, (*i*) no consideration had passed and (*ii*) the mortgage had not been created in order to provide funds to meet a family necessity. The District Munsif found for the appellant on both these issues. An appeal was filed to the District Court of South Malabar by the first, second and third respondents, who are the junior members of the family. The District Judge was not satisfied that certain questions of fact had been fully investigated by the District Munsif and he remanded the case for findings

1. (1856) 6 M.I.A. 393. 2. (1915) 29 M.L.J. 632.

Krishnan Chettiar v. Ammalu Amma.
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Leach, C.J.

on two questions. The first was whether the mortgaged property belonged to the tarwad or was the private property of the fourth respondent, and the second was whether the fourth respondent was entitled to alienate the property on behalf of the family as she was a woman. On remand the case was further investigated by the successor of the District Munsif who had tried the case in the first instance. The successor held that the property did not belong to the tarwad, but to the fourth respondent. He also held that the fourth respondent in any event had the right of alienation as the *de facto* karnavastri.

When the matter came before the District Judge again he overruled the finding of the District Munsif that the property belonged to the fourth respondent. He considered that the evidence proved that it was tarwad property. He concurred, however, in the findings of the District Munsif that consideration had passed and that the alienation had been occasioned by family necessity and he confirmed the decree in part on the ground that there had been a prior mortgage in which the karnavan had joined. The District Judge was of the opinion that the fourth respondent was not entitled to act on behalf of the family and that in consequence the mortgage of the 11th October, 1928, was not binding on the tarwad, but inasmuch as there had been a previous mortgage in which the karnavan had joined he allowed a decree for the amount of the earlier mortgage. This had the effect of reducing the decree in favour of the appellant by Rs. 102 and corresponding interest. The only question which this Court is called upon to decide is whether the District Judge was right in holding that the fourth respondent was not entitled to bind the family.

The appellant has not printed the evidence and the Court can only look to the judgment under appeal for the purpose of ascertaining the facts. The District Judge held that the only acts of management which the fourth respondent could claim as having been performed by her were these: (*i*) She lived in the family house, (*ii*) she had plucked fruits from the trees on the paramba and (*iii*) she had paid the revenue or the *purappad* due to the jenmi. He was, however, of the opinion that attending to these matters when the karnavan was employed elsewhere did not amount to management and did not indicate abdication by the karnavan so as to give any right of alienation to the

Krishnan Chettiar v. Ammalu Amma.

Leach, C.J.

fourth respondent. In due course of his judgment the District Judge said:

"In thousands of families in Malabar it would now be happening that the karnavan is living elsewhere following some occupation or profession and that the three acts mentioned above are being performed as a matter of course by the members of the family living on the tarwad paramba. It cannot be stated that thereby a junior member of the family acquires a right to alienate the property."

With these remarks we are in agreement. There is no evidence in this case that the karnavan ever renounced his position. According to the karnavan's own evidence his mother paid the revenue out of moneys remitted to her by him for the purpose. This may not be true, but as the evidence has not been printed it is rather difficult for the Court to decide whether it is true or false. Be it either way, the mere fact that the fourth respondent did perform minor acts of management during the absence of her son would not constitute her the karnavastri of the tarwad. Before the Court would be justified in holding that she had become the karnavastri and was entitled to alienate property on behalf of the tarwad it must be shown by positive evidence that the karnavan had renounced or that this was the only legitimate conclusion open to the Court. While there is a karnavan capable of acting and he has not renounced, either directly or by implication, he alone can bind the family. In this case the document might have been sent to him for signature as was done in the case of the first mortgage, but his mother decided to act without him. We consider that she was not justified in so doing.

For these reasons the appeal will be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Inspecting Assistant Commissioner of Income-tax. *Petitioner** (*Complainant*)

v.

Chotabhai Javerbhai and others .. *Respondents* (*Accused 1 and 3 to 6*).

Inspecting Asst., Commissioner of Income-tax v. Javerbhai.

Income-tax Act (XI of 1922), S. 52—Agent if can present a return—Liability of such agent for making a false return.

There is no reason why an agent cannot present an income-tax return for the assessee his principal. The word 'person' in S. 52 of the Income-tax Act

* Crl. R. C. No. 806 of 1940
(Crl. R. P. No. 760 of 1940). 1st August, 1941.

Inspecting Asst., Commissioner of Income-tax *v.* Javerbhai.

can be given its dictionary meaning and can include the assessee's agent making a return. Accordingly an agent making a fraudulent return on behalf of his principal is liable to be proceeded against for an offence under S. 52 of the Income-tax Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, dated 2nd September, 1940 and made in C. C. No. 2186 of 1940.

V. L. Ethiraj for *A. S. Sivakaminathan* for Petitioner.

T. R. Venkatarama Sastri, V. V. Srinivasa Aiyangar, K. S. Jayarama Aiyar, P. S. Sarangapani, N. D. Varadachari and *R. Viswanathan* for Respondents.

The Crown Prosecutor (P. Govinda Menon) for the Crown.

The Court made the following

ORDER.—The five accused in the lower Court are partners of a firm of the name of Chotabhai Javerbhai, doing business in yarn and silver; and the sixth accused is the son of the first accused and the power-of-attorney agent of the firm in Madras. The sixth accused submitted an income-tax return showing profits of about Rs. 5,000. P. W. 4, the then Income-tax Officer, upon looking through the accounts of the accused firm, discovered that the figure '1' had been introduced in front of the figures 3180 on the debit side, thus indicating an expenditure of Rs. 10,000 more than if that '1' had not been inserted. This aroused P. W. 4's suspicions, and so he examined the accounts more closely. He then discovered that many fraudulent entries had been made in the accounts and that the profits were at least Rs. 41,672. After a full examination of the accounts he assessed the firm's profits at more than Rs. 65,000, but as an appeal is pending with regard to Rs. 24,000, the case proceeded on the footing that the profits of the firm for the year in question were Rs. 41,672. It was the sixth accused who had made calculations and submitted the return; but a complaint was filed by the Inspecting Assistant Commissioner against all the accused, alleging that they had fraudulently introduced these false entries into their accounts with a view to defraud the income-tax authorities and had thereby made themselves liable for punishment under S. 52 of the Income-tax Act and under Ss. 193 and 196 of the Indian Penal Code. The learned Chief Presidency Magistrate by

Inspecting Asst., Commis-sioner of Income-tax *v.* Javerbhai.

whom this case was tried, came to the conclusion that neither in law nor in fact was the sixth accused authorised to file an income-tax return and that therefore no prosecution could be launched with regard to a return which had no legal significance. In considering the charges under Ss. 193 and 196 of the Penal Code, he came to the conclusion that although it was true that false entries had been made in these accounts, there was nothing to show that the sixth accused—and still less the other five accused—had any knowledge of these false entries and that the necessary *mens rea* for a criminal conviction was lacking. He therefore discharged all the accused. A revision petition has been filed by the Crown against this order of discharge.

It is not here disputed that the sixth accused was the agent of accused 1 to 5 in the conduct of the Madras business. A general power-of-attorney by the five partners in his favour has been marked as Ex. U. It is however argued by all the six accused that the sixth accused had no authority to file an income-tax return. The power-of-attorney is worded in the very widest terms, although no specific reference is made to the filing of income-tax returns. The sixth accused is empowered under clause 5:

"To sign and verify plaints—and all other documents and papers and to institute or defend any proceeding in any Court of law etc".

In clause 11 he is authorised to appear and represent the firm 'before any revenue officer—railways, Port Trust, Corporations and all departments of the Government or local authority'. Under Cl. 14 he is authorised:

"Generally to do all acts and things necessary or expedient in the interests of the said firm as fully and effectually as we could have done if personally present";

And the partners:

"Agree to ratify and confirm all that our said attorney or attorneys shall do or cause to be done in the execution of these presents".

The sixth accused for many years acted as the agent of the firm, and in pursuance of this power-of-attorney dated the 7th February, 1935, he did, in fact, send in income-tax returns. The other partners of the firm knew that he was sending in income-tax returns and they of course knew in due course what profits he had shown in his accounts and in his returns to the Income-tax Officer; and they seem to have always approved of his conduct and his representations before the income-tax authorities. In the year in question, when he presented his

Inspecting Asst., Commissioner of Income-tax *v.* Javerbhai.

return, P.W. 4 asked him why he had submitted his report and not the partners themselves; and the sixth accused's reply was that he was the accredited agent of the firm in Madras. In support of his statement he showed the Income-tax Officer Ex. U. P.W. 4 acted upon this representation as he or his predecessors had done in previous years. There can therefore be no doubt—whether the very wide and general terms of Ex. U extracted above expressly authorized the sixth accused or not—that the sixth accused regarded himself as the agent of the firm for the purpose of filing income-tax returns and that accused 1-5 intended him to file them and expressly or impliedly authorised him to file the return in question.

A more serious argument against the validity of the prosecution is that in law he was not the agent of the firm, in that the Income-tax Act does not permit of an agent's presenting an income-tax return. It is pointed out that S. 22 (2), for example, requires the Income-tax Officer to serve a notice upon any person whose total income in his opinion is such an amount as is liable to render such person liable to income-tax. That person is then required to make a report. The subsequent sections continue to refer to that person. That person may be a firm, it is argued; but it must be some individual or body of individuals, himself or themselves liable to assessment. I have not however been given any cogent reason why, if an assessee can present a return, his agent cannot do it for him. The principle *"qui facit per alium, facit per se"* is of very wide and general application. An exception would arise if a person entered into a contract to have something done by one on whose personal skill he relied. There seems however to be nothing in the Income-tax Act which suggests that it is essential that this act of sending in an income-tax return should be done only by an assessee. It can be done not only equally well by the person in charge of the business; but very much better. Paragraph 90 of the instructions issued by the Central Board of Revenue says:

"Returns and verifications required under the Act must be signed either by the assessee himself or by some representative duly authorised for the purpose in proper legal form, so that his acts will bind his principal".

S. 52, which is one of the provisions of law under which the accused have been charged, says:

"If *a person* makes a statement in a verification mentioned in S. 19-A or S. 20-A or S. 22—which is false and which he either knows or believes to be

Inspecting Asst., Commissioner of Income-tax *v.* Jeverbhai.

false—(he) shall be deemed to have committed the offence described in S. 177 of the Indian Penal Code".

Mr. Venkatarama Sastri contends that the word 'person' referred to here means the assessee, as it does in S. 22 (2) and elsewhere, and that one should not give to the word 'person' in this section its ordinary meaning. I do not see why the word 'person' should not have its dictionary meaning in S. 52; but even if it means only what the same word means in S. 22 (2), I am satisfied for the reasons given above that the word 'person' includes a person duly authorised. Far from agreeing, therefore, with the learned Magistrate that "the sixth accused had no authority in law or in fact to make the return which he did", I hold that the sixth accused had authority both in law and in fact to make the return he did.

The learned Magistrate has discussed but little the actual evidence against the accused which would go to support a charge under S. 52; because he had arrived at the conclusion that whatever may have been the guilty knowledge and intention of the sixth accused, he could not be liable under S. 52 of the Act. It has been argued by Mr. Venkatarama Sastri for the sixth accused that the evidence on record is insufficient to justify this Court in ordering any further proceedings. I wish to say as little about the matter as possible, because it is desirable that the Magistrate and not this Court should adjudicate upon the weight of the evidence and give a finding whether or no the evidence is sufficient to bring home the charge to the accused. I need only say that it is difficult in the absence of some sort of explanation by the sixth accused to understand how on one day a clerk or subordinate could put Rs. 10,000 in his pocket without the manager of the business being any the wiser, on another day not long afterwards putting Rs. 8,400 in his pocket, and the day after that again another Rs. 1,600. It is also difficult to understand how an intelligent man of business should not be aware that his business was making a substantial profit (Rs. 40,000 and more a year) and believe that his firm was doing so badly as to make only Rs. 5,000 a year. I do not wish to express any opinion whether this in itself would be sufficient evidence to justify a conviction. Still less do I wish to say that this is so conclusive against the accused that nothing he can say would rebut that evidence. But I think that these facts and the other evidence in the case require further consideration by the Magistrate.

With regard to the charge against the accused under Ss. 193 and 196 of the Indian Penal Code, Mr. Venkatarama Sastri has put up a very strong argument which, if correct, would show that the complaint had not been made by the proper person within the meaning of S. 175 of the Code of Criminal Procedure. This objection to the complaint was not raised in the Magistrate's Court, and the learned Public Prosecutor points out that because that was not done, he is not in a position on the evidence on record to satisfy me that the complaint was made by a proper person. He however contends that if it is questioned in the trial Court, he is prepared to adduce evidence to satisfy the Court that the complaint made was a proper one upon which a Court can proceed. As the case is going back to the Magistrate, the question of the propriety of the complaint with regard to the charges under Ss. 193 and 196, Indian Penal Code, will be left open for the consideration of the Magistrate.

Although the accused 1 to 5 knew that the sixth accused was showing that the firm had made a profit of nearly Rs. 5,000 and must have been somewhat surprised it was not doing better, yet in a criminal case where the burden of proving knowledge and intention is upon the prosecution, I do not think it can be said that the accused 1 to 5 knew beyond all reasonable doubt that the sixth accused was making fraudulent returns. So that I do not think it is in the interests of justice that I should require the Presidency Magistrate to make any further inquiry into the charges against them.

In the result, the order of discharge by the Presidency Magistrate with regard to the sixth accused only is set aside and some Magistrate other than the Magistrate against whose judgment this petition has been preferred is ordered to make further inquiry into the case against him.

The petition against accused 1 to 5 is dismissed.

K. S. *Order of discharge with regard to sixth accused set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Sepulchre Brothers, Proprietors, The Belgium East India Trading and Engineering Company, Bombay. *Petitioners** (*Defendants*)

v.

Sait Khushal Das Jagjivan Das Mehta trading in the name of Messrs. J. Khushal Das and Company, Bezwada. *Respondent* (*Plaintiff*).

Sepulchre Bros. *v.* Khushal Das.

Civil Procedure Code (V of 1908), S. 20, Cl. (c)—Suit for damages for breach of contract—Place where telegram accepting offer was received—Part of the cause of action if arises at such place.

In suits arising out of contracts, a part of the cause of action arises where the letter or telegram accepting the offer is received or delivered.

Venkata Reddi v. *Nataraja Setti,* (1924) 46 M.L.J. 371 followed and *Evans* v. *Nicholson,* (1875) 32 L.T. (N.S.) 778, relied on.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Bezwada dated 17th August, 1939 and made in O. S. No. 348 of 1938.

N. Rajagopala Aiyangar for Petitioners.

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—The only question argued in this civil revision petition relates to the jurisdiction of the Court below to entertain the suit. The issue has been found for the plaintiff and the defendant has preferred this revision petition.

The suit was for damages for breach of contract for delivery of certain perforated steel sheets according to specification to the plaintiff who is a merchant trading at Bezwada. The defendants who are carrying on business at Bombay are the representatives of a Belgian firm of steel manufacturers. The plaintiff averred that the defendants broke the contract by failing to deliver the goods and they sued in the District Munsif's Court at Bezwada alleging that their cause of action arose in part at Bezwada. The defendants pleaded *inter alia* that the Court had no jurisdiction to entertain the suit as no part of the cause of action arose at Bezwada. The issue was tried by consent of parties as a preliminary issue and the letters

*C. R. P. No. 2271 of 1939. 8th August, 1941.

Sepulchre Bros. *v.* Khushal Das.

by means of which the contract was concluded have been included in the record. The lower Court took the view that the indent form which the defendants finally sent to the plaintiff to be duly completed and returned after the specifications and quotations had been exchanged must be taken to be the offer and the plaintiff's posting it duly signed and completed was the acceptance and that therefore the contract was concluded at Bezwada. The learned District Munsif was further of opinion that the Court had jurisdiction as the goods were to be received finally at Bezwada *via* Madras.

Mr. Rajagopala Aiyangar, the learned counsel for the petitioner, urged that the view taken by the learned District Munsif was unsustainable. He contended that the plaintiff's return of the indent form duly completed and signed was merely a customary formality which the defendants required their customers to observe in such cases, and that the contract was really concluded by the defendants' telegram from Bombay accepting the plaintiff's order for the goods at the price quoted by the defendants. Mr. Rajagopala Aiyangar further submitted that the correspondence showed that the contract was on c.i.f., terms and that the shipping documents were to be delivered against payment at Bombay, while the harbour at which the goods were to be unloaded was Madras. The place of delivery, he therefore argued must be taken to be either Bombay or Madras and not Bezwada. The respondent's learned counsel Mr. Seshagiri Rao did not attempt to repel these contentions but sought to support the decision of the Court below on the ground that if the telegram was to be treated as the acceptance, its receipt by the plaintiff was a part of the cause of action and as this was admittedly at Bezwada, the Court below had jurisdiction to entertain the suit under S. 20 Cl. (*c*) of the Code of Civil Procedure. The decision of Ramesam, J. in *Venkata Reddi* v. *Nataraja Setti*[1], was cited in support of this contention. After referring to the decisions holding that in suits arising out of contracts a part of the cause of action must be deemed to arise where the letter containing the offer was received, the learned Judge held that the receipt of acceptance when the contract was complete was a part of the contract "there being no reason why acceptance should be in a worse position than offer". The learned Judge distinguish-

1. (1924) 46 M.L.J. 371.

Sepulchre Bros. *v.* Khushal Das.

ed the case of *Clarke Brothers* v. *Knowles*[1], by pointing out that it did not appear from the affidavit on which the application was based that any letter of acceptance was received at West Hartlepool and the case in *Kamisetti Subbiah* v. *Katha Venkataswamy*[2], by observing that no attempt was made there to support the judgment under appeal on the ground that the letter of acceptance was received in Kurnool.

Mr. Rajagopala Aiyangar urged that this decision should not be accepted as sound because it was opposed to the two later cases decided by Divisional Benches of this Court and reported in, *The National Insurance Company Limited, Calcutta* v. *Seethammal*[3], and *Ahmad Bux* v. *Fazal Karim*[4], in both of which the decision should have been the other way if *Venkata Reddy* v. *Nataraja Setti*[5], were to be regarded as good law. In both these cases which arose out of suits filed on the Original Side of this Court, it appears no doubt from the statement of facts that the communication of acceptance was received at Madras. But it is to be observed that no point was made of such receipt as being part of the cause of action and the decision of Ramesam, J., referred to above does not appear to have been brought to the notice of the learned Judges who held that the cause of action in each case did not arise in part within the Original Civil Jurisdiction of this Court.

It was also argued that there was no real analogy between the receipt of an offer and the receipt of an acceptance; for, while the former was an essential step in the making of a contract as there could be no acceptance unless the offer was received, the receipt of acceptance was not necessary to complete the contract which was concluded as soon as the letter of acceptance was posted as settled by a long course of decisions. The argument is not without force and I should have hesitated to follow the decision of Ramesam, J., if there was nothing more to support it than the analogy of the receipt of an offer on which apparently it was based. But there is authority for the view that although an acceptance is complete as against the proposer as soon as the letter containing it is posted, it is a continuing act until it reaches the person to whom it is communi-

1. (1918) 1 K.B. 128.
2. (1903) I.L.R. 27 Mad. 355.
3. (1933) 65 M.L.J. 455.
4. (1940) 1 M.L.J. 676: I.L.R. (1940) Mad. 195.
5. (1924) 46 M.L.J. 371.

Sepulchre Bros. *v.* Khushal Das.

cated and may thus be taken to be made also at the place where it is received. This was the view taken in *Evans* v. *Nicholson*[1], which arose out of a motion for a writ of prohibition to the Mayor's Court on the ground that it had no jurisdiction to entertain an action for money due on an account stated as the whole cause of action did not arise within the city of London. The defendant in that case received out of the city some goods which he had ordered from the plaintiff and in answer to a letter requesting payment of the price wrote that he would remit the amouut as requested as soon as possible. This letter was posted at the defendant's place of residence out of the city and was received by the plaintiff at his place of business in the city. It was argued on the analogy of cases relating to acceptance of an offer that the account must be deemed to have been stated out of the city where the defendant's letter was posted but the Court held that although a statement of an account was analogous to the acceptance of a contract and it was settled law that a contract was concluded as soon as the acceptance was posted, the statement, like the acceptance, was a continuous act until it reached the person to whom it was communicated and that therefore the defendant's letter was an account stated to the plaintiff at the place where the latter received it namely, the city of London. Lord Coleridge, C. J., observed at page 780:

"It has been pointed out, indeed, and with perfect truth, that the cases referred to have stopped at this point with laying down as law that a contract is complete when its terms are accepted; and that the acceptor need not wait till the other party receives his letter notifying his acceptance. But, then, that was all that it was necessary to decide in all those cases. *Adams* v. *Lindsell*[2], *Duncan* v. *Topham*[3], and *The Imperial Land Company of Marseilles (Harris' Case)*[4], and the Courts there needed not to go on and say whether the acceptance was a continuous act; still, all the reasoning in the cases upon which the judgments are founded, though the judgments themselves are confined to the points necessary to be decided, is applicable to the further proposition which we are now considering, namely, that the acceptance continues to be an act done by the person accepting in a uniform and unbroken course of dealing until it reaches the other person to whom it is notified. And, in my opinion, although when he sends it off by post it is made then as against him, it is nonetheless made also when it reaches the mind of the offerer by reason of its having also been made before. This leads me to be unable to distinguish an acceptance so explained from a statement of an account; and so, to apply the proposition to the facts in this case, I should say that, although an account was undoubtedly stated at Cop-

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1. (1875) 32 L.T. (N.S.) 778.
2. (1818) 1 B. & Ald. 681: 106 E.R. 250.
3. (1849) 8 C.B. 225: 137 E.R. 495. 4. (1872) L.R. 7 Ch. Ap. 587.

Sepulchre Bros. v. Khushal Das.

thorne, wherever that may be, it was nonetheless stated again when the letter containing the admission was received in the city."

Lindley and Archibald, JJ., expressed a similar opinion. Denman, J., while agreeing that an account must be deemed to be stated where the person to whom it was addressed received the statement, doubted the applicability of the analogy of the posting of the letter of acceptance concluding a contract, to the case of an account stated. He added however:

"But I do agree, that, if the letter speaks at the moment it is posted, it is in the nature of a continuous statement, and speaks also at the moment when it is received."

It will thus be seen that though the point actually decided related to an account stated, the decision was based on general principles applicable to all contracts and this has been recognised in Hals. Vol. 8, page 191 where this decision among others is cited as an authority for the proposition that where an offer is made and accepted through post, a part of the cause of action arises where the letter accepting the offer is posted and a part where it is delivered. In this view, a part of the cause of action in the present case must be taken to have arisen at Bezwada where the defendant's telegram accepting the plaintiff's order was received by the plaintiff.

Mr. Rajagopala Aiyangar cited two English cases, namely, *Cowan* v. *O'Connor*[1], and *Holland* v. *Bennett*[2], as being in conflict with *Evans* v. *Nicholson*[3], referred to above. In the former an order to make certain bets was transmitted by postal telegraph by the plaintiff residing outside the city of London to the defendant within the city, who telegraphed that the order had been carried out, and it was held that the contract of agency was made in the city and that the action was properly laid in the Lord Mayor's Court as the whole cause of action arose within the jurisdiction of the city. This, however, does not conflict with the view adumbrated in *Evans* v. *Nicholson*[3], for, as already observed, all that was held in the latter case was that an acceptance must *also* be deemed to have been made where the offerer received it. The fact, therefore, that the contract of agency could also be deemed to have been made at the plaintiff's place of residence without the city of London did not militate against the exercise of jurisdiction by the Lord Mayor's Court within whose jurisdiction the contract was con-

1. (1888) 20 Q.B.D. 640. 2. (1902) 1 K.B. 867.
3. (1875) 32 L.T. (N.S.) 778.

Sepulchre Bros. *v.* Khushal Das.

cluded by the despatch of the defendant's telegram notifying the carrying out of the plaintiff's order.

The case of *Holland* v. *Bennett*[1], related to an alleged wrongful dismissal of the plaintiff who was employed in England by a letter posted by his employer the defendant who was residing abroad. It was held that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad and that the English Court had no jurisdiction to entertain the action under O. 11, r. 1 (*e*) of the Rules of the Supreme Court which authorised service out of the jurisdiction of a writ of summons in cases, *inter alia* where the action was "in respect of a breach committed within the jurisdiction of a contract wherever made." The facts were entirely different and the provision under which the case was decided did not make the exercise of jurisdiction by the Court depend upon the arising of the cause of action wholly or in part within the jurisdiction. I cannot therefore regard the case as being in conflict with *Evans* v. *Nicholson*[2].

For the reasons indicated, I hold that the Court below is competent to try the suit and accordingly I dismiss the civil revision petition with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ahmed Mohideen .. *Petitioner* (Complainant)*

v.

Yusuf Ali Syed ... *Respondent (1st Accused).*

Ahmed Mohideen *v.* Yusuf Ali.

Criminal Procedure Code (V of 1898), S. 197—Complaint against officer of Government—Necessity for previous sanction of Governor for taking cognizance of alleged offence.

Where it was alleged that the complainant was beaten under orders given while acting or purporting to act in the discharge of his official duty, by the accused,an officer not removable from his office save by or with the sanction of the Secretary of State, previous sanction of the Governor of the Province is essential for taking cognizance of the alleged offence by such officer.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898 praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate of the

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1. (1902) 1 K.B. 867. 2. (1875) 32 L.T. (N.S.) 778.

* Crl. R. C. No. 733 of 1940 (Crl. R. P. No. 692 of 1940). 10th January, 1941.

Court of the Presidency Magistrates, Egmore, Madras, dated 19th August, 1940 and passed in C. C. No. 2686 of 1940.

Ahmed Mohideen *v.* Yusuf Ali.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

V. L. Ethiraj for *A. S. Sivakaminathan* for Respondent.

The Crown Prosecutor for the Crown.

The Court made the following

ORDER.—The house of the complainant was raided by the respondent, the Assistant Commissioner of Police under the provisions of S. 42 of the Madras City Police Act on 9th July last and instruments of gaming on horse races were found. The complainant escaped and he was arrested by the respondent on 10th July, and taken to the police station. Two Sub-Inspectors are stated to have beaten him in the station under the orders of the respondent and as urged by the Crown Prosecutor the respondent gave the order while acting or purporting to act in the discharge of his official duty. He is not removable from his office save by or with the sanction of the Secretary of State and S. 197, Criminal Procedure Code, enacts that no Court can take cognizance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment. The revision petition therefore fails and is dismissed.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor ... *Appellant**

v.

B. V. A. Lury Company, represented by A. V. Raghavaraju, Director and another. *Respondents (Accused).*

Public Prosecutor *v.* Lury Co.

Companies Act (VII of 1913), *S.* 32 (5)—*Default without wilful neglect —If punishable.*

Under S. 32 (5) of the Companies Act, mere default in not filing before the Registrar of Joint Stock Companies a list of members of the company within 21 days after the ordinary general meeting is punishable. Knowledge or wilfulness is not a necessary ingredient of the offence where it is the company and not its officers that is sought to be prosecuted.

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* Crl. Appeal No. 149 of 1941. 14th August, 1941.

Public Prosecutor *v.* Lury Co.

Appeal under S. 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondents (accused) by the Sub-Divisional Magistrate of Cocanada in C. C. No. 71 of 1940 on his file.

The Appellant in person.

D. Narasaraju for Respondents.

The Court made the following

ORDER.—Under S. 32 of the Companies Act a company has to draw up a list of the members of the company and of the persons who have ceased to be members since the date of the last return. That list has to be completed within 21 days after the ordinary general meeting and a copy has to be sent, signed by a director or the manager or the secretary, to the Registrar. In this case, whereas the list should have been sent to the Registrar on or before 20th November, 1939, it was not in fact filed until 3rd January, 1940. A case was therefore filed against the company and its directors for not complying with the requirements under S. 32 of the Act. The Sub-Divisional Magistrate of Cocanada held that there was no reason to think that the failure to submit this return was due to anything but negligence and that as the delay was not due to any wilful default, they were not guilty of any offence. He therefore acquitted them. The Crown has preferred an appeal with regard to the acquittal of the company.

The words 'knowingly' and 'wilfully', which are found to be the necessary ingredients of the offence by the learned Magistrate, cannot be applied to a company at all. A company, as a corporate body, cannot either 'know' or 'will'. That the Legislature did not personify companies and impute to them minds is made clear by the wording of the relevant sections. The punitive clause of S. 32, for example, reads:

"If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding Rs. 50 for every day during which the default continues, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty",

It is to be noted that the words 'knowingly' and 'wilfully' are used with reference only to the officers of the company and not to the company itself, obviously for the reason I have given above. The company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly or wilfully authorise or permit the default.

Public Prosecutor v. Lury Co.

Mr. Narasaraju for the respondent has quoted *Dorte* v. *South African Super-Aeration Ltd*[1], in which, referring to the English Act, the Alderman held that:

. . . . "the word 'default' in S. 27 implied a continued neglect to do an act required."

The English Act has not been shown to me; and so I do not know to what extent, if at all, that case can safely be applied in India; but even if it could, it can be distinguished from the case before me by the fact that a prosecution had been launched apparently against the officers of the company as well as against the company, and also by the fact that in that case the omission was one which it was impossible to remedy. It may be noted that the company had already been fined for not having submitted the required return on the due date, and a daily penalty was also imposed on the company for its subsequent default. It was only when a prosecution was launched after the omission was impossible to remedy that the lower Court refused to impose a further penalty.

The only Indian case that has been cited to me is a judgment of Burn, J., in Crl. R. C. No. 601 of 1937, *Sri Meenakshi Mills Co., Ltd.* v. *Assistant Registrar of Joint Stock Companies, Madura*[2], which is a case in which the company and the directors had been fined under S. 76 of the Companies Act. Burn, J., acquitted the officers of the company because in the circumstances of that case he held that it could not be said that they had been 'knowingly parties to the default'; but he upheld the penalty imposed on the company. Precisely the same conditions exist in this case. The learned Magistrate has found that there was no wilful default on the part of the officers of the company and the learned Public Prosecutor is not prepared to dispute that finding. So while the officers of the company were rightly acquitted, the company should have been punished. As far as the company is concerned the order of the Magistrate is set aside and the company is ordered to pay a penalty of Rs. 50.

K. S. *Order set aside.*

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1. (1904) 20 Times Law Reports, 425.
2. (1938) 1 M.L.J. 856: 1938 M.W.N. (Crl.) 128.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Samuel Nadar .. *Appellant** (*Plaintiff*)

v.

Thangayya Nadar .. *Respondent* (*Defendant*).

Samuel Nadar *v.* Thangayya Nadar.

Limitation Act (IX of 1908), Art. 106—Applicability—Partnership for running a chit fund with the partnership as stake-holder—Suit for dissolution and accounts—Limitation.

The business of a partnership formed for running a chit fund with the partnership as the stake-holder, does not cease or terminate with the expiry of the chit period or earlier if the auction of the chits every month comes to an end earlier for other reasons. Accordingly for a suit for dissolution of such partnership time will not begin to run until all the assets of the partnership are realised and the liabilities paid when alone the business can be said to come to an end.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in A. S. No. 31 of 1937 preferred against the decree of the Court of the District Munsif of Manamadura in O. S. No. 40 of 1933.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for Appellant.

K. Rajah Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the decree of the Subordinate Judge of Devakottai in A. S. No. 31 of 1937. The plaintiff (appellant) filed the suit out of which this second appeal arises for dissolution of a partnership which he and the defendant are said to have been carrying on. The business of the partnership consisted in the running of a chit transaction, both the partners acting as stake-holders. The chit was to be conducted for a period of fifty months. Two prizes were to be taken by the stake-holders and the remaining forty-eight were to be open to the other subscribers. The person who offered the lowest bid was given the prize. The suit has been dismissed by the lower appellate Court as barred by limitation.

The chit started on 13th March, 1924 and the fifty months expired on 14th May, 1928. The present suit was filed on 13th February, 1933. If the adventure or undertaking of carrying

*S. A. No. 1084 of 1938. 1st August, 1941.

Samuel Nadar v. Thangayya Nadar.

on a chit fund was completed by the end of the fiftieth month, then there were was a dissolution of the partnership under S. 42 of the Indian Partnership Act. That would be on 14th May, 1928. If there was a dissolution on that date, then under Art. 106 of the Second Schedule of the Indian Limitation Act a suit for an account would have to be filed within three years from that date, unless in the meanwhile there were acknowledgments within three years of each other. The lower appellate Court held that the business of the partnership or the undertaking or adventure as mentioned in S. 42 (*b*) came to an end on the expiry of the fifty months during which the chit was to run. If this is conceded, the rest follows. The lower appellate Court says:

"Ordinarily a chit to run for 50 months by two persons in partnership is an adventure which terminates at the 50th month, or it is a partnership for a particular period".

This is a thorough misunderstanding of the nature of the partnership. When two persons form themselves into a partnership for the purpose of carrying on a chit transaction, the chit may come to an end on the expiry of the fiftieth month; but as between the two persons who are joint stake-holders the adventure or undertaking does not come to an end immediately, for monies due to the partnership from the subscribers have to be collected. If it is a case of single stake-holder there is no trouble; he will collect all the monies due from the subscribers who drew the prizes. But in a case where two persons form themselves into a partnership and the partnership is the stake-holder, then the partnership business does not cease or terminate with the fiftieth month or earlier if the auction of the chits every month comes to an end earlier for other reasons. Very much more has to be done; all the monies due to the partnership have to be collected and the liabilities have to be discharged and it is only then that the business can be said to come to an end. As between the two the relationship of partners continues until the termination of the business of the partnership, that is, until all the assets of the partnership are realised and the liabilities paid. It is this initial misunderstanding of the nature of the business namely, that the partnership business came to an end at the termination of the fiftieth month, that has led the lower appellate Court to hold that the suit is barred. As held by a Bench of this Court in

Samuel Nadar v. Thangayya Nadar.

Katta Gundayya v. *Katta Siddappa*[1], a suit for taking the accounts of a partnership:

.... "would not be barred unless the defendant makes out that there has been a dissolution of the partnership more than three years prior to the institution of the suit. The onus of making out such dissolution is upon the defendant and it is well established that the mere fact that after a particular date no further business was done will not amount to a dissolution of the partnership."

It is unnecessary to refer to the decisions cited in that judgment. In this case the onus of proving that there was a dissolution lay upon the defendant. All that is said by the respondent in support of the judgment of the lower Court is that the plaintiff pleaded that there was a reference to arbitration and an attempt to settle the accounts and that there was an agreement for division of the assets and liabilities of the partnership between the partners. Unfortunately the agreement pleaded by the plaintiff was denied by the defendant and the defendant succeeded in satisfying the lower Courts that the plaintiff's case in regard to the settlement is not true. The first Court found that there was only an attempt at settlement and the lower appellate Court says that the finding of the trial Court that the settlement was only an abortive settlement in April or May, 1928, was not even challenged before him. In the evidence given by the defendant at page 18 of the printed papers this is what he says:

"The chit was stopped because plaintiff said the 43rd auction might be postponed owing to the want of collections. The plaintiff looked into the accounts with his accountant for the attempted agreement. The proposed terms were that the assets and the liabilities should be divided equally. I do not remember the persons who might have been present at that time. There was only a proposal to wind up our business as stated above."

After this evidence it is idle to contend that there was a dissolution or a completed agreement in April or May, 1928. I hold that the suit is not barred by limitation. I reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court.

Leave to appeal is refused.

K.S. *Appeal allowed.*

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1. (1938) 1 M.L.J. 574: 45 L.W. 749.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Al. Ct. Alagappa Chettiar, through his authorised agent Ranganatha Aiyangar. ... *Appellant* (Petitioner—Assignee—Plaintiff attaching—Decree-holder)*

v.

Ramakrishna Aiyar and others ... *Respondents (Respondents 9, 11 to 16 and 18 to 31).*

Alagappa Chettiar *v.* Ramakrishna Aiyar.

Limitation Act (IX of 1908), Art. 182—Previous execution application—Order in 1931 directing fresh application to be filed against certain judgment-debtors—Final order on application on 30th March, 1933—Subsequent application for execution in March, 1935.—If within time—Civil Procedure Code (V of 1908), S. 48—Assignment of decree — Attachment of another decree by assignor—Assignee proceeding to execute attached decree —If assigned decree becomes barred under S. 48.

A, the assignee of a decree passed in a suit of 1916 applied in March, 1935. to execute another decree which his assignor had attached as against some of the defendants therein. The latter decree as amended in appeal in 1928, had ordered them to pay back certain amounts drawn from Court on the security of immoveable property. The decree was granted also personally against those defendants. The execution application of 1935 was to sell the property offered as security. Certain previous applications one by himself in November, 1928 (seven months after the appellate decree) and two others by another attaching decree-holder in 1931 and 1932 respectively were relied on as saving limitation for the execution application of 1935. The earlier applications were in general terms praying for the transmission of the decree copies to various Courts and for simultaneous execution against those and other defendants. *A's* application of 1928 was finally disposed of on 18th December, 1933. On the question whether the execution application of 1935 was barred by limitation, it was contended that as against the particular defendants sought to be proceeded against the executing Court had passed an order on the 30th March, 1931 calling on *A* to make fresh applications with fuller and better particulars and therefore limitation commenced to run from that date. It was also contended that the application of 1928 had not been made to the proper Court and that the decree assigned having been passed in 1916 was barred by 1935 and therefore *A* could not execute the attached decree.

Held:—(*i*) The expression 'final order' in Art. 182 of the Limitation Act refers only to the final order on the application and not to any order as against any particular judgment-debtor and therefore the application of 1935 for execution is not barred.

(*ii*) The Court which has transmitted a decree still retains its jurisdiction to execute it under certain circumstances, *Muthurama Reddi* v. *Motilal Daga*, I.L.R. (1938) Mad. 326, followed.

(*iii*) By attaching the other decree in execution of the decree assigned to him *A* had done all he can to secure for himself the property of his judg-

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* A. A. O. No. 37 of 1938. 26th March, 1941.

Alagappa Chettiar v. Ramakrishna Aiyar.

ment-debtor. The application for execution of the attached decree does not involve the execution of the decree assigned to *A* and therefore the application is not barred by S. 48, Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge of Madura dated 2nd February, 1937, and made in E.P. No. 197 of 1935 in O. S. No. 153 of 1910 on the file of the Temporary Sub-Court of Ramnad.

R. Gopalaswami Aiyangar for Appellant.

T. S. Muthuswami, O. V. Baluswami, K. V. Srinivasa Aiyar and *K. Vydianathan* for Respondents.

The Judgment of the Court was delivered by

King, J.

King, J.—The appellant here is the assignee of the decree in O. S. No. 70 of 1916 of the Ramnad Sub-Court. His assignor had attached a decree in O. S. No. 53 of 1910, and as assignee he applied in March, 1935, to execute that attached decree as against certain of the defendants. Those defendants were ordered by the decree, as amended in appeal in 1928, to pay back the amounts which they had drawn from Court out of the late Raja's allowance money with interest. In withdrawing the money from Court they had offered the security of immoveable property. This application of 1935 by the appellant is to sell the property which they thus offered as security. The appellant relied upon certain previous applications, one of which was filed in November, 1928, seven months after the appellate decree, and two of which were filed in 1931 and 1932 respectively. These later applications were not filed by himself but by another attaching decree-holder. It was held by the learned Additional Subordinate Judge of Madura that the application of 1935 was barred by limitation on the ground that it was the first application made after the appellate decree in 1928 to proceed against these particular properties. Apparently the learned Subordinate Judge had overlooked the fact that the decree was granted also personally against these defendants. There is therefore no discussion in the order of the learned Subordinate Judge of the question whether the application of November, 1928, was or was not directed against these particular defendants. We find it quite clear that the appellant prayed in general terms for the transmission of copies of the decree to various Courts and for simultaneous execution in order that he might proceed against these defendants as well as the others. There is also an order of the executing Court passed in

Alagappa Chettiar *v.* Ramakrishna Aiyar.

King, J.

March, 1931, which shows clearly that it was in this sense that the execution application was understood by the Court itself. It is quite clear therefore that in November, 1928, the appellant desired to proceed against the present respondents.

According to Art. 182 of the Limitation Act he will now be entitled to reckon as the date from which limitation begins to run for his next application the date of the final order on that application. The petition in question was finally disposed of by the Court on the 18th December, 1933. The learned advocate for the respondents no doubt brings to our attention the fact that in so far as his own clients are concerned the executing Court passed on the 30th March, 1931, an order calling upon the appellant to make fresh applications with fuller and better particulars. He argues therefore that it is only from this date that the appellant is entitled to count time in regard to limitation and that for our present purpose 30th March, 1931, must be considered to be the date of the final order. We are unable to accept this contention. The language of Art. 182 is very simple. It refers to the date of "the final order passed on an application made in accordance with law to the proper Court". Although for certain purposes, as is set out in the explanation, applications have to be analysed and their effect considered as against particular judgment-debtors, there is nowhere in the section any further explanation which deals with the meaning of this expression "final order". If the Legislature had wished to constitute the final order as against any particular judgment-debtor as the final order to be considered in any future application against him, it would have been easy for it to have said so explicitly. Without any such explicit statement it seems clear to us that the final order on an application can only mean just what it says—and that in this case the date of the final order is undoubtedly the 18th December, 1933. If therefore there are no other objections it is clear that the application of 1935 is within time in its relation to the application of 1928.

There are however two other objections raised on behalf of the respondents. The first is that the application of 1928 was not made to the proper Court. As has already been stated, the prayer in the application was to transmit the decree to certain other Courts and we have been informed that in actual fact the decree had been transmitted years before to these other

Alagappa Chettiar v. Ramakrishna Aiyar.

King, J.

Courts and had never been returned. It was therefore argued that since the decree had been transmitted before from the executing Court, the Court which transmitted it had lost all jurisdiction in the matter of further execution and therefore this petition was not presented to the proper Court. A very similar argument was addressed to us only last week in connection with another Civil Miscellaneous Appeal (No. 342 of 1939) and we have there dealt with it in full, and have given reasons for holding that the Court which has transmitted the decree still retains its jurisdiction to execute it under certain circumstances. We have there followed a decision of a Bench of this Court in *Muthurama Reddi* v. *Motilal Daga*[1]. Nothing has been addressed to us in the argument today which leads us to dissent from the views which we expressed so recently. We are accordingly of opinion that the present application, which is similar in its facts to the one with which we then dealt, was made to the proper Court.

Finally it is argued that under S. 48 Civil Procedure Code the appellant is barred from filing this particular execution application on the ground that although the execution of the decree in O. S. No. 53 of 1910 may not be barred, the execution of the decree in O. S. No. 70 of 1916 was barred by 1935. No doubt the period between 1916 and 1935 is well in excess of 12 years, but we can see no reason for holding that in proceeding to execute the decree in the 1910 suit which had been attached by his assignor years before, the appellant was in reality executing his own decree of 1916. In our opinion, by the act of attaching the decree in the 1910 suit the appellant has done all he can to secure for himself in his 1916 suit the property of his judgment-debtor. In proceeding to execute the decree which he has attached he is essentially doing nothing more than he would be doing if he proceeded to sell ordinary landed property which he had attached. We are not therefore convinced that the present application in any sense involves the execution of the decree of 1916. It is therefore irrelevant that the decree of 1916 was barred by 1935.

In the result there are no grounds whatever for holding that the application now in question was barred by limitation. This appeal must accordingly be allowed and the application restored

1. I.L.R. (1938) Mad. 326.

to file and disposed of by the learned Subordinate Judge in accordance with law. The respondents must pay the appellant's costs in this Court. The costs of the execution application will abide the result.

Alagappa Chettiar *v.* Rama-krishna Aiyar.

King, J.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Tirugnanavalli Ammal, by agent Rajamanikkam Pillai. *Appellant*-Petitioner (Respondent-Plaintiff).*

v.

P. Venugopala Pillai and others. *Respondents (Petitioners-Defendants).*

Tirugnana-valli Ammal *v.* Venugopala Pillai.

Madras Agriculturists' Relief Act (IV of 1938)—S. 3 (2) Proviso C and S. 20—Usufructuary mortgagee of house bound to pay property tax under the contract—Tax realised from the owner of the property—Eligibility of mortgagee to apply for stay of proceedings in execution of decree against him.

Where the Municipal register indicated that the assessee in respect of a house was a Mutt to which it belonged and the receipts showed that tax had been paid by the Mutt for the two years immediately preceding 1st October, 1937, though the demand had in the first instance been made on the usufructuary mortgagee of the house who was liable to pay the tax under his contract and had in fact so paid for some years, on the question whether the mortgagee can be deemed to have been assessed to tax for purposes of Proviso *C* to S. 3 (2) of Act IV of 1938 precluding him from getting stay under S. 20,

Held, that it was difficult to treat either the entries in the assessment register or the demand for the tax as the sole criterion of assessment, and since no appeal lay and interference by the High Court was solely confined to powers of revision under S. 115, Civil Procedure Code, even assuming that the view of the lower Court as to whether the mortgagee has been assessed to tax and what constitutes assessment in the circumstances of the case is wrong, there was no ground for interference as there was no irregularity relating to jurisdiction.

Appeal and Petition under S. 115 of Act V of 1908 presented against the order of the District Court of South Arcot dated 25th October, 1938 and made in M.P. No. 162 of 1938 in O. S. No. 6 of 1927.

T.R. Venkatarama Sastri and *T. E. Ramabhadrachariar* for Appellant.

K. Bhashyam Aiyangar and *J. R. Gundappa Rao* for Respondents.

The Judgment of the Court was delivered by

Wads-worth, J.

Wadsworth, J.—This appeal and the alternative revision petition arise out of an order allowing an application under

*C.M.A. No. 349 of 1939. 1st May, 1941.
C.R.P. No. 1416 of 1939.

Tirugnanavalli Ammal v. Venugopal Pillai.

Wadsworth, J.

S. 20 of the Madras Act IV of 1938 to stay proceedings in execution of a decree. The only question argued before us relates to the eligibility of the respondents, who were the petitioners before the lower Court, to be agriculturists having regard to Proviso *C* to S. 3 (2) of Act IV. It is now settled that no appeal lies from an order under S. 20, so that we have to consider whether, if there is an error, there are grounds to justify interference in revision under S. 115, Civil Procedure Code. It is common ground that the respondents will be excluded from the category of agriculturists if house No. 105 is deemed to be a house in respect of which the 1st respondent has been assessed to property tax. That house admittedly forms part of the property of the Chockapuraswami Mutt and is held by the 1st respondent under a usufructuary mortgage of the year 1932. The property tax in respect of this house is payable under the mortgage contract by the mortgagee and was so paid in the years immediately following the mortgage. It is also established that the first respondent applied to the Municipality for a vacancy remission in respect of this house and described himself as the owner thereof. For the purpose of Proviso *C* the important question is what happened during the two years immediately preceding 1st October, 1937. It is established that the Municipal property register in respect of these two years showed the Chockapuraswami Mutt as the owner of this house, but it seems clear that the demand notice for the tax was sent to the mortgagee, first respondent, in respect of the tax for these two years. He did not pay the tax and a suit was filed by the Municipality against the first respondent alone, without impleading the manager of the Mutt until a later stage. That suit was pending at the time of the application to the lower Court. After the suit was filed, the taxes for the two relevant years appear to have been paid to the Municipality by the manager of the Mutt, who has deposed that he expected to recover the money from the mortgagee.

Now on these facts the lower Court has found that the Municipality did not actually treat the mortgagee as the owner for the purpose of the collection of the tax on house No. 105 and that there was no evidence that the mortgagee actually paid the property tax for the two relevant years. The latter finding is undoubtedly justified, although it may be that the money which the Mutt paid to the Municipality will eventually

Tirugnanavalli Ammal *v.* Venugopala Pillai

Wadsworth, J.

be recovered from him. The finding that the Municipality did not actually treat the mortgagee as owner seems to overlook the very wide definition of "owner" in S. 3 of the Madras District Municipalities Act. Under this Act the usufructuary mortgagee, being entitled to collect the rent, would presumably come within the definition of an owner. It has been argued before us that, even assuming that Proviso *C* to S. 3 (2) of Act IV of 1938 contemplates the assessment of a person as owner, it does not contemplate any form of ownership higher than that which suffices to render a person liable to property tax under the District Municipalities Act. We do not think it is necessary for the purpose of this case to decide whether Proviso *C* would have no application to the case of an assessment imposed upon a person who is not an owner, nor do we think it incumbent upon us to attempt any precise definition of what is meant by assessment under this Proviso. There are difficulties in the way of treating the entries in the assessment register as the sole criterion of assessment and there are also difficulties in the way of regarding the demand for the tax as the sole criterion of assessment. In the present case the register indicates that the assessee in respect of house No. 105 was the Mutt and the receipt shows that the Mutt actually paid the tax for previous years. The demand was almost certainly made in the first instance of the mortgagee who was liable to pay the tax not only under his contract, but also under the District Municipalities Act as an "owner". The question whether in such circumstances it can be said that the mortgagee has been assessed to this tax for those two years is one of considerable difficulty upon which the learned District Judge has come to a conclusion which cannot be described as perverse and certainly embodies no irregularity relating to jurisdiction. In such circumstances, since no appeal lies and our powers of interference are confined solely to powers of revision under S. 115 of the Civil Procedure Code, we are of opinion that, even assuming the learned Judge's view as to what constitutes assessment in such a case to be incorrect, there are no grounds which would justify interference in revision. The appeal and revision petition are therefore dismissed with costs. One advocate's fee only.

K.C. *Appeal and Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

N. Kayambu Pillai .. *Petitioner** (*2nd Appellant*).

F.B.

Kayambu Pillai, *In re.*

Court-Fees Act (VII of 1870), Art. 1, Sch. II—Dismissal of pauper appeal on default by dispaupered appellant in paying the court-fee and furnishing security for costs—Order, if 'decree'—Review application—Proper court-fee payable.

A dispaupered appellant was directed to pay court-fee on the memorandum of appeal and security for costs of respondent. On default of payment of the court-fee and furnishing of security the appeal was dismissed. An application for review of the dismissal order was made, the petition being stamped with a court-fee of Rs. 2. The Taxing Officer held that the application should be stamped *ad valorem* under Art. 4 of Sch. I of the Court-Fees Act, as on a memorandum of appeal.

Held, that an order under O. 41, r. 10 (2) rejecting an appeal for failure to furnish security within the time ordered by the Court is not a decree; nor is an order rejecting an appeal for failure to pay court-fee within the prescribed time a decree as it is only an order of dismissal for default within the meaning of S. 2 (2) of the Code of Civil Procedure. Hence a court-fee of Rs. 2 is the proper court-fee under Art, 1 of Sch. II of the Court-Fees Act for the application for review.

Application under S. 114 of the Code of Civil Procedure for review of the order of the High Court dated 4th March, 1938, and passed in A. S. No. 343 of 1931 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 71 of 1928.

S. Sundaresa Aiyar for the Petitioner.

The Government Pleader (*B. Sitarama Rao*) for Government.

The Court made the following

Leach, C. J.

ORDERS. *The Chief Justice.*—This matter has been placed before a Full Bench as it raises a question of importance under the Court-Fees Act and involves the consideration of certain Bench decisions of this Court. The petitioner was allowed to file an appeal *in forma pauperis*, but, at a later stage, it was discovered that he was not a pauper and an order was passed by Horwill, J., dispaupering him. In addition to directing that the petitioner should pay the appropriate court-fee on the

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* S. R. No. 27375 of 1939. 12th August, 1940.

memorandum of appeal the learned Judge directed him to furnish security for the costs of the respondent in the sum of Rs. 8,000 within three months from the 4th of November, 1937. This order was not complied with, and on the 4th March, 1938, the appeal was placed in the list of Venkatasubba Rao and Abdur Rahman, JJ., who passed the following order:

"The security ordered has not been furnished. The appellant has been dispaupered. Both sides agree that the appeal has to be dismissed, and it is accordingly dismissed. We fix the advocate's fee at Rs. 750. The appellant will pay to the Government the court-fee payable on the memorandum of appeal."

After the expiration of ninety days the petitioner presented a petition asking the Court to review its order dismissing his appeal. This petition bears a stamp of the value of Rs. 2, which the petitioner maintains is the proper court-fee by virtue of the provisions of Art. 1 of Sch. II of the Court-Fees Act. The question of the correctness of the stamping having been raised, it was referred to the Taxing Officer, who held that the application should be stamped *ad valorem* under Art. 4 of Sch. I of the Act. Art. 1 (*d*) of Sch. II provides that a court-fee of Rs. 2 shall be paid on an application or petition when presented to a High Court. Art. 4 of Sch. I states that on an application for review of judgment, if presented on or after the ninetieth day from the date of the decree, the fee leviable shall be the fee leviable on the plaint or memorandum of appeal. Therefore, the question is whether this Court's order of the 4th of March, 1938, dismissing the petitioner's appeal for default in payment of the required court-fee and in furnishing the required security is a decree within the meaning of Art. 4 of Sch. I of the Court-Fees Act. It has not been suggested that the word 'decree' here has any different meaning from the word 'decree' as defined by the Code of Civil Procedure. S. 2 (2) of the Code says:

" 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default."

F.B.

Kayambu Pillai, *In re.*

Leach, C.J.

Sub-clause (14) of S. 2 defines the word 'order' as meaning the formal expression of any decision of a Civil Court which is not a decree.

The learned Government Pleader accepts the proposition that an order dismissing an appeal for non-compliance with an order requiring security is not a decree within the definition given in the Code. In fact there is ample authority of this Court and other High Courts that such an order is not a decree. The question was first raised in *Lekha* v. *Bhauna*[1], where a Full Bench of the Allahabad High Court held that an order rejecting an appeal under S. 549 of the Code of Civil Procedure of 1882 (which corresponds to O. 41, r. 10 of the present Code) was not appealable, either as an order or as a decree. The basis of the decision was that an order under S. 549 was not a final expression of an adjudication upon any right claimed or defence set up. In the Code of 1882 the definition clause read as follows:

"'Decree' means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit (or appeal). An order rejecting a plaint or directing accounts to be taken, or determining any question mentioned or referred to in S. 244, but not specified in S. 588, is within this definition; an order specified in S. 588 is not within this definition."

This view was accepted as being the correct view by this Court in *Singani Mupan* v. *Krishna Char*[2], and *Guruswami Naidu* v. *Narayana Naidu*[3]. The first of these cases was decided when the Code of 1882 was in force and the second after it had been replaced by the Code of 1908. The Calcutta High Court took the same view in *Jnanadasundari Shaha* v. *Madhabchandra Mala*[4]. In that case Suhrawardy, J., dealt with the effects of S. 107 of the Code of Civil Procedure in this connection. S. 107 confers upon an appellate Court the same powers as are conferred by the Code on a Court of original jurisdiction in respect of suits. Suhrawardy, J., pointed out that S. 107 does not purport to give an order passed by an appellate Court the same effect as an order passed by an original Court of a like nature. S. 2 expressly says that the word 'decree' shall be deemed to include the rejection of a plaint. If it was the intention of the Legislature to include within the definition of 'decree' an order rejecting a memo-

1. (1895) I.L.R. 18 All. 101 (F.B.).
2. (1910) 9 M.L.T. 117.
3. 1932 M.W.N. 655.
4. (1931) I.L.R. 59 Cal. 388.

F.B.

Kayambu Pillai, *In re.*

Leach, C.J.

randum of appeal it would, he considered, have expressly said so. In *Srinivasam Pillai* v. *Rukmani Ammal*[1], this Court accepted the judgment in *Ramesh Chandra Das* v. *Sarada Kripa Lala*[2], as embodying the correct statement of the law.

An examination of the language used in defining the word 'decree' in S. 2 (2) of the Code of Civil Procedure convinces me that the order which Venkatasubba Rao and Abdur Rahman, JJ., passed on the 4th of March, 1938, directing that the appeal should be dismissed for non-payment of court-fee and for failure to furnish security, is not a decree. After saying that the word 'decree' means the formal expression of an adjudication which, so far as the Court expressing it, conclusively determines the rights of parties with regard to the matters in dispute in the suit, the section goes on to say what the expression shall be deemed to include and what it shall not include. It does not include two kinds of orders, namely: (1) An adjudication from which an appeal lies as an appeal from an order and (2) an order of dismissal for default. What was the order of the 4th of March, 1938, but an order dismissing the appeal for default? The appeal had been admitted *in forma pauperis* but on it becoming apparent that the appellant was not a pauper the Court in effect said:

. . . . "you shall not proceed unless you pay the proper court-fee as you are no longer a pauper."

The appellant failed to pay and therefore entitled the Court to dismiss the appeal for default in payment. The fact that there was a further condition unfulfilled—the condition with regard to the furnishing of security—and that O. 41, r. 10 (2) directs that, where security is not furnished within such time as the Court orders, the Court shall 'reject' the appeal, does not turn the order dismissing the appeal into a decree. As I have shown there is ample authority for the proposition that an order under O. 41, r. 10 (2) is not a decree.

Our attention has been drawn to three decisions of this Court, *Venkatarayadu* v. *Rangayya Appa Rau*[3], *Ayyanna* v. *Nagabhushanam*[4] and *Zamindar of Tuni* v. *Bennayya*[5], but these cases are not really in point. In the first of them an appeal petition was presented with an insufficient court-fee. It was accordingly returned to the appellant, but after the period

1. (1927) 55 M.L.J. 330.
2. (1921) I.L.R. 49 Cal. 355.
3. (1897) I.L.R. 21 Mad. 152.
4. (1892) I.L.R. 16 Mad. 285.
5. (1898) 8 M.L.J. 304: I.L.R. 22 Mad. 155.

F.B.
Kayambu Pillai, *In re.*
Leach, C.J.

of limitation had expired it was again presented, this time with a sufficient stamp. The District Court refused to admit the appeal. It was held on appeal to this Court that no appeal lay. In *Ayyanna* v. *Nagabhushanam*[1], the facts were that an appeal had not been properly presented within the meaning of S. 541 of the Code of 1882 which corresponds with O. 41, r. 1 of the present Code, and an order was passed rejecting it. It was held that this order was a decree. In *Zamindar of Tuni* v. *Bennayya*[2], a memorandum of appeal was returned to the lower appellate Court because certain language used in the document was disrespectful. The appellant refused to alter his memorandum of appeal and the appeal was rejected. It was held that an appeal lay against the order of rejection. In none of these cases was it a question of 'default'.

It follows that in my opinion the order of the 4th of March, 1938 dismissing the appeal was not a decree within the meaning of the definition of the term in the Code of Civil Procedure, and this being so, the petitioner is entitled to stamp his application for review with a court-fee of Rs. 2 under Art. 1 of Sch. II of the Court-Fees Act.

Venkataramana Rao, J.

Venkataramana Rao, J.—I agree.

The order passed on the 4th March, 1938 in this case was passed for non-compliance by the petitioner in respect of two matters, (1) non-payment of the court-fee and (2) not furnishing security for costs. In so far as the order of dismissal for non-compliance with the order for furnishing security for costs is concerned, there can be no doubt that it is not a decree. This view has been consistently held by all the High Courts, including our Court. The next question is whether the order, in so far as it purports to be an order of dismissal for non-compliance in regard to payment of the court-fee, is a decree. I agree with my Lord that it is an order of dismissal for default within the meaning of S. 2 (2) of the Code of Civil Procedure and therefore is not a decree. The order, though it purports to be one for non-compliance with an order for payment of the court-fee, is strictly an order for non-compliance of an order passed in consequence of an order of dispaupering made under O. 33, r. 9. The word 'default' in S. 2(2) (*b*) of the Code of Civil Procedure, in my opinion, need not be

1. (1892) I.L.R. 16 Mad. 285.
2. (1898) 8 M.L.J. 304: I.L.R. 22 Mad. 155.

F.B.

Kayambu Pillai, *In re.*

confined only to default of appearance, but may include other defaults as well, and certainly this default.

Therefore I agree that the proper court-fee that is payable in respect of this application is only Rs. 2 under Art. 1 of Sch. II of the Court-Fees Act.

Horwill, J.

Horwill, J.:—I agree.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

Nanduri Venkatasubba Row .. *Plaintiff**

v.

Dr. Taylor Stanley Philip, M.R. C. S. (Eng.) L. R. C. P. (Lond.) and another. *Defendants.*

Venkatasubba Row *v.* Stanley Philip.

Practice—Application in High Court for leave to sue as pauper for damages for slander—Summary dismissal on the ground that damages cannot exceed a certain sum and referring plaintiff to Court of lower jurisdiction—Propriety.

In an application in the High Court for leave to sue in *forma pauperis* for damages for Rs. 12,500 in respect of certain alleged defamatory statements, the Master held that the damages claimed could not in any event exceed Rs. 5,000 and that consequently the plaintiff should be referred to a Court of lower jurisdiction to agitate his claim. On appeal,

Held, that the claim for damages for slander being one in which the damages are at large the damages cannot be ascertained until there has been an examination of all the evidence nor can it be said that they cannot in any event exceed any particular sum and therefore the summary dismissal of the application for leave to sue as pauper is wrong.

Plaintiff in person.

The Court delivered the following

JUDGMENT.—The appellant before me applied to sue in *forma pauperis*. His application was summarily dismissed by the learned Master against whose decision this appeal has been preferred.

The plaint is drafted by the appellant himself and although it does not set out as concisely and succinctly the matters of the claim which he desires to prefer as would have been the case had a qualified and experienced lawyer been the draftsman, the substance of the claim which he makes against the two defendants is as follows. The first defendant is a doctor living in Secunderabad in the dominion of the Nizam and is employed

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*Application No. 1563 of 1941 in Application No. 865 of 1941. 22nd August, 1941.

Venkatasubba Row v. Stanley Philip.

by the State Railways. The second defendant is an advocate of this Court living in Vizagapatam. The appellant appears to allege that the first defendant in Secunderabad wrote a medical certificate in respect of the plaintiff which contained defamatory matter concerning his mental condition. There is no allegation that the letter was published in Madras and the appellant before me has stated that this was not the case. The second defendant is alleged to have made oral statements containing matters to the same effect as were written in the medical certificate of the first defendant. These oral statements, it is alleged, were made in Madras within the jurisdiction of this Court. It is alleged that the statements both in the medical certificate and orally made by the second defendant are defamatory of the plaintiff. The plaint does not use the language which would have been employed by a professional gentleman and it is not alleged in the form which is adopted in England that in consequence of the defamatory statements, the plaintiff has suffered in his character, credit and reputation and has been brought into public odium, hatred and contempt. But the substance is that by reason of the written and oral statements, he has been defamed and has suffered damage. The claims preferred are for a declaration that the medical certificate is invalid and for Rs. 12,500 damages in respect of the defamatory statements.

The learned Master dismissed the application on the following grounds. In so far as the first defendant is concerned, leave to sue had not been obtained. On the face of the plaint, the first defendant lives in Secunderabad and the cause of action of which complaint is made against him arose in Secunderabad also. Consequently, the learned Master held that the plaintiff would have failed in the suit. In regard to the second defendant, the learned Master held that the damages claimed could not in any event exceed Rs. 5,000 and consequently the plaintiff should be referred to a Court of lower jurisdiction to agitate his claim. In regard to the first defendant, I agree with the finding of the learned Master and there is no need for me to elaborate the reasons which he expresses. Leave to sue not having been obtained, the cause of action arising outside the jurisdiction of this Court and the defendant not having an address or residing within its jurisdiction, the learned Master's conclusion is correct and in regard to the first defendant, this appeal fails.

Venkatasubba Row v. Stanley Philip.

In regard to the second defendant, I am satisfied that the appeal should be allowed. Although the claim is not neatly or clearly expressed, it is one for damages for slander, a claim in which the damages are at large and until there has been an examination of all the evidence, the amount of the damages cannot be ascertained nor can it be said that they cannot in any event exceed any particular sum. The learned Master examined in some detail whether there would be any damage flowing from some allegations which the plaintiff made in his plaint, such as, he was caused mental suffering and had lost the benefit of the hospitality of his friends. Those matters, as I see them, were included as grounds to increase the damage in addition to what ordinarily would flow from the establishment of a slanderous statement made by the defendant in regard to the plaintiff. It is not necessary to consider those matters in detail now. This is not an action for wrongful dismissal although the plaintiff says in consequence of the statements of which complaint is made, he was dismissed from his employment by the railway company in Hyderabad. The claim so far as the second defendant is concerned is one for damages for slander. The grounds upon which the learned Master summarily dismissed the application for leave to sue are wrong. The appeal is allowed and the learned Master is directed to enquire into the application for leave to sue the second defendant in *forma pauperis* in the usual way. The appellant appears in person and there will be no order as to costs.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

C. Krishnamachariar .. *Appellant** (*Defendant*)

v.

B. Lakshmi Ammal .. *Respondent* (*Plaintiff*).

Krishnamachariar v. Lakshmi Ammal.

Madras Land Encroachment Act (III of 1905), S. 6—Assignment of site by Government after cancellation of previous lease to another—Right of assignee to sue previous lessee for possession in Civil Court—Effect of S. 6 of Act III of 1905.

Where the grant of a site by Government on patta on certain conditions was cancelled because of the failure of the grantee to comply with the conditions and the subsequent assignee of the site from the Government sued the first grantee for possession in a Civil Court,

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* S. A. No. 909 of 1938. 23rd July, 1941.

Krishnamachariar *v.* Lakshmi Ammal.

Held, that S. 6 of the Land Encroachment Act gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a civil Court or the right of an assignee from Government to proceed against the previous lessee in a civil Court.

Bhaskaradu v. *Subbarayudu*, (1913) 26 M.L.J. 60: I.L.R. 38 Mad. 674, distinguished.

Appeal against the decree of the District Court of Chingleput in A. S. No. 256 of 1935 preferred against the decree of the Court of the District Munsif of Trivellore in O. S. No. 327 of 1933.

M. Krishna Bharathi and *S. Annamalai* for Appellant.

S. Ramanujachariar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for possession of a certain site which was granted to the defendant by the Government on patta on certain conditions. The defendant failed to comply with those conditions and the Revenue Divisional Officer cancelled the assignment in accordance with the terms of the patta and the Tahsildar assigned the site on the 30th August, 1931 to the present plaintiff. The only contention raised before me is that the suit for possession by the present plaintiff was not competent and that it was incumbent upon the Government to proceed under S. 6 of the Land Encroachment Act and thus give him a right of appeal to the revenue authorities and failing that, to bring a civil suit within six months. S. 6 of the Land Encroachment Act gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a civil Court or the right of the assignee of the Government to obtain an assignment of the land after the lease had been cancelled and proceed against the previous lessee in a civil Court. Learned counsel for the appellant wished to rely on *Bhaskaradu* v. *Subbarayudu*[1], but that has no application to the facts of the present case. The defendant-appellant can have no legitimate grievance if he, instead of being compelled to sue in a civil Court, is forced to come to the civil Court as a defendant in a suit instituted either by the Government or by the Government's assignee. The contention that the terms or conditions of the patta were complied with was not seriously pressed even before the lower appellate Court and nothing has been said here which would incline me to take a view different from what was taken by the learned District Judge. The appellant alleged that

1. (1913) 26 M.L.J. 60: I.L.R. 38 Mad. 674.

Krishnamachariar v. Lakshmi Ammal.

he had erected foundations on the patta land after the expiry of the lease at a cost of something like Rs. 250 and by this procedure he has been deprived of the compensation that he might have been able to persuade the revenue authorities to pay or to deal with him a little more leniently. I cannot however take notice of this fact. He should have asked for compensation in his written statement if he thought he was entitled to any.

For the above reasons the appeal is dismissed. But in the circumstances I leave the parties to bear their own costs.

Leave to appeal is refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

S. Subramania Aiyar .. *Petitioner* (Petitioner)*

v.

The India Equitable Insurance Company Limited, through its authorised Agent S. B. Mitra. *Respondents (Respondents).*

Subramania Aiyar v. India Equitable Insurance Co., Ltd.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (iii) and Ss. 8 and 9—Debt due to public company carrying interest at less than 9 per cent. in renewal of earlier ones carrying interest at 12 per cent—If explanation to S. 8 can apply and make it a debt which can be scaled down.

Where a debt due to a public company carries interest at not more than 9 per cent. it is clearly excluded from the operation of Ss. 8 and 9 and therefore those sections cannot be called in aid to substitute for that liability an earlier liability which it renewed and which bore a higher rate of interest and thereby exclude it from the operation of S. 10 (2) (*iii*) of Act IV of 1938.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 16th March, 1939 and made in I.A. No. 179 of 1938 in S. C. No. 170 of 1936.

T. L. Venkatarama Aiyar and *L. Krishnaswami Aiyar* for Petitioner.

S. Srinivasa Aiyar instructed by King and Partridge for Respondents.

The Court delivered the following

JUDGMENT.—The contention raised in this petition under Madras Act IV of 1938 is one which, so far as I am aware, is

*C. R. P. No. 1324 of 1939. 30th July, 1941.

Subramania Aiyar *v.* India Equitable Insurance Co., Ltd.

not covered by authority, but it seems to me to be clearly untenable. The petitioner was employed by the India Equitable Insurance Company, Limited, and he borrowed from his employers in 1927 a sum of Rs. 250 on a promissory note carrying interest at 12 per cent. per annum. In 1930 that debt was renewed by the execution of a fresh promissory note for Rs. 340 with interest at the same rate. In 1933 there was a further renewal by the execution of a note for Rs. 450 carrying interest at only 9 per cent. On this note the company sued and got a decree on 23rd October, 1936. The debtor applied to scale down this decree under S. 19 of the Act and has been met by the objection that under S. 10 (2) (*iii*) of the Act, nothing in Ss. 8 and 9 applies to a liability in respect of a sum due to a public company when the interest payable in respect of the liability is not more than 9 per cent. The argument advanced before me is that because the debt which has been decreed is itself a renewal of earlier debts carrying interest at 12 per cent., the explanation to S. 8 can be applied and that by the application of this explanation the liability becomes transformed into one bearing interest in excess of 9 per cent., so as to exclude it from the operation of S. 10 (2) (*iii*). That is to say, the petitioner proposes to apply S. 8 of the Act in order to make this liability into one to which S. 8 of the Act shall apply. This process seems to me unjustifiable. The liability excluded from the purview of operations under S. 8 or 9 of the Act is the present liability under which the debtor is at the time of his application indebted. If that liability is due to a company and carried interest at not more than 9 per cent., it is clearly excluded from the operation of Ss. 8 and 9 and therefore these sections cannot be called in aid to substitute for this liability an earlier liability which bore a higher rate of interest. The petition is dismissed with costs.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Gangayya *v.* Lakshmi Devi.

Dukka Gangayya and another .. *Appellants** (*Plaintiffs*)

v.

Buddepu Lakshmi Devi .. *Respondent* (*Defendant*).

Criminal Procedure Code (V of 1898), S. 88, Cl. 6 (d) *and S. 488—Money realised by criminal Court by sale af properties attached in execution of*

* S.A. Nos. 1124 and 1125 of 1938. 5th August, 1941.

maintenance order—Rejection of claim by third party—Subsequent suit—Government if necessary party—Scope of suits under S. 88, Cl. 6 (d).

Gangayya *v.* Lakshmi Devi.

Respondent obtained an order under S. 488 of the Code of Criminal Procedure for maintenance against her husband. She got some paddy attached in execution. The paddy was sold and the sale proceeds were lying in the Magistrate's Court. The second wife of the husband of the respondent and her own maternal uncle filed separate suits each claiming the whole of the paddy attached, after their claims had been rejected by the criminal Court. The suits were for the recovery of the money either from the Magistrate's Court or from the respondent in the event of the money having been paid to her.

Held, that as the Government had no claim to the money realised, the suit is competent without impleading the Government. S. 88, Cl. 6 (*d*) of the Criminal Procedure Code entitles a party whose claim or petition has been disallowed in whole or in part, to institute a suit to establish the right, which he claims against the property in dispute. The mere fact that on account of the sale of the property the claimant asks for recovery of money instead of a declaration does not take the suit out of the category of suits contemplated by S. 88, Cl. 6 (*d*) of the Code of Criminal Procedure.

Appeals against the decrees of the Court of the Subordinate Judge of Chicacole in A. S. Nos. 326 and 329 of 1937 preferred against the decrees of the Court of the District Munsif of Sompeta in O. S. Nos. 200 and 201 of 1936 respectively.

B. Jagannadha Das for Appellants.

G. Chandrasekhara Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The facts which led to the institution of the two connected suits out of which the present appeals have arisen are simple and may be briefly narrated. The respondent obtained an order under S. 488 of the Criminal Procedure Code for maintenance against her husband in M. C. No. 97 of 1933 in the Court of the Joint Magistrate of Berhampur. She got certain quantities of paddy attached in execution of the order passed by that Court. After attachment the paddy was stored in two pits. It was subsequently sold by the Magistrate and the sale proceeds are lying in that Court. The plaintiff in O. S. No. 201 of 1936 is the second wife of the respondent's husband, the plaintiff in the other suit being (her) maternal uncle. Both of them set up a claim to the whole of the paddy attached by the Magistrate but their claim petitions were rejected. They consequently brought the two suits. These suits were for the recovery of money either from the Magistrate's Court or from the respondent in the event of the money having been paid by the Magistrate to her (who was the petitioner in

Gangayya *v.* Lakshmi Devi.

M. C. No. 97 of 1933). These suits were dismissed by the District Munsif of Sompeta on the ground that the plaintiffs had failed to establish their title. The objection that the suits were not maintainable in their present form was, however, overruled by that Court. On appeal the Subordinate Judge of Chicacole did not go into the question of title but dismissed the appeals on the ground that the suits were not competent as the Secretary of State had not been impleaded as a party to the present suits. In dismissing the appeals on that ground he relied on a decision in *The Secretary of State for India in Council* v. *Jagat Mohini Dassi*[1]. The plaintiffs had consequently preferred the present appeals which may be disposed of by one judgment.

The contention advanced on behalf of the respondent is that the plaintiffs should have asked for a declaration to the effect that the order passed in the claim proceedings was incorrect and should be set aside. Since, it is contended, the suits are not for declaration, they are not competent. It is contended in the alternative that in so far as money was lying in the Court of the Joint Magistrate and as long as that money was not paid, it was or must be deemed to be at the disposal of the Secretary of State, and the latter, that is, the Secretary of State should have been made a party to the suits.

There is no force, in my opinion, in either of these contentions. No rules have been framed by the Local Government under S. 386 of the Code of Criminal Procedure and it is therefore urged that the provisions of S. 88 of that Code must be held to be applicable. But even if that contention is assumed to be correct it would not help the respondent. There is a distinct provision in S. 88, clause 6 (*d*) which entitles a party whose claim or petition has been disallowed in whole or in part to go and institute a suit to establish the right which he claims against the property in dispute and that is exactly what the plaintiffs in both the suits are trying to do. The mere fact that on account of the sale of the paddy, they have asked for a decree for money instead of a declaration does not take these suits out of the category of the suits contemplated by S. 88 Cl. 6(*d*) of the Criminal Procedure Code. It must not be overlooked that the money which has been realised although capable

1. (1901) I.L.R. 28 Cal. 540.

Gangayya v. Lakshmi Devi.

of being realised as fine under S. 488 Cl. (3) is not in fact a fine itself and is not being held by or at the disposal of the Government for its own purposes, but with the object of paying maintenance to the person in whose favour the order was passed. The Government cannot and does not lay any claim to any portion of the money thus realised. It is therefore futile to argue that the Secretary of State was interested in the decision whether the property attached at the instance of the respondent belonged to her, and should have been for that reason impleaded. The only party who is interested in the result is the respondent and the suit was instituted against her. There is therefore no force in the contention that the suit should have been against the Secretary of State and since the Secretary of State was not impleaded as defendant, is not maintainable.

I cannot understand the ground on which the lower appellate Court dismissed the plaintiff's suits. The decision in the *Secretary of State for India in Council* v. *Jagat Mohini Dassi*[1], had absolutely no application to the facts of the present case. As for the contention that the suits should have been for declaration the answer is simple. First of all the paddy having been converted into money, the relief that should have been and is being claimed on behalf of the plaintiff, is for that money itself. But conceding for the sake of argument that the contention of the learned counsel for the respondent is correct all the necessary facts have been given in the plaint and it is the duty of the Court to grant the relief to which a party is found entitled even if it has not been by a mistake asked for by the party.

Both these contentions therefore fail. The appeals must consequently be accepted and the suits sent back to the lower appellate Court for disposal of the appeals on their merits. It is unfortunate that the lower appellate Court did not go into the question of title at the same time. Had that been done a further delay would have been avoided. The costs in these appeals both in this and the lower appellate Court will be costs in the cause.

The court-fees in these appeals may be refunded to the appellants.

K. S. *Appeals accepted.*

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1. (1901) 28 Cal. 540.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MOCKETT.

S. A. Ramanatha Sastrigal ... *Petitioner** (*1st Respondent*)

v.

Koladi Krishna Menon .. *Respondent* (*Petitioner*).

Ramanatha Sastrigal *v.* Krishna Menon.

Practice—Appeal to Federal Court—Admission—Procedure—Civil Procedure Code (V of 1908), O. 45, rr. 7 and 8.

When once a certificate has been granted by the Court delivering the judgment or passing the decree or final order that a substantial question of law as to the interpretation of the Government of India Act is involved, no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of r. 7 of O. 45, Civil Procedure Code, as is incumbent on him. All that an appellant is then required to do is to provide funds for printing the record and transmitting it to the Federal Court. Thereafter the appeals will be declared to be admitted and the other requirements of r. 8 ordered.

Petitions praying that in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner herein to prefer an appeal to the Federal Court against the judgments of Lakshmana Rao, J., dated 6th March, 1939, and passed in C. R. Ps. Nos. 1603 and 1604 of 1938 presented to the High Court to revise the decrees of the Court of the Subordinate Judge of Ottapalam in O. S. Nos. 24 of 1937 and 72 of 1936 respectively etc.

K. P. Ramakrishna Aiyar for Petitioner.

P. Govinda Menon for Respondent.

The Order of the Court was delivered by

Leach, C.J.

The Chief Justice.—These civil miscellaneous petitions can be dealt with conveniently in one judgment. In C. M. P. No. 3026 of 1939 the petitioner asks that he be granted leave to appeal to the Federal Court against the order passed by this Court in C. R. P. No. 1603 of 1938. In C. M. P. No. 3028 of 1939 he asks for leave to appeal to the Federal Court against the order of this Court in C. R. P. No. 1604 of 1938. In C. M. Ps. Nos. 3027 and 3029 of 1939 the petitioner asks for orders dispensing with deposits for printing charges and directing the office to issue bills setting out the amounts of the printing charges. His learned advocate has indicated that he is prepared to pay the bills at once. In C. M. P. No. 3030 of 1939

* C. M. Ps. Nos. 3026 to 3030 of 1939. 24th April, 1941.

the petitioner asks for an order consolidating the proposed appeals to the Federal Court.

The petitioner filed two suits against the respondent in the Court of the Subordinate Judge of Ottapalam to recover amounts claimed to be due on promissory notes. The suits were subsequently transferred to the Court of the Subordinate Judge of Calicut and there numbered as O. S. Nos. 52 of 1939 and 53 of 1939 respectively. In the first suit the petitioner asked for a decree for Rs. 13,932-13-4 and in the second suit for a decree for Rs. 19,762-1-3. The respondent pleaded that he was an agriculturist and therefore entitled to the benefit of the scaling down provisions of the Madras Agriculturists' Relief Act. The petitioner denied that the respondent was an agriculturist within the meaning of the Act. He also contended that the Act was *ultra vires* the Provincial Legislature. A preliminary issue was framed in each suit on the question of the validity of the Act and the Subordinate Judge held that it was *ultra vires*. The respondent then filed applications in this Court asking it to reverse the decision in the exercise of its revisional powers. Before the applications came into the list for hearing a Full Bench of this Court had held in *Mada Nagaratnam* v. *Puvvada Seshayya*[1], that the Act was *intra vires*. Consequently when the applications were called before Lakshmana Rao, J., they were allowed. The learned Judge was then asked to grant a certificate under S. 205 of the Government of India Act, which he did, whereupon the petitioner filed the petitions now before us.

The petitions came before the Court in the first instance on the 25th September, 1939, when the right of appeal to the Federal Court claimed by the petitioner was challenged by the respondent. The questions of fact arising in the suits had not then been decided, and if decided in favour of the petitioner, the question of the validity of the Madras Agriculturists' Relief Act would not arise. In these circumstances the Court suggested to the learned advocates engaged in the case that the applications might stand over until after the suits or the appeals therefrom had been decided. They agreed to this course and the petitions were ordered to stand out of the list until decrees in the suits or appeals arising out of them had been passed.

The trial Court delivered judgment in the suits on the 8th December, 1939. In O. S. No. 52 of 1939 a decree was passed

1. (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.).

Ramanatha Sastrigal v. Krishna Menon.

Leach, C.J.

in favour of the petitioner for Rs. 2,987-10-0, the claim having been reduced by nearly Rs. 11,000 under the provisions of the Madras Agriculturists' Relief Act relating to scaling down. In O. S. No. 53 of 1939 only a decree for costs was passed, as it was found that when the provisions of the Act were applied nothing remained due. In neither case has an appeal been filed, and in the circumstances the petitioner asks that his petitions for leave to appeal to the Federal Court should now be decided. The respondent says that they do not lie as the decrees passed by the Subordinate Court have not been challenged in appeal.

By reason of S. 205 (1) of the Government of India Act, 1935, an appeal lies to the Federal Court from a judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made under it. Sub-S. (2) states that where a certificate has been granted, any party in the case may appeal to the Federal Court on the ground that the question has been wrongly decided, and on any ground on which he could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and, with the leave of the Federal Court, on any other ground. It has not been suggested that it was improper of Lakshmana Rao, J., to give a certificate under S. 205 (1) and the certificate having been given, the petitioner is entitled to proceed to the Federal Court, unless there is some other provision of law with regard to procedure which prevents him.

S. 111-A of the Code of Civil Procedure says that where a certificate has been given under S. 205 (1) of the Government of India Act, 1935, Ss. 109, 110, and 111 of the Code of Civil Procedure shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to his Majesty in Council, and accordingly reference to His Majesty shall be construed as references to the Federal Court, but there are two provisos the effect of which is to leave the right of appeal to the Federal Court unaffected by any of the restrictions imposed by Ss. 109, 110 and 111 of the Code of Civil Procedure with regard to appeals to the Privy Council, when the appeal to the Federal Court is merely concerned with interpretation of the Government of India Act, 1935 or any Order in Council made thereunder. When the question is simply confined to interpre-

Ramanatha Sastrigal v. Krishna Menon.

Leach, C.J.

tation, the right to appeal to the Federal Court depends upon the grant of a certificate under S. 205 of the Act.

By the addition of r. 17 there has been a corresponding amendment of O. 45 of the Code of Civil Procedure. R. 17 states that where a certificate has been given under S. 205 (1) of the Government of India Act, 1935, the provisions of the Order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, subject, however, to these provisos:

"(*a*) R. 3 of this Order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words 'apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder';

"(*b*). where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in r. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent".

R. 2 of O. 45 requires a person who desires to appeal to His Majesty in Council to apply by petition to the Court whose decree is complained of. Therefore a person who wishes to appeal to the Federal Court must, after he has obtained a certificate under S. 205 (1) of the Government of India Act, 1935, file a petition in the Court which has passed the adverse decree or order and r. 8 of O. 45 indicates that the petition should ask for the appeal to be 'admitted'. R. 3 says that every petition shall state the grounds of appeal and pray for a certificate, either that, as regards amount or value and nature, the case fulfils the requirements of S. 110 or that it is otherwise a fit one for appeal, but by virtue of proviso (*a*) to r. 17 such a certificate is not required when it is a matter of appealing to the Federal Court on a question merely of interpretation of the Government of India Act, 1935. R. 7 (1) states that where the certificate is granted, the applicant shall within the time allowed (*a*) furnish security for the costs of the respondent and (*b*) deposit the amount required to defray the expenses of translating, transcribing, indexing and transmitting the record. The certificate referred to here is the certificate referred to in r. 3, but such a certificate is not required when the appeal is only concerned with interpretation, nor is the petitioner required to furnish security for the costs of the respondent. Therefore all

Ramanatha Sastrigal v. Krishna Menon.

Leach, C.J.

that the petitioner may be called upon to do in such a case is to furnish the amount required to defray the expenses which will be incurred in connection with the printing of the record and its transmission to the Federal Court. R. 8 says that where the security has been furnished and the deposit made to the satisfaction of the Court, the Court shall, (*a*) declare the appeal admitted, (*b*) give notice thereof to the respondent, (*c*) transmit a copy of the record to the Federal Court and (*d*) provide either party who applies with one or more copies of the record on payment. As security has not to be furnished when the appeal is to the Federal Court on a mere question of interpretation r. 8 (*a*) must be read here as being subject only to the requirement of r. 7 with regard to the necessity for a deposit to cover the expenses of translating, transcribing, indexing and transmitting the record.

In *Subramaniam* v. *Muthuswami*[1], this Court held that an appeal lies to the Federal Court from a final order of a single Judge of a High Court when a certificate has been granted by him under S. 205 (1) of the Government of India Act, 1935, and that the provisions of S. 111-A and O. 45, r. 17 of the Code of Civil Procedure do not preclude the admission of the appeal. In *Lachmeshwar Prasad* v. *Keshwar Lal*[2], the Federal Court itself held that though the scheme of O. 45 implies that till the High Court makes the order under r. 8 it still retains a measure of control over the proceedings, such an order is not a condition precedent to the exercise of jurisdiction by the Federal Court. This was the opinion expressed by Varadachariar, J., in *Lachmeshwar Prasad* v. *Keshwar Lal*[2], and it was concurred in by Gwyer, C.J. Sulaiman, J., however, considered that so long as r. 8 of O. 45 remains applicable to appeals to the Federal Court an appellant cannot go to the Federal Court without his appeal having been admitted by the High Court. In view of the majority decision it may be taken that when matters have proceeded as far as r. 8 a formal order of admission by the High Court is not necessary but if all the requirements of the law upto that stage have been complied with it would be improper for the High Court not to declare the appeal admitted.

1. (1940) 2 M.L.J. 170: I.L.R. (1941) Mad. 43.
2. (1941) 1 M.L.J. 49 (Supp.): 53 L.W. 373.

Learned counsel for the respondent has stressed the fact that no appeals have been filed from the decrees passed by the Subordinate Court, and it is said that the Federal Court would not entertain an appeal against an order passed in revision in connection with a preliminary issue when there has been no appeal preferred by the aggrieved party from the decree itself. As the law now stands this Court has no jurisdiction to decide the question. Proviso (*a*) to S. 111 (*a*) of the Code of Civil Procedure governs the situation. It will be for the Federal Court to decide whether the question of the validity of the Madras Agriculturists' Relief Act is debatable when there has been no appeal from the decree in a case such as we have here. Nor is it for this Court in the present proceedings to consider the effect of the judgment of the Federal Court in *Subramanian Chettiar* v. *Muthuswami Goundan*[1].

If all the steps which it is necessary for the appellant to take have been taken or will be taken, this Court must admit the appeal. S. 111-A and r. 17 of O. 45, of the Code of Civil Procedure could very easily have been more clearly worded, particularly proviso (*a*) to S. 111 (*a*), but we have no doubt as to the effect of the words used. Where a judgment, decree or final order involves a substantial question of law as to the interpretation of the Act and the Court delivering the judgment or passing the decree or final order considers that a substantial question of law is involved as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder, it is its clear duty, as the law now stands, to give a certificate under S. 205. When that certificate has been given no further certificate is required and the person aggrieved is entitled to go to the Federal Court provided that he complies with so much of r. 7 of O. 45 as is incumbent upon him. It may be mentioned that it has not been suggested that the order of Lakshmana Rao, J., is not a judgment or a final order. It has been accepted that so far as the proceedings here are concerned the order of the learned Judge comes within the section and therefore this Court is not called upon to decide what will be the position if a certificate is given in respect of a decision which could not be classified either as a judgment, decree or final order.

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1. (1941) 1 M.L.J. 1 (Supp.) : (1940) 3 F.L.J. 157.

Ramanatha Sastrigal v. Krishna Menon.

Leach, C.J.

It follows from what has been said that in our opinion all that the appellant is required to do here is to provide funds for printing the record and transmitting it to the Federal Court. He is willing to do this. Therefore the Office will be directed to inform the petitioner of the amount required for these purposes and when the amounts have been paid the appeals will be declared to be admitted, and the other requirements of r. 8 ordered. The appellant is given three weeks within which to pay the required amount, that is three weeks from the date the amount is communicated to him.

The only other matter which requires to be dealt with is the petition for consolidation. The appellant is here under a misconception. The only provisions in the Code of Civil Procedure with regard to consolidation are those contained in r. 4 of O. 45. In this case there is no question of pecuniary valuation and that rule obviously does not apply. Therefore, the Court is not in a position to make any order of consolidation. There will have to be separate appeals and it will be for the Federal Court to say whether they should be heard together.

The costs of these applications will be made costs in the appeals.

K.S. *Ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

R. Arunagiri Mudaliar ... *Appellant* (Plaintiff)*

v.

T.R. Radhakrishna Aiyar and others. *Respondents (Defendants 2 to 8).*

Arunagiri Mudaliar v. Radhakrishna Aiyar.

Transfer of Property Act (IV of 1882), S. 82—Suit on mortgage—First mortgagee purchasing part of hypotheca in execution of decree on later mortgage in his own favour—Liability of mortgagee to contribute.

A first mortgagee who had purchased subject to such mortgage the equity of redemption in certain items of the mortgaged property, at a Court sale in execution of a decree on a second mortgage of those items in his own favour, filed a suit for the recovery of the full amount due on his first mortgage. The defendants who had purchased the other items of the mortgaged property subsequently and improved them pleaded that they were liable to pay only a proportionate part of the amount due as the items purchased by the mortgagee should themselves contribute rateably towards the

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* Appeal No. 254 of 1937. 8th October, 1940

Arunagiri Mudaliar *v.* Radhakrishna Aiyar.

first mortgage, and that in working out the ratio, the value of the properties as on the date when they were mortgaged should alone be taken, and not their value as on the date of the purchase by the mortgagee or the date of the suit as claimed by the plaintiff who in that event would be entitled to the benefit of the increase in value resulting from improvements to the hypotheca made subsequent to the date of the mortgages by the defendants.

Held, (1) that though S. 82 of the Transfer of Property Act would not apply as the action was not one by a mortgagor or a purchaser from him for contribution but one by the mortgagee for sale of the mortgaged properties, still the rights of the parties in the present case should be adjusted in the light of its principles.

(2) that for the purpose of calculating the proportionate liability as between mortgagors *inter se* or as between a mortgagee who has purchased the equity of redemption of a portion of the mortgaged property and the mortgagor or any other person interested in the other portion of the mortgaged property the value of the various items as on the date of the mortgage should alone be considered.

(3) that a mortgagee purchasing the equity of redemption of a part of the hypotheca will not on that account be entitled to be treated in a different manner from a stranger purchaser of the same.

Appeal against the decree of the District Court of North Arcot at Vellore dated 31st March, 1937 and passed in Original Suit 2 of 1936 (O. S. No. 13 of 1936, Sub-Court, Vellore).

C. Padmanabha Aiyangar for Appellant.

P. Visvanatha Aiyar, V. N. Srinivasa Rao and *T. E. Ramabhadrachariar* for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit for the recovery of Rs. 5,100 being the principal and interest due under a mortgage deed Ex. A dated the 12th February, 1916, executed by the first defendant (who died during the pendency of the suit) in favour of the plaintiff. Twenty two items of property were covered by the mortgage out of which items 1 to 3 belonged to the first defendant originally and items 4 to 22 belonged to another person—one Ramachandra Aiyar. Out of these nineteen items of property, seven items (that is, items 4 to 10) were mortgaged with a Venkateswara Aiyar. Ramachandra Aiyar sold all the items that he owned (that is, items 4 to 22) to the first defendant in 1912 subject to Venkateswara Aiyar's mortgage and the first defendant mortgaged all the properties which he owned (that is, items 1 to 22) for Rs. 5,000 with the plaintiff under Ex. A. A second mortgage for Rs. 2,500 in respect of the items 4 to 22 was created by the first defendant in favour of the plaintiff in 1918. This was not discharged and the plaintiff instituted a suit (O. S. 11

Arunagiri Mudaliar v. Radhakrishna Aiyar.

Abdur Rahman, J.

of 1922) in the Court of the Subordinate Judge of Vellore for the recovery of the amount due to him under the latter mortgage. It was decreed and the equity of redemption of items 11 to 22 was sold in execution and purchased by the third defendant for Rs. 104 on the 31st August, 1925, subject to the first mortgage Ex. A. It has been found by the Court below and the finding has not been challenged before us, that the third defendant was merely a benamidar and that the property was really purchased in auction by the plaintiff himself. At about this time items 4 to 10 which were mortgaged with Venkateswara Aiyar were brought to sale in execution of the decree obtained by him on his mortgage and were purchased before 1925 by him. Since he was a prior mortgagee, these items of property passed out of the story. The first defendant filed an insolvency application later (I. P. No. 32 of 1926) and was adjudicated on the 6th September, 1927. The Official Receiver of Vellore sold items 1 to 3 of the property in 1932 without disclosing the plaintiff's incumbrance. Out of these three items, two (that is, items 1 and 3) were purchased by the sixth defendant and the remaining second item by the seventh defendant in the name of the eighth defendant. The present suit was instituted by the plaintiff for the recovery of the amount due under his mortgage dated the 12th February, 1916 (Ex. A). This was decreed but to a very small extent. The learned District Judge of North Arcot who passed this decree, held that inasmuch as the plaintiff had purchased the items 11 to 22 of the property benami in the name of the third defendant, he was liable to contribute, under S. 82 of the Transfer of Property Act to the defendants 6 to 8. Since it was admitted by the parties before the trial Court that the value of the items 4 to 10 as compared to the items 11 to 22 be taken in the proportion of 2: 11 and the value of these 19 items of property was at the time of the second mortgage in 1918 found to be Rs. 12,000 and that of the items 1 to 3 at the time of the first mortgage in 1916 to be Rs. 500 only, the claim was decreed for Rs. 203-15-2 for principal and for Rs. 44-5-0 in respect of interest against these defendants. The rest of the claim was dismissed. Not being satisfied with the decree the plaintiff has preferred the present appeal.

It appears that the sixth defendant made certain improvements on the property purchased by him and one of the

Arunagiri Mudaliar *v.* Radhakrishna Aiyar.

Abdur Rahman, J.

grounds urged on behalf of the appellant before us is that the lower Court was wrong in ignoring the subsequent accession to the mortgaged property and depriving the plaintiff of the advantage which he would get under S. 70 of the Transfer of Property Act which entitled him to such accession for the purpose of his security. This is, however, a minor complaint, as it deals only with the value of security and not with the amount which is recoverable by the plaintiff. The main point which has been urged by the learned counsel for the appellant before us is that in so far as the suit was not by a mortgagor for contribution but by a mortgagee for the recovery of his money by the sale of the mortgaged property, the lower Court was wrong in applying S. 82 of the Transfer of Property Act and in assessing the value of the various mortgaged properties as it prevailed at the time when they were mortgaged with the plaintiff in 1916 and in 1918. The appellant's contention is that he could not have been debited for anything more than the proportionate value of the items of property (11 to 22) purchased by him as found to be prevailing either on the date on which he instituted the present suit or on the date when he purchased these items of property but in no case on the date on which these properties were mortgaged with him. Learned counsel for the respondent contends, on the other hand, that although the plaintiff was originally a mortgagee, he has, by his subsequent purchase of the items 11 to 22 come to occupy the mortgagor's position *qua* the items that he has purchased and would thus be liable to contribute on the principle contained in S. 82 of the Transfer of Property Act. Since it has been held that the value of the property in a case of contribution under this section has to be taken with reference to the date on which the mortgage was executed, it has been urged on behalf of the respondent that the value of the property as existing on the date of the mortgage was correctly taken by the trial Court as a basis for its decision.

The narrative of facts makes it clear that the law applicable to the facts of this case will be what was in force before the amendment of the Transfer of Property Act in 1929. S. 82 of the Transfer of Property Act before the amendment read as follows:

"Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mort-

Arunagiri Mudaliar v. Radha-krishna Aiyar.

Abdur Rahman, J.

gage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage".

This section embodied the well recognised principle that a property which is equally liable with the other property to pay a debt shall not escape because the creditor has been paid out of the other property alone and must rateably bear the burden of a mortgage. As the mortgage debt is indivisible and if several properties are hypothecated to a creditor and have passed to different purchasers subsequently, a creditor is as a rule, entitled to proceed against all the properties that were mortgaged with him, the only way to satisfy the mortgagee would be to tender the whole amount due under the mortgage. In such a case, it is only just that the person who satisfies the mortgage debt in its entirety should be indemnified by the purchasers of the other mortgaged properties and no fairer rule can be suggested than that each of the purchasers should contribute according to the value of the property purchased by him. This, however, is a right which exists between the owners of the mortgaged properties and does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him. The contribution referred to in S. 82 of the Transfer of Property Act refers to this right and is applicable between the mortgagors *inter se*. If this is correct, strictly speaking, it would have no application to the present case which is not a suit by a mortgagor or a purchaser from a mortgagor in which any relief to contribution is asked for; but is plainly a suit by the plaintiff for the enforcement of the mortgage in his favour. It may be argued and in fact it was suggested by the learned counsel for the respondents that the plaintiff, although primarily a mortgagee, has, on account of his purchase of a part of the mortgaged property, placed himself in the mortgagor's shoes to the extent of the property purchased by him and the present suit must, consequently, be regarded as one not only by a mortgagee but by a representative of the mortgagor as well. This, however, is not quite correct, in our opinion. The present suit is for sale and it is impossible for a mortgagor to bring a suit for that purpose. It may be that in these circumstances some other principle of law is attracted and in construing the equities to which the mortgagor may be entitled, the principle of S. 82 may have to be borne in mind, but that is really a different matter. Reliance was placed on the other hand, by the learned counsel for the

Arunagiri Mudaliar *v.* Radha-krishna Aiyar.

Abdur Rahman, J.

appellant on the last para of S. 60 of the Transfer of Property Act which reads as follows:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees has or have acquired, in whole or in part, the share of a mortgagor".

This part of the section provides for the only exception in which a portion of the mortgaged property could be redeemed the general rule being, as stated before, that a mortgage was indivisible. This part of the section, as is clear from its language, provides for redemption of a property by the mortgagor and would have, ordinarily no bearing on a suit by the mortgagee for sale of the property, But since according to the provisions of this section, a mortgagor or a person interested in a share only of the mortgaged property is entitled, after the integrity of the mortgage is broken up by a mortgagee purchasing a portion of the mortgaged property or the equity of redemption therefor, to redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage, it has a greater bearing on the present case than S. 82. If the mortgagor or a person interested in a share only of the mortgaged property is entitled to redeem his share on payment of a certain amount, it may be contended and the contention would be sound in our opinion that the mortgagee who has purchased a share of the equity of redemption can only sue for the recovery of the balance of the amount and not for the entire amount which was due to him under the mortgage. The principle, which is applicable to cases of this character, is that if a mortgagee happens to purchase a portion of the mortgaged property there would be a merger and extinction of liability under the mortgage to that extent unless it is found that it was to the benefit of the mortgagee to keep his mortgagee's rights alive or that he declared his intention either expressly or by necessary implication that he would keep his subsequently acquired rights distinct from his prior rights which he held as a mortgagee. Applying this principle, therefore, we are of opinion that in the absence of any other circumstances such as we have mentioned above, it must be held that the plaintiff's right to recover his money under the mortgage, was, on his purchasing the equity of redemption in a portion of the property mortgaged with him extinguished *pro tanto*; or, in other words, he remained entitled to recover only a proportionate part of the

Arunagiri Mudaliar *v.* Radhakrishna Aiyar.

Abdur Rahman, J.

amount due on the mortgage, that is to say, the portion of the debt which bears the same relation to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the properties comprised in the mortgage. The words 'remaining due' in the section are, to some extent, misleading and must not be taken too literally.

The question then is as to the date on which this value of of the property has to be calculated; or in other words, whether we have to take the value of the mortgaged property as it existed on the date of the mortgage into consideration or the value as it existed on the date on which a portion of the mortgaged property was purchased by the plaintiff—the date of the institution of the suit being in our opinion, entirely immaterial. There is an observation at p. 98 by Mr. Justice Candy in *Fakiraya* v. *Gadigaya*[1], that the value of the property would apparently be the value at the time of the purchase of the equity of redemption in part of the mortgaged property; but this, as pointed out in *Nyaunglebin Co-operative Bank* v. *Maung Ba U*[2], was *obiter* and not required for the decision of that case. It is true that in *Ponnambala Pillai* v. *Annamalai Chettiar*[3], the value actually taken into consideration was the value which was found to be existing three years after the date of the purchase, but there is nothing in that case to show that the value was any different either on the date of the mortgage or on the date when the property was purchased and this point was not in any case considered there.

Learned counsel for the appellant contends that since he is entitled to the benefit of any accession to the mortgaged property the value should be calculated as at the date of his purchase for if that is not done, we would be according to him ignoring the principle enunciated in S. 70 of the Transfer of Property Act. This argument, however, ignores the words used in the section which are to the effect that the mortgagee is entitled to the benefit of accession to the mortgaged property, "for purpose of the security" only. S. 70 cannot, therefore, render any assistance in the decision of the question. There is nothing in the last clause of S. 60 which would point to the conclusion that the value of the property has got to be taken into consideration as it existed on the date of the plaintiff's

1. (1901) I.L.R. 26 Bom. 88.
2. (1928) I.L.R. 6 Rang. 417.
3. (1920) 38 M.L.J. 239: I.L.R. 43 Mad. 372 (F.B.).

Arunagiri Mudaliar *v.* Radha-krishna Aiyar.

Abdur Rahman, J.

purchase although undoubtedly the person interested in a share only of the mortgaged property can redeem his share only on payment of a proportionate part of the amount remaining due on the mortgage. It is not clearly stated in that section, however, as to how this proportionate amount is to be calculated. Nor are we able to discover any reason why two different principles should be adopted in calculating the proportionate amount as between mortgagors *inter se* or as between a mortgagee who has purchased the equity of redemption of a portion of the mortgaged property and the mortgagor or any other person who may be interested in the other share of the mortgaged property. It seems to us that although S. 82 may not in terms apply to a case like the present, it lays down a general rule and the last clause of S. 60 is an instance of the application of this rule to a mortgagee who happens to acquire a share of the equity of redemption. The right to contribution (to use the expression in a general sense) comes into being after all when more properties than one are mortgaged although it may not be capable of being enforced until the mortgagee has recovered his dues from one property or until, as in this case, a portion of liability under the mortgage is extinguished by the mortgagee purchasing a share of the equity of redemption. Once such a right becomes capable of being enforced between mortgagors *inter se* or what may be regarded as an equivalent of the same right as between a mortgagee who has acquired a share of the equity of redemption and the other persons interested in the equity of redemption of the rest of the property, we should in either case—on the principle recognised in S. 82 of the Transfer of Property Act—look back to the value of the various properties as they existed on the date of the mortgage and abstain from considering the subsequent increase or decrease in their value. This rule has in our opinion the merit of certainty and the persons who are interested in the equity of redemption of one or more of the mortgaged properties, know the extent of their liability at the time of their purchase and have not to depend on the whims or fancies of a subsequent intending purchaser of a share of the equity of redemption in some of the properties mortgaged—be it by a mortgagor or by any one else. We are thus in the absence of any other specific provision either in S. 60 or anywhere else, constrained for the above stated reasons to hold that the principle underlying S. 82 should be held to apply to cases of this kind and the

Arunagiri Mudaliar v. Radhakrishna Aiyar.

Abdur Rahman, J.

mortgagee should not by his purchase be permitted to improve his position and should be treated in the same manner as a stranger would have been if he happened to purchase the property. After all by purchasing a share of the equity of redemption, the mortgagee has chosen to stand in his mortgagor's shoes to that extent and it is only to avoid a multiplicity of suits that the exact amount to which he is entitled has to be ascertained in the present suit. The decision in *Nyaunglebin Co-operative Bank* v. *Maung Ba U*[1], is not opposed to the conclusion at which we have arrived. It must be remembered that the provisions of S. 82 were and are to be applied in the absence of a contract to the contrary and from the circumstances existing in the Rangoon case it is apparent that the parties intended that the property which was not actually built but which was going to be built should be covered by the mortgage which was created.

We must, for the foregoing reasons, hold that the method adopted by the lower Court in arriving at the figure to which it did was, in view of the admissions made by the parties before it, correct. The finding in regard to the value of the mortgaged properties in 1916 and 1918 was not contested before us and having regard to the admission by the parties before the lower Court that the value of the properties of the items 4 to 10 when compared with the value of the items 11 to 22 be calculated in the proportions of 2: 11, the conclusion arrived at by the lower Court is inevitable. The lower Court has, however, made a small mistake in calculation. The proportionate liability of the items 1 and 3 would be $\frac{400 \times 5100}{10654}$ and similarly the liability for the 2nd item would be Rs. $\frac{100 \times 5100}{10654}$. Bearing the principle contained in S. 70, Transfer of Property Act in mind, the plaintiff's security must be held to extend to the whole of the property purchased by the sixth defendant along with the improvements effected thereupon but inasmuch as the amount decreed in favour of the plaintiff has been, we understand, deposited in Court, this direction would not confer any advantage on him. The appeal, therefore, fails and is dismissed. The respondents will have their costs of the appeal.

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1. (1928) I.L.R. 6 Rang 417.

Arunagiri Mudaliar v. Radha-krishna Aiyar.

Abdur Rahman, J.

The appeal having been set down 'to be spoken to' this day the Court made the following

ORDER.—The figures Rs. 6,120-1-0 should be substituted for Rs. 5,100 in page 10 of the judgment. The latter figure is an error due to a slip.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Panthanam *alias* Alagianayakathammal and others. *Appellants** (*Counter-petitioners*).

v.

P. R. M. K. Muhammad Abdul Rahiman Marakayar, Trustee and Landlord of Puthur Village. *Respondent* (*Petitioner*).

Panthanam v. Abdul Rahiman.

Madras Estates Land Act (I of 1908), S. 75—Collector's decision for payment of rent in kind—Whether decree or order—Appeal only to District Judge—Absence of specific provision for further appeal to High Court—C. P. Code, S. 100—If applicable.

A decision by the Collector under S. 75 of the Estates Land Act for payment of rent in kind is not a decree and there can be only one appeal *i.e.*, to the District Court. As the decision of the Collector is in the nature of an order the appeal against such order must be regarded to be a continuation of the proceedings before the Collector and the decision by the District Court on appeal cannot be characterised as a decree. The provisions of S. 100, Civil Procedure Code cannot apply and no appeal is competent against the decision of the District Court.

Appeals against the orders of the District Court of Ramnad at Madura in A. Ss. Nos. 20 etc., of 1937 preferred against the order of the Court of the Sub-Collector of Ramnad dated 31st October, 1936 and made in M. P. Nos. 163 etc., of 1936 respectively.

U. Somasundaram for Appellants.

B. Sitarama Rao for *T. K. Subramania Pillai* and *M. G. Shunmugham Pillai* for Respondent.

The Court made the following

ORDER.—This is a batch of thirty second appeals. A preliminary objection has been raised by Mr. Sitarama Rao. He contends that in the absence of a provision in the Estates Land Act conferring a right on the appellants to prefer second appeals, these are not competent and are liable to be dismissed. The question to decide is whether they are.

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*S. As. Nos. 906 to 934 and 999 of 1939. 14th August, 1941.

Panthanam *v.* Abdul Rahiman.

They arise out of objections made by the respondent-landholder for appraisement of the crop or division of the produce under S. 74 of the Estates Land Act. On receiving these applications, the Collector deputed an officer, as required by S. 75 of the Act, to make the division or appraisement. The Officer appointed by the Collector carried out the orders and made a report. Objections were raised on behalf of the appellants to this. They were to the effect that the rent was payable in money and not in kind. These objections were disallowed. The appellants went up to the District Court in appeal but the Collector's decision was affirmed. They have preferred the present appeals against the orders of the District Court.

Sub-clauses (*d*) and (*e*) to S. 75 (8) which contain the provisions relevant to the point to be determined read as follows:

"(*d*) The Collector's order for the payment of rent and costs, if any, shall be final unless an objection of the nature described in clause (*b*) has been raised and shall be enforceable as a decree for arrears of rent.

(*e*) Where an objection of the nature described in clause (*b*) has been raised, the Collector's decision thereon shall be subject to an appeal to the District Court. Such appeal shall be presented within thirty days from the date of the Collector's decision."

Clause (*b*) referred to in these sub-clauses provides that if an objection is raised that the rent is not payable by division or appraisement or that no rent is payable and the Collector upholds the objection, he shall set aside the award made by the person who was deputed to make the division or appraisement.

According to the first of these sub-clauses, the Collector's order for the payment of rent and costs has been declared to be final. Since, during the course of argument, learned counsel for the appellant contended that the order passed by the District Court and the orders passed by the Collector were decrees in fact, it would be useful to remember that the sub-clause (*d*) does not declare the Collector's orders to be decrees but merely orders that are enforceable as decrees for arrears of rent. As to the character of the decision made by the District Court, sub-clause (*e*) provides that when the objection that the rent is not payable either at all or at least in kind *i.e.*, by division or appraisement but is payable in cash, is taken on behalf of a tenant, the Collector's decision (the use of the word 'decision' to which reference was made during the course of the arguments is not important as it obviously refers to the

Panthanam v. Abdul Rahiman.

order passed by the Collector and to nothing else) shall be subject to an appeal to the District Court. If these two sub-clauses are read together, there would be no doubt as to their meaning. They lay down that the Collector's order for payment of rent in kind would be final if no objection is taken under sub-clause (*b*) and would continue to be so even if an objection is taken under that sub-clause if the District Court on being appealed to does not come to a different decision from that of the Collector. In both these cases, it is the decision of the Collector that remains final. If the District Court takes a different view on the other hand, the order of the Collector is to be substituted or replaced by the order of the former. Whether such an order could be appealed against does not arise here for decision. But the point to be borne in mind is that in the absence of a different conclusion by the District Court, the decision of the Collector would continue to hold the field and retain its character of finality.

There is no provision in the Act which permits a further appeal to the High Court; but learned counsel for the appellant contends that in spite of the absence of a specific provision to that effect, such appeals are competent as under S. 192 of the Estates Land Act, the provisions of the Code of Civil Procedure have been made applicable to all appeals under the Act and in so far as the appeals to the District Court were laid under S. 75 (*d*), a further appeal to the High Court would lie under S. 100 of the Code of Civil Procedure. But before the provisions of S. 100 can be held to be attracted, it is incumbent upon the appellants to satisfy me that the orders passed by the District Court on appeals amounted to decrees. The proceedings, it must be remembered, arose out of applications made to the Collector for division or appraisement and not out of suits. The decision by the Collector has been described by clause (*d*) to be in the nature of an order. The appeals against that order must be regarded to be a continuation of the proceedings before the Collector. If the decision by the Collector culminated in an order only, how can a decision by the District Court on appeal be characterised as a decree? There are a large number of orders against which appeals have been provided under O. 43, r. 1, Civil Procedure Code. Can it be legitimately contended that the decision of the Court of appeal would amount to a decree although the decision of the first Court was in the nature of an order? I do not think so,

Panthanam *v.* Abdul Rahiman.

The Code makes a clear distinction between decrees and appealable orders and it is impossible to forget that distinction in deciding this question. My attention was drawn to the fact that the decisions of the District Court were final so far as that Court was concerned and that they were embodied in the form of decrees. But I do not feel impressed by these facts. An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned. As to the form in which these orders were embodied, a practice seems to have grown up in this presidency to embody every order or judgment passed by a Court in the form of a decree. In cases of orders, these formal expressions have come to be known by the style of decretal orders. This practice owed its growth probably to the difficulty experienced by the lower Courts in discriminating between judgments and orders and since no appeal is competent in case of judgments unless they are formally drawn up and embodied in decrees, it was probably considered safer to embody both judgments and orders in that manner. This would not, however, confer a right of appeal where none exists or convert what was really an order into a decree.

Reliance was placed on behalf of the appellant on several decisions of this Court and of the Privy Council; but it is unnecessary to examine them in detail as the decisions in *Ravi Veeraraghavulu* v. *Venkatanarasimha Naidu Bahadur*[1], *Venkatramier* v. *Vythilinga Thambiran*[2], and *Ganne Kotappa* v. *Venkataramiah*[3], were decisions in suits instituted under the Rent Recovery Act or the Estates Land Act and must therefore have ended in decrees.

The decision in *Kamaraju* v. *The Secretary of State for India*[4], on which very great emphasis was laid by learned counsel for the appellant has no application also, in my opinion, as the Forest Officer in that case was found by the Full Bench to have been constituted a Court with special jurisdiction which a Collector in deciding the question of appraisement under S. 75 is not. The last decision to which reference was made during the course of the arguments was that of *Rajah of Mandasa* v. *Jagannayakulu*[5], but the real point to be deter-

1. (1914)27 M.L.J. 451: L.R. 41 I.A. 258: I.L.R. 37 Mad. 443 (P.C.).
2. (1913) 1 L.W. 89: I.L.R. 38 Mad. 655. 3. (1900) 10 M.L.J. 398.
4. (1888) I.L.R. 11 Mad. 309 (F.B.). 5. (1931)63 M.L.J. 450, (F.B.).

Panthanam v. Abdul Rahiman.

mined in that case was whether the Civil Court was a competent revising authority in regard to the directions given by the Board of Revenue to revise the proceedings of a Revenue Officer who had made a settlement of rents under Chapter XI of the Estates Land Act. That is not the question which has to be determined now. In the course of the judgment, however, one of the learned Judges, Anantakrishna Aiyar, J., referred to the position whether second appeals would be competent in certain cases but there is nothing in those observations which may lead me to infer that the learned Judge was referring to the maintainability of such appeals from anything else other than decrees.

In my opinion, this case is governed by the principle enunciated in the Full Bench decision in *Rajagopala Chettiar* v. *Hindu Religious Endowments Board, Madras*[1] and in *Rangoon Botatoung Co. Ltd.,* v. *The Collector of Rangoon*[2]. A right of appeal is a statutory right and cannot be inferred by implication. For the above reasons I must hold that the appeals are not competent.

A request is made to me on behalf of the appellants that they may be permitted to convert these appeals into revisions. As I am assured that there are points of law which may have to be considered by the Court and in the ends of justice, I have no objection to grant that permission provided that the appellants make up the deficiency in the court-fee and pay a consolidated sum of Rs. 50 to the learned counsel on the other side both because these appeals have not been held to be competent and because of the adjournment which has been asked to make up the deficiency. These costs would be irrespective of any final orders as to costs that may be ordered to one party or to the other on the decision of appeals which are now being converted into revisions or what would be converted into revisions if the necessary deficiency in court-fee is made up.

The necessary deficiency may be made up and the costs paid to the other side within a month.

K. S. *Appeals held to be incompetent.*

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1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.).
2. (1912) 23 M.L.J. 276: L.R. 39 I.A. 197: I.L.R. 40 Cal. 21 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Moongan and others ... *Petitioners* (Accused Nos. 1, 2, 4, 7, 8, 9, 13, 14, 15, 18 and 19)*

v.

Mir Roshan Ali Sahib ... *Respondent (Complainant).*

Moongan *v.* Roshan Ali.

Criminal trial—Misjoinder of parties—Conviction if to be set aside—Presumption as to prejudice to accused.

Where there was no intention or object common to two sets of persons cutting trees in different parts of a forest, trying them together will amount to misjoinder of parties. Where the accused have been so tried jointly prejudice should ordinarily be presumed unless it is quite certain that there could have been none, and in the circumstances of the case, the convictions should be set aside and separate trials ordered.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Hosur dated 19th December, 1940 and made in C. A. No. 50 of 1940 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Krishnagiri in C. C. No. 1121 of 1940.

K. S. Jayarama Aiyar for *G. Gopalaswami* and *V. V. Radhakrishnan* for Petitioners.

V. T. Rangaswami Aiyangar for *K. S. Sundaram* and *M. R. Ramachandra Pant* for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—All the petitioners entered into a forest which had been leased to the complainant and cut certain trees. They were all tried together, although separate charges were framed with regard to two sets of the accused who were cutting trees in different parts of the same forest. They have all been convicted. In this petition it is contended on behalf of the petitioners that there was a misjoinder of persons and that the conviction is therefore illegal and should be set aside.

Although the matter was taken in appeal, neither of the Courts say that there was any intention or object common to the two sets of persons cutting trees in different parts of the

* Crl. R. C. No. 316 of 1941
(Crl. R. P. No. 300 of 1941). 21st August, 1941.

Moongan v. Roshan Ali.

forest; so that I agree with the learned advocate for the petitioners—as well as with the learned Public Prosecutor—that there was a misjoinder of parties. Mr. V. T. Rangaswami Aiyangar for the complainant contends that there was no misjoinder and quotes *Sambasiva Mudali* In re[1], but it is clear from the judgment in that case that Pandalai, J., was satisfied that the two acts complained of—although on different dates—were parts of the same transaction and that the object on the two occasions was the same.

The only other question that arises in this case is whether the fact that all the accused were tried at one trial is a sufficient ground for setting aside their conviction and ordering a re-trial. For many years after *Subrahmania Aiyar* v. *King Emperor*[2], it was held that any disobedience or failure to comply with the mandatory provisions of the Criminal Procedure Code was an illegality that vitiated the conviction. That was a case in which there was a misjoinder of causes of action, and a Full Bench of this Court held that there was a misjoinder but that it was open to them to strike out the first count, to reject the evidence with regard to it, and to deal with the evidence on the remaining counts of the indictment. But their Lordships of the Privy Council held that the disregard of any express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by S. 537, Criminal Procedure Code and that such a phrase as 'irregularity' was not appropriate to the illegality of trying an accused person for more or different offences at the same time, if those offences were spread over a longer period than a year. In 1927 a case, *Abdul Rahman* v. *The King Emperor*[3], was considered by the Judicial Committee in which the depositions of witnesses had not been read over in the presence of the accused as required by S. 360, Criminal Procedure Code. It was held that this was a mere irregularity curable under S. 537 of the Code. This decision showed that a mere disregard of the mandatory provisions of the Code did not necessarily vitiate a conviction; but it left it rather difficult to say whether in a particular case a disregard of a mandatory provision amounted to an illegality or was a mere irregularity. Burn, J., in *Bomman Chetty* v.

1. (1930) 35 LW. 98.
2. (1901) 11 M.L.J. 233: L.R. 28 I.A. 257: I.L.R. 25 Mad. 61 (P.C.).
3. (1926) 52 M.L.J. 585: L.R. 54 I.A. 96: I.L.R. 5 Rang. 53 (P.C.).

Moongan v. Roshan Ali.

Emperor[1], which dealt with a misjoinder of charges, referred to the failure to obey a mandatory provision of the Code as an 'irregularity', but added that it was not one of the kind indicated by their Lordships of the Privy Council in *Abdul Rahman* v. *The King Emperor.*[2] In *Subramania Reddi* v. *Emperor*[3], five persons were tried together; but there should have been two trials one for the first accused and one for the accused 2-5. The accused 2 to 5 were however acquitted; and it was therefore argued that there no prejudice had resulted to the first accused. Burn, J., however held that:

"The joint trial was illegal and the illegality could not be cured by the acquittal of accused 2 to 5 of the offences under which they were charged".

In *Karuppa Goundan* v. *Emperor*[4], in which there was a misjoinder of causes of action, King, J., held that it was not a mere irregularity such as was referred to in *Abdul Rahman* v. *The King Emperor*[2], and that the trial and conviction were therefore illegal. None of these cases decided by single Judges however refer to *Ramaraja Tevan* In re[5], in which the effect of a misjoinder of persons was considered. There, Wallace and Jackson, JJ., say:

"Ever since the pronouncement of the Judicial Committee in *N.A. Subramania Aiyar* v. *King Emperor*[6], it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to *N. A. Subramania Aiyar* v. *King Emperor*[6], in *Abdul Rahman* v. *The King Emperor*[2], clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case, the Code was clearly infringed but the curative provision of S. 537 was considered a sufficient remedy".

So the position is not altogether clear even to day, although 53 Mad. 937 is not binding on me, because the above-quoted remark was *obiter*, it being found that in fact there was no misjoinder. But the purpose of the Legislature in laying down various restrictions with regard to charges against a number of persons or against the same person of different charges was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence with regard to a

1. (1936) M.W.N (Crl.) 1095.
2. (1926) 52 M.L.J. 585: L.R. 54 I.A. 96: I.L.R. 5 Rang. 53 (P.C.).
3. 1936 M.W.N. (Crl.) 839.
4. (1935) M.W.N. (Crl.) 820.
5. (1930) 59 M.L.J. 945: I.L.R 53 Mad. 937.
6. (1901) 11 M.L.J. 233: L.R. 28 I.A. 257: I.L.R. 25 Mad. 61 (P.C.).

number of accused; and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a misjoinder of accused, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. It is not necessary to disagree with the above quoted opinion from 53 Mad. 937 and to say that a misjoinder always vitiates a trial; but I think that a Court should ordinarily presume prejudice until it is quite certain that there could have been none. Moongan v. Roshan Ali.

In the present case, apart from the presumption of prejudice, the trial Magistrate—and even the appellate Magistrate—seemed to be of opinion that it was not proper to try the two sets of accused separately and that was why the trial Magistrate framed separate charges. He however erroneously thought that in doing so and in allowing each batch of accused to recall and cross-examine the prosecution witnesses separately, he was giving them separate trials. Mr. V. T. Rangaswami Aiyangar does not deny that there was in fact only one trial and not two. It is conceded by Mr. Jayarama Aiyar that the two sets of accused were animated each with a common intention if the prosecution story is true; and so he demands only two trials and not a trial for each accused separately.

The petition is therefore allowed, the convictions and sentences set aside, and the case remanded for fresh and separate trials of the two sets of accused by the District Magistrate himself or by some other Magistrate subordinate to him other than the Magistrate who tried the case.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Arunagiri Goundan and another .. *Petitioners* (Plaintiffs)*

v.

Ramaswami Pillai .. *Respondent (1st Defendant).*

Arunagiri Goundan v. Ramaswami Pillai

Small Cause suit—Trial by Judge having jurisdiction to try it—Suit numbered as original suit—Whether still small cause—Right of appeal.

* C. R. P. No. 1300 of 1939.
C. M. P. No. 3951 of 1941. 29th July, 1941.

Arunagiri Goundan v. Ramaswami Pillai.

If a suit is filed as a small cause suit and is disposed of by a Judge who possessed the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit and therefore, there can be no right of appeal. This legal principle must be applied even though the suit was numbered as an original suit.

Ramaswami Muthirian v. *Arunachalam Chettiar*, (1935) 69 M.L.J. 443 followed.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying that the High Court will be pleased to revise the judgment and decree of the District Court of South Arcot in A. S. No. 101 of 1937 preferred against the decree of the Court of the District Munsif of Tindivanam in O. S. No. 193 of 1936 etc.

T. E. Ramabhadrachariar for Petitioners.

I. K. Deva Rao for Respondent.

The Court delivered the following

JUDGMENT.—The subject matter of this petition is a promissory note executed by the first defendant in a suit in the Court of the District Munsif of Tindivanam numbered as O. S. 193 of 1936. The plaintiffs are the nephews of one Shanmugha Goundan in whose favour the promissory note had been assigned. Shanmugha Goundan is now dead and the plaintiffs have filed this suit as members of the joint family to which Shanmugha Goundan had belonged and who therefore continue to own the joint family property. The suit was decreed by the learned District Munsif in somewhat unusual circumstances. It was originally filed as a small cause suit in Tindivanam, its valuation being below Rs. 300 and the Judge who was then in charge of the Court having extended small cause powers. This Judge was succeeded by another Judge who was not so empowered and so the suit was transferred to the Original Side. A third District Munsif then presided over the Court and he was empowered to try all suits up to the valuation of Rs. 300 as small cause suits. This third District Munsif has clubbed together three suits and disposed of them in a single judgment. The third of these suits is the one which was numbered as O. S. 193 of 1936. The first defendant in O. S. 193 of 1936 after the decree had been given against him, appealed to the learned District Judge of South Arcot. The learned Judge set aside the decree on the ground that the plaintiffs were not entitled to sue as they had not obtained a succession certificate.

Arunagiri Goundan v. Ramaswami Pillai.

This is now a revision petition by the plaintiffs against the decree of the learned District Judge dismissing their suit.

The first point taken in revision is that the learned District Judge had no jurisdiction to entertain the appeal. It is contended that when a suit is filed as a small cause suit and is disposed of by a Judge who possessed the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit and therefore there can be no right of appeal. It is contended further that this legal principle must be applied even though the suit be numbered as an original suit. In support of this contention I have been referred to a decision of Stone, J., reported in *Ramaswami Muthirian* v. *Arunachalam Chettiar*[1]. The facts there are almost precisely similar to those in the present case and with respect I do not see any reason why I should not follow the reasoning of the learned Judge.

By the respondent (first defendant) I have been referred to two rulings of this Court, one of Patanjali Sastri, J., in *Kamalathammal* v. *Harihara Aiyar*[2], and the other in *Chockalingam* v. *Palaniappa*[3]. Both of these cases dealt with facts which can be easily distinguished. They are cases of suits which began their existence as small cause suits in the Court of a Subordinate Judge and were subsequently transferred for trial to a District Munsif. It was held in both of them that the District Munsif was not debarred from trying the suits from the mere fact that they had first been instituted as small cause suits in the Court of a Subordinate Judge. It is of course impossible for any Court to have held in the case of suits valued at more than Rs. 300 that when a District Munsif did in fact come to try them, he must be deemed to have tried them as small cause suits. These rulings therefore afford no assistance to the learned advocate for the respondent in attempting to challenge the authority of *Ramaswami Muthirian* v. *Arunachalam Chettiar*[1]. The argument for the petitioners must be accepted that the learned District Judge had no jurisdiction to hear this appeal.

The only question that remains is whether in these circumstances I should interfere under S. 115 of the Code of Civil

1. (1935) 69 M.L.J. 443.
2. (1940) 2 M.L.J. 700.
3. (1932) 63 M.L.J. 689: I.L.R. 55 Mad. 960.

Arunagiri Goundan *v.* Ramaswami Pillai.

Procedure. Such interference is of course permitted, and in my opinion should be practised unless there are clear indications that the learned District Judge is obviously right and the learned District Munsif obviously wrong upon other points in the case. I have not gone fully into the question whether the plaintiffs had the right to sue in this matter. It seems to me however, *prima facie* that if they are entitled to act for the members of the family, no succession certificate would be necessary for them. See the decision of Beasley, J., in *Arunachalam Chetty* v. *Jagannatha Pillai*[1]. I do not propose now to consider the objections sought to be raised on behalf of the respondent that it was in reality the other members of the joint family who had the right to sue, and not the plaintiffs. The situation is simply this: on the finding of fact the respondent owes money upon this promissory note to the joint family. A decree has been passed against him by the District Munsif at the instance of the plaintiffs on the clear understanding that the property in the decree belongs to the joint family. The first defendant therefore suffers no prejudice from being compelled to discharge his obligations under this decree. There can be no question of any other plaintiffs suing him for this debt on the allegation that the present plaintiffs have wrongly appropriated it to themselves. There therefore remains no obstacle to my taking action under S. 115 of the Code of Civil Procedure and this being a clear case in which the learned District Judge has acted without jurisdiction I set aside his decree and restore the decree of the learned District Munsif.

During the pendency of the appeal the first defendant filed an application claiming relief under Act IV of 1938. This application was of course not dealt with by the learned District Judge because he had dismissed the plaintiffs' suit and its consideration therefore became unnecessary. The first defendant has now repeated his application claiming relief under the Act in this Court; and my decision confirming the decree of the learned District Munsif will be subject to the disposal of that application which is herewith sent for disposal to the learned District Munsif.

The respondent must pay the costs throughout of the petitioners.

K.C. *Petition allowed.*

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1. (1926) 24 L.W. 659.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Syed Ismail Sahib *alias* Syed Tahsildar Sahib and another. *Petitioners** (*Plaintiffs*)

v.

Ethikasha Sarguru *alias* Syed Chandu Sahib and another. *Respondents* (*Defendants*).

Ismail Sahib *v.* Ethikasha Sarguru.

Mussalman Wakf Act (XLII of 1923), Ss. 3 and 10—Default in discharge of duties relating to wakf *under the Act—Proper Court to try the offence.*

An application was made to the District Court under S. 10 of the Mussalman Wakf Act to punish the respondents by way of fine for default in the discharge of their duties under the Act in connection with a certain darga. The respondents denied the existence of any such *wakf* and also contended that the District Court had no jurisdiction to enquire into the petition.

Held, that since S. 10 of the Wakf Act creates an offence as defined in S. 4 of the Criminal Procedure Code and since no Court is mentioned in S. 10 of the Wakf Act as the Court to try the offence it was only the ordinary criminal Courts that had jurisdiction to punish a person under S. 10.

Shia Youngmen's Association Punjab v. *Fateh Ali Shah,* I.L.R. (1941) Lah. 395 (F.B.), followed.

Nasrullah v. *Wajid Ali* (1932) I.L.R. 54 All. 475, *Kalekhan* v. *Karim* (1934) 37 Bom.L.R. 207 and *Abdul Hadi* v. *Abdul Latiff,* A.I.R. 1937 Nag. 135, not followed.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Madura dated 4th April, 1939 and made in O. P. No. 60 of 1938.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Petitioners.

S. Pachapagesa Sastri and *G. Srinivasa Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise the order passed by the learned District Judge of Madura in O. P. No. 60 of 1938. That original petition was filed under S. 10 of the Mussalman Wakf Act, XLII of 1923, desiring the lower Court to punish the respondents by way of fine for failure to discharge their duties under the Wakf Act in connection with a

* C. R. P. No. 1804 of 1939. 13th August, 1941.

Ismail Sahib v. Ethikasha Sarguru.

darga called Hazarat Mohaiat Shaw Darga at Anuppanady village, near Madura. The respondents denied that any such *wakf* existed, and pleaded that it was only a Criminal Court that could impose the fine indicated under S. 10 of the Act. The learned District Judge thought that it was the District Court that had the jurisdiction to impose the fine, but held that since the *wakf* itself was denied, it was not competent for him to hold an enquiry into that matter.

With regard to the first point, I am of opinion that the learned District Judge has not come to the correct conclusion. He relied upon the decisions in *Nasrullah* v. *Wajid Ali*[1], *Kalekhan* v. *Karim*[2], and *Abdul Hadi* v. *Abdul Latiff*[3]. But in all these decisions it is noticeable that the learned Judges have pronounced their decisions rather with reference to what they consider to be "the scheme of the Act" than with reference to the wording of its provisions. In S. 2 of the Mussalman Wakf Act, XLII of 1923 "Court" is defined as:

" The Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the Local Government may, by notification in the local official Gazette, designate in this behalf".

The arguments which weighed with the learned Judges in the cases referred to was that the District Court is burdened with all the duties under this Act and therefore the District Court must be the Court which can impose the fine provided in S. 10. This, however, with all respect, is in my opinion not sound. S. 10 of the Act simply says that any person who is required to perform certain duties shall, if without reasonable cause, he fails to perform those duties, be punishable with fine which may extend to Rs. 500 or in the case of a second or a subsequent offence with fine which may extend to Rs. 2,000.

Now under S. 4 of the Code of Criminal Procedure "Offence" means any act or omission made punishable by any law for the time being in force. It is clear therefore that S. 10 of the Wakf Act creates an offence, and indeed it says in so many words that the omission described is an offence. S. 29 of the Code of Criminal Procedure runs as follows:

(1) Subject to the other provisions of this Code any offence under any other law (that is any law other than the Indian Penal Code) shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

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1. (1932) I.L.R. 54 All. 475.
2. (1934) 37 Bom.L.R. 207.
3. A.I.R. 1937 Nag. 135.

Ismail Sahib *v.* Ethikasha Sarguru.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

There is no mention in the Wakf Act of any Court as a Court which shall impose the punishment provided in S. 10. In other words there is no Court mentioned as the Court which shall try offences under S. 10. It follows therefore that the Court which can try those offences is the Court indicated in the Criminal Procedure Code.

I may say that in my opinion, it would be contrary to all principle that the Court of the District Judge should have the power to punish offences under S. 10 of the Wakf Act with fine. In any such case the Court of the District Judge would be virtually in the position of prosecutor and Judge at the same time. I find myself therefore, with all respect, unable to agree with the learned Judges who decided the cases already quoted. I would prefer to follow, with respect, the decision of a Full Bench of the Lahore High Court in *Shia Youngmen's Association, Punjab* v. *Fateh Ali Shah*[1]. The Full Bench there answered in the negative the question whether, in case the *muttawalli* has not complied with the provisions of the Act, the District Judge is empowered himself to impose a fine on him.

In the same judgment the Full Bench of the Lahore High Court decided that in proceedings under S. 10 of Act XLII of 1923, the District Judge has no jurisdiction to hold an enquiry into the naturé of the property where the alleged *muttawalli* denies the existence of the *wakf*. This is important support for the view taken by the learned District Judge in the order which I am asked to revise. But it is not necessary for me to discuss that question at length since learned counsel for the petitioners agrees that if a decision on the other point is against the petitioners, the application to the District Court must be considered to have been rightly dismissed.

This application to revise the order of the learned District Judge therefore fails and is dismissed with costs.

K.S. *Petition dismissed.*

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1. I.L.R. (1941) Lah. 395 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Pandara Sannadhi, Tiruvannamalai Adhinam by Trustee Sri Deivasigamani Ponnambala Desigar and another. *Appellants** (*Defendants*).

v.

The Corporation of Madras .. *Respondent* (*Plaintiff*).

Bandara Sannadhi, Tiruvanna-malai Adhinam *v.* Corporation of Madras.

Madras City Municipal Act (IV of 1919), S. 101 (b)—Building whose rents are utilised for upkeep of buildings, not a "choultry" exempted from tax.

A building which is used as a rest house for travellers will alone be a choultry and exempted from payment of taxes under S. 101 (*b*) of the City Municipal Act 1919, as amended in 1936, and not buildings the rent of which is being used for the running of another building as choultry or for its maintenance and therefore for charitable purposes.

A building allowed to be used by the public only for performing marriages will not be a choultry.

Appeals against the decrees of the Court of the City Civil Judge, Madras dated 3rd March, 1939 and passed in O. S. Nos. 1103, 1653 and 1662 of 1938 respectively.

V. Ramaswami Aiyar for Appellants.

A. Suryanarayaniah for Respondent.

The Court delivered the following

JUDGMENT.—These are three appeals filed against the decrees of the Additional City Civil Judge in O. S. Nos. 1103, 1653 and 1662 of 1938. A common judgment was delivered by the trial Court and the decision in all the three cases depends upon the question whether the building in each suit is a choultry and therefore exempted under S. 101 (*b*) of the City Municipal Act. The exemption was claimed on the wording of the Amending Act X of 1936. The provision exempts the following buildings from the property tax: (1) choultries for the occupation of which no rent is charged and (2) choultries the rent charges for occupation of which is used exclusively for charitable purposes. The respondent municipality levied taxes on the three buildings in question rejecting the claim of the appellant that they are exempted under S. 101 (*b*) of the Amended Act. The tax not having been paid, the three suits out of which these appeals arise were filed by the respondent Corporation for recovery of the tax.

The three buildings are contiguous to each other. One has a frontage in Mint Street and bears No. 2/355 Mint Street.

* C.C.C. A. Nos. 56 to 58 of 1939. 2nd May, 1941.

Pandara Sannadhi, Tiruvannamalai Adhinam v. Corporation of Madras.

The other two houses have a frontage in Nattupilliar Koil Street which is parallel to the Mint Street and bear Nos. 26 and 27 in that street. The lower Court held that the buildings are not choultries and therefore not exempted from liability to pay the tax and decreed the suits. In these appeals, the appellant challenges the finding that the houses are not choultries. The parties to the three appeals are the same; the appellant in each case is the Pandarasannadhi of the Tiruvannamalai Adhinam and the respondent, the Corporation of Madras.

As pointed out by the lower Court it is common ground that 2/355 Mint Street has been in the occupation of a number of tenants and that it was never used as a lodging for pilgrims or travellers. It was also common ground that the first compartment of Nos. 26 and 27, Nattupilliar Koil Street is generally used by the public for celebrating marriages and is also occasionally used as a place of shelter for pilgrims or travellers. Both the parties agreed before the trial Court that the first compartment of Nos. 26 and 27 is not let out for rent. The parties differed as to the way in which the back compartment of Nos. 26 and 27 was used. The case of the appellant was that even the second compartment was not let out to tenants and that it was being used for the same purposes for which the first compartment was used, namely, for celebration of marriages and as a place of shelter for travellers. His next contention was that the three buildings constituted choultries for the reason that the rent realised from the tenants is being utilised exclusively for the purpose of maintaining all the three buildings and therefore for charitable purposes.

In order to claim exemption under S. 101 (*b*) as amended, the first condition to be satisfied is that the buildings must be choultries. If they are not choultries, then they are not entitled to exemption. A choultry is a well known expression involving the idea that the building called a choultry affords a resting place for travellers. Unless, therefore, the building affords accommodation for travellers, it is not a choultry and unless it is a choultry S. 101 (*b*) has no application even though the rent derived from the building is used exclusively for charitable purposes. A choultry is no doubt a charitable trust. If for the purpose of running that choultry, there are other buildings which are not used as rest houses but which are used exclusively, say, for running a business, the building in which

Pandara Sannadhi, Tiruvannamalai Adhinam v. Corporation of Madras.

the business is being run is not a choultry even though the rent derived from it is used for the maintenance of the choultry. The choultry may be run in one building and in another locality there may be other buildings which are not at all used as rest houses for pilgrims and which are let out to tenants for occupation or to shop keepers for use as shops and the rents derived from them may be used exclusively for running the choultry. In such a case the building which is used as a rest house for travellers will alone be exempted and not the other buildings the rent of which is being used for the running of the choultry. If the buildings themselves are not used as rest houses, which is the central idea underlying the expression 'choultry', they are not exempt from payment of tax.

In *Kothandarama Pillai* v. *The Municipal Council, Trichinopoly*[1] Krishnan Pandalai, J., pointed out that a building cannot be a choultry if it is not used as a resting place for travellers. In that case, there was a provision for supplying food and drink to paradesis, that is, to religious mendicants. But there was no provision for allowing travellers or pilgrims to stay in the building or to take shelter there. The learned Judge held that the essential requisite of a choultry is that the building should be used as a resting place for travellers. I respectfully agree.

The question therefore is whether any of these buildings answers the requirements of a choultry or in other words whether it is used as a rest house for travellers. Taking No. 2/355, Mint Street, first, it is admitted that no part of it is allowed to be used by travellers. The whole building is let out to tenants and the only ground for exemption is that the rents derived from that building are used for charitable purposes which as stated before me is the maintenance of all the three buildings. This building does not therefore answer the description of the term 'choultry'.

Then coming to Nos. 26 and 27 Nattupilliar Koil Street, the front portion is no doubt being used by the public for celebrating marriages and is also occasionally used as a place of shelter by pilgrims and travellers. As regards the second compartment, the lower Court relies on the evidence of certain witnesses that they are being let out to tenants and that the case of the appellant in this respect is not true. P. Ws. 1 and

1. (1933) 65 M.L.J. 678.

2 are the assessors of the Corporation and they state that they visited the building and found tenants in the second compartment of the two houses. Two of the tenants were also examined as P. Ws. 3 and 4. The lower Court has accepted the evidence of these witnesses and I see no reason to differ from the finding of the lower Court. The appellant is admittedly maintaining a printed receipt book as shown by Ex. IV. That receipt book was not produced. Therefore it is clear that the second compartments of Nos. 26 and 27 are being let out to tenants and rents realised. Ex. B is a copy of a rental agreement executed by the present lessee of all the three buildings, one Sambanda Naicker, in favour of the appellant. By this agreement the lessee is bound to pay a rent of Rs. 30 a month to the Pandarasannadhi, the appellant and to bear the public charges, taxes, expenses of repairs up to Rs. 10 or 15. It also states that while the front compartments of Nos. 26 and 27 should be used for marriage purposes and for travellers, the lessee was to be at liberty to lease out the second compartment and to collect rent from the tenants. The lessee Sambanda Naicker is not likely to allow the second compartment to remain without letting them to tenants because this document expressly authorises him to let out the second compartment. There is no evidence that the sum of Rs. 30 which was being paid to the Pandarasannadhi was utilised for the maintenance of the building as the appellant's advocate argues. Then it was said that that sum of Rs. 30 was being used for charitable purposes. Because the Pandarasannadhi was the head of a mutt, I am asked to say that the Pandarasannadhi must have used it for the purposes of the mutt and therefore for charitable purposes. This is really asking me to presume too much. There is no evidence as to the user to which this sum of Rs. 30 was being put by the Pandarasannadhi and it lies upon the person claiming the exemption to prove all the requirements. The Pandarasannadhi might use it for his own purposes or for any other purpose which is not a charitable purpose. As regards Nos. 26 and 27 a portion of them is being let out to tenants and it is not proved that the rents derived from those buildings are used for charitable purposes.

As regards the front compartment, Ex. B says that the lessee should allow it to be used by the public for performing marriages. Assuming that a building is set apart for perform-

Pandara Sannadhi, Tiruvannamalai Adhinam v. Corporation of Madras.

ance of marriages by the public, it cannot, I think, be said that the building is a choultry. Choultry involves as I said a resting place for travellers. If therefore a building is allowed to be used only for performance of marriages, it would not be a choultry. Then as regards user of the front compartment by travellers, the translation of Ex. B as contained in the printed record is not correct. The original document which I have seen provides that the front compartment was to be given to travellers and for purposes of marriage and not to travellers for purposes of marriage as translated. But this does not affect the question which falls for decision.

Only that portion which is set apart for travellers would be a choultry; further it is not stated that the Corporation has assessed the front portion of the building. I hold that Nos. 26 and 27 Nattupilliar Koil Street cannot be said to be choultries. If only a small portion of it is being occasionally allowed to be used by travellers and if the rest of it is being let out to tenants and the rent derived therefrom is not shown to be used for charitable purposes, it cannot, I think, be said that the building as such is a choultry. I agree with the conclusions of the lower Court and dismiss the three appeals with costs.

K.C. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE HAPPELL.

Fatima Bibi ... *Appellant* (Petitioner)*

v.

Shaik Peda Pentu Saheb ... *Respondent (Respondent).*

Fatima Bibi v. Pentu Saheb.

Guardians and Wards Act (VIII of 1890), Ss. 19 and 25—Scope—Mahomedan minor girl—Custody—Father and maternal grandmother—Rights.

On an application under the Guardians and Wards Act by a Mahomedan maternal grandmother for custody of her deceased daughter's minor daughters,

Held, that where the father is not shown to be unfit to be guardian S. 19 will be a bar to such application. Though under Mahomedan law failing the mother, the custody of a Mahomedan girl who has not attained puberty belongs by right to the mother's mother in preference to the father, yet the father of a Mahomedan girl is her legal guardian. Unless the minors had ever been in the custody of the grandmother and had left or been removed from such custody S. 25 can have no application and no ques-

* A. A. O. No. 348 of 1939. 23rd July, 1941.

tion as to whether it will be for the welfare of the minors to return to the custody of the grandmother can arise.

Appeal against the order of the District Court of Guntur dated 7th March, 1939, and made in O. P. No. 110 of 1938.

V. Suryanarayana for Appellant.

V. Rangachari for Respondent.

The Judgment of the Court was delivered by

Burn, J.

Burn, J.:—This is an appeal from the order of the learned District Judge of Guntur in O. P. No. 110 of 1938. The appellant was the petitioner before the District Court. She said that she was the maternal grandmother of three minor Mahomedan girls. She said that the youngest child was in her custody and that the two elder ones were in the custody of their father the respondent in the petition and the respondent in this appeal. The application was for the appointment of a proper and fit person as guardian of the property of the minors and for delivery of the two elder children to the custody of the petitioner. It was also prayed that the rate of maintenance for the minors may be fixed. The learned District Judge dismissed the petition holding that under S. 19 (2) of the Guardians and Wards Act he had no power to appoint a guardian of the persons of any of these minor children because their father had not been shown to be unfit to be their guardian. The amount of property left by the minors' mother, the learned District Judge says, appears to be small and therefore he was of opinion that there was no necessity to appoint a guardian of the property. The maternal grandmother has filed this appeal.

Mr. V. Suryanarayana for the appellant has agreed that the maternal grandmother cannot in this case pray that she may be appointed as guardian of these children under the provisions of the Guardians and Wards Act. He recognises that S. 19 is a bar since the father has not been shown to be unfit. He contends however that treated as an application under S. 25 of the Guardians and Wards Act the prayer of the grandmother for the custody of the two elder children ought to have been granted and should now be granted by this Court. This contention however must fail when the wording of S. 25 of the Guardians and Wards Act is considered. It appears from the treatises on Mahomedan law that, failing the mother, the custody of a Mahomedan girl who has not yet attained puberty belongs by right to the mother's mother in preference

Fatima Bibi v. Pentu Saheb. — Burn, J.

to the father (*Vide* Mulla on Mahomedan Law, XI Edition Ss. 256, 257 and 259). But it is equally settled law that the father of a Mahomedan girl is her legal guardian. Sir Dinshaw Mulla himself on page 255 of the 11th edition of his treatise quotes the decision of the Privy Council in the case of *Imambandi* v. *Mutsaddi*[1]:

"It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian".

Now S. 25 makes provision for the restoration to the guardian's custody of a ward who has left or been removed from the guardian's custody. S. 25 therefore can have no application unless it is shown that the ward has left or been removed from the custody of his or her guardian. In the present case there is no allegation that the two elder minors have ever been in the custody of the appellant, their maternal grandmother. The allegation in the petition is that they are in the custody of their father the respondent and it is not suggested that they have been in any other custody during the whole of their short lives. There is therefore no question in this case of the Court arriving at the conclusion that "it will be for the welfare of the ward to *return* to the custody of his guardian". The petition was therefore rightly dismissed by the learned District Judge and this appeal must fail. Whether the appellant can by a suit in a civil Court enforce her right under the Mahomedan law to the custody of the two elder children is a question upon which no opinion need now be given. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Shanmugham Chettiar v. Nagaswami Aiyar & Co.

Minor Shanmugham Chettiar through guardian Shanmugham Chettiar. *Appellant** (*Petitioner*)

v.

N. M. Rayaloo Aiyar Nagaswami Aiyar and Company. *Respondent* (*Defendant Respondent*).

Civil Procedure Code (V of 1908), O. 21, r. 90—Application to set aside sale on the ground only of material irregularities etc.—Dismissal—Appeal—

1. (1918) 35 M.L.J. 422: L.R. 45 I.A. 73: I.L.R. 45 Cal. 878 (P.C.).

*A. A. O. No. 436 of 1938. 25th March, 1941.

Shanmugham Chettiar v. Nagaswami Aiyar & Co.

New contention that sale was a nullity, based on allegations of fact not made in lower Court—Permissibility—C. P. Code, S. 60 (m)*—Sale of alleged co-parcenary interest the status itself being challenged—Whether* spes successionis *which cannot be attached or sold—Hindu law—Decree against co-parcener—Execution—Attachment and sale of interest in only some items of joint family property—Validity.*

X a Hindu father executed a mortgage representing that the hypotheca was his self-acquired property. In a suit on the mortgage against *X* and his son *Y*, though it was held that the hypotheca was not the separate property of *X* but joint family property, a personal decree for money against *Y* also was passed indicating in the decree itself that the plaintiff could recover against *Y* by proceeding in execution against his share of the joint family property. Four items of joint family property were attached and sold, including the interest of *Y*, whatever it may be, in those items. *Y* though aware of all the steps taken in execution never intimated to the executing Court that he had a co-parcener's interest in vastly greater extents of immovable property than those attached and sold. *Y's* application under O. 21, r. 90 of the Civil Procedure Code for setting aside the sale on the grounds of material irregularities and fraud having been dismissed, he appealed to the High Court where he contended *inter alia* that the attachment and sale of his interest in only a small portion of the joint family property were illegal and therefore void *ab initio*.

Held, (*i*) *Y* cannot lie by in the executing Court with an allegation of this kind and then bring it up in appeal and found upon it a proposition of law to the effect that the attachment or sale is bad. *Arunachalam Chetty* v. *Arunachalam Chetty*, (1888) I.L.R. 12 Mad. 19: L.R. 15 I.A. 171 (P.C.) and *Olpherts* v. *Mahabir Pershad Singh*, (1882) I.L.R.9 Cal. 656: L.R. 10 I.A. 25, (P.C.), relied on.

(*ii*) The want of specification of the extent of *Y's* interest in the joint family properties and coupling it with an allegation that he had no interest cannot invalidate the sale as it was really one of whatever interest he may be found to have, there being no allegation that the interest was a matter of contingency or dependent upon any future happening, so as to attract S. 60 (*m*), C. P. Code.

(*iii*) It is possible for a creditor to attach and sell his judgment-debtor's interest in a part only of the joint family property. *Collector of Monghyr* v. *Hurdai Narain Shahai*, (1879) I L.R. 5 Cal. 425 and *Hardi Narain Sahu* v. *Ruder Perkash Misser*, (1883) I.L.R. 10 Cal. 626: L.R. 11 I.A. 26 (P.C.), referred to.

Appeal against the order of the Court of the Additional Subordinate Judge of Madura dated 16th November, 1937 and made in E. A. No. 482 of 1936 in E. P. No. 55 of 1935 in O. S. No. 114 of 1925.

K. S. Ramabhadra Aiyar for Appellant.

B. Sitarama Rao and *O. V. Baluswami* for Respondent.

The Court delivered the following

JUDGMENTS: *Burn, J.*:—This appeal is from the order of the learned Subordinate Judge of Madura dismissing an application under O. 21, r. 90, Civil Procedure Code to set aside a sale of immovable property held in execution. The sale was held on the 13th of July, 1936. The application under O. 21, r. 90

Burn, J.

Shanmugham Chettiar v. Nagaswami Aiyar & Co.

Burn, J.

was presented on the 11th of August, 1936 and was disposed of by the learned Subordinate Judge on the 16th of November, 1937. The learned Subordinate Judge held that there were no material irregularities or fraud established in the case and that therefore the application to set aside the sale could not be allowed. He dismissed it accordingly.

We have heard a very lengthy argument from Mr. K. S. Ramabhadra Aiyar on behalf of the appellant, the 2nd defendant in the suit, O. S. No. 114 of 1925. The appellant is the son of the 1st defendant in the suit and the suit was filed on a mortgage executed by the first defendant who represented when he took the money from the lender that the hypotheca was his self-acquired property. The learned Subordinate Judge held that the hypotheca was not the self-acquired property of the first defendant but joint family property. The suit was dismissed against the second defendant; but, on appeal to the High Court by the plaintiff, the High Court passed a personal decree for money against the second defendant also, and indicated in its decree that the plaintiff could recover against the second defendant by proceeding in execution against his share of the joint family property. The present application for sale is in respect of four items of joint family property which were attached in execution of the decree.

The hearing of this appeal has been considerably complicated by the fact that learned counsel for the appellant has chosen to abandon all the grounds of irregularity and fraud which were alleged in the application to the lower Court under O. 21, r. 90. He no longer contends that the sale was vitiated by any irregularity or fraud in the conduct of the sale. What he contends now is that the sale was *ab initio* illegal and therefore void; in other words, he says that the application to the lower Court ought not to have been an application under O. 21, r. 90, as in fact it was, but that it ought to have been an application under S. 47, of the Code of Civil Procedure. We have therefore heard no arguments with regard to the usual allegation under O. 21, r. 90, namely, that there was no proper tom-tom or that there was combination preventing adequate bidding or that there was no proper advertisement of the sale; nor have we heard arguments on the point that the sale was adjourned without specifying the hour of the date to which it was adjourned or on the allegation that the encumbrances had not been proper-

ly mentioned. Learned counsel for the appellant has devoted his arguments entirely to an attempt to show that the attachment itself and the sale in pursuance of it were illegal.

The first point taken by the learned counsel for the appellant is that the sale in this case was in violation of the direction of the High Court in its decree in A. S. No. 406 of 1930. The relevant portions of the decree are as follows:

"(1) that the second defendant in the suit (the present appellant) also do pay to the plaintiffs the amount decreed by the lower Court in O. S. No. 114 of 1925 with subsequent interest . . . . . subject to the declarations that the plaintiffs are entitled to get a money decree in the suit as against the second defendant and that the suit document is not binding on the second defendant as a mortgage;

(2) that cl. 4 in the said decree be and hereby is deleted;

(3) that plaintiffs be at liberty to execute the said decree by attaching and selling not only the share of the first defendant but also the share of the second defendant in the joint family properties."

There is no dispute about the fact that these items, which were items of the hypotheca, were attached and brought to sale as the self-acquired properties of the first defendant and were purchased by the decree-holder for about Rs. 43,000. There is also no doubt about the fact that he applied to attach and bring to sale the interest of the second defendant also in these properties. Learned counsel's contention that the sale proceedings in this case are in contravention of the High Court's decree is based upon an allegation that these four items of immovable properties did not constitute the whole of the joint family property in which the first defendant and the second defendant are co-parceners. He says that besides these the joint family is entitled to vast extents of immovable property. He says that the only course open to the decree-holder in A. S. No. 406 of 1930 was to attach the share of the second defendant in the whole of the joint family properties and to bring that to sale to satisfy his decree for money against the second defendant. He says that the attachment and sale of the second defendant's interest in only a small portion of the joint family property are illegal.

This contention is one which, I think, cannot be heard in this appeal. It has nowhere been alleged in the execution proceedings in the lower Court, and it does not appear in the decree of the High Court which is being executed, that the joint family is possessed of any other properties besides the items concerned in this sale. As the learned Subordinate Judge has pointed out,

Shanmugham Chettiar v. Nagaswami Aiyar & Co.

Burn, J.

the appellant has been aware of all the steps taken in execution, and he has never brought it to the notice of the executing Court that he had a co-parcener's interest along with his father in vastly greater extents of immovable property and that therefore it was not in accordance with law to attach and sell his interest in these four items alone. It is not, I think, absolutely clear that the holder of a money decree against one of several co-parceners is not at liberty to attach and bring to sale that co-parcener's interest in a portion of the joint family property, but must proceed against his interest in the whole of the joint family property. Such a proposition would lead to absurdities. For instance, in the case of a creditor holding a money decree against a minor co-parcener entitled to, say, a half share in properties of very great value, it would seem to be absurd to require the decree-holder to bring to sale the judgment-debtor's interest in joint family properties worth perhaps ten lakhs in order to satisfy a decree for money for, say, Rs. 100. Yet, that would follow from the contention put forward on behalf of the appellant in this case. It is only necessary to cite the decisions of the Calcutta High Court reported in *Collector of Monghyr* v. *Hurdai Narain Shahai*[1] and of the Privy Council reported in *Hardi Narain Sahu* v. *Ruder Perkash Misser*[2], in order to show that it is possible for a creditor to attach his judgment-debtor's interests in a part only of the joint family property. But I would prefer to decide the question with reference to the principle that the judgment-debtor cannot lie by in the executing Court with an allegation of this kind, and then bring it up in appeal and found upon it a proposition of law to the effect that the sale is bad. I must agree with the learned counsel for the respondent that this allegation, namely, that the joint family properties consist of more items than were brought to sale, is an allegation which would require an investigation into facts. The appellant ought to have brought this forward during the execution proceedings and, as he has not done so, I think it is not proper to allow him to do so now.

The second objection made by the learned counsel for the appellant is that the decree-holder brought the interest of the second defendant in these four items of joint family property to sale without specifying what interest it was and indeed coupled

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1. (1879) I.L.R. 5 Cal. 425.
2. (1883) L.R. 11 I.A. 26: I.L.R. 10 Cal. 626 (P.C.).

with an allegation that the second defendant had no interest in these properties. Learned counsel for the appellant contends that the sale is invalid for these reasons, but there is no authority for such a statement. Learned counsel has only referred us to S. 60 (*m*) of the Code of Civil Procedure whereby a merely contingent or possible right or interest cannot be attached and brought to sale in execution of a decree. That provision clearly has no application. There is no question here of the interest of the second defendant being a merely contingent or possible right or interest. What the decree-holder said was:

> "I wish to sell the interest of the second defendant in these items of property, whatever it may be. I do not know whether he really has any interest in it. I contend that he has not and I have filed in the Sub-Court O. S. No. 75 of 1934 to establish that contention of mine. But however that might turn out and whatever his interest might turn out to be when it is ascertained, I wish to bring it to sale."

There is no allegation that the interest of the second defendant is a matter of contingency or dependent upon any future happening. So far as it is an interest at all it must *ex hypothesi* be a vested interest. The case reported in *Pestonjee Bhicajee* v. *Anderson*[1], therefore has no application; nor the case reported in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*[2]. I am not able to see how the want of specification of the extent of the second defendant's interest in the joint family properties could invalidate the proclamation or the sale.

The third objection is that the order of attachment at first passed by the learned Subordinate Judge on the decree-holder's application for attachment was illegal. The order is: "Attachment of the second defendant's interest in this property by 28th March, 1935." The contention with regard to this point depends again upon the allegation that it was not permissible for the decree-holder to attach the 2nd defendant's interest in separate items of joint family property and that he ought to have attached the 2nd defendant's interest in the whole of the joint family property. There is nothing in the order passed by the learned Subordinate Judge to show that the property, the attachment of which was sought, was not the whole of the joint family property or that the learned Subordinate Judge was ordering the attachment of anything less than the 2nd defendant's interest in the whole of it. This point therefore also fails, in my opinion.

1. (1938) 2 M.L.J. 906. 2. (1871) 14 M.I.A. 40.

Shanmugham Chettiar v. Nagaswami Aiyar & Co.

Mockett, J.

For these reasons I think that this appeal ought to be dismissed with costs.

Mockett, J.:—I entirely agree. Although frequently pressed to do so, the learned counsel for the appellant has never been able to indicate to us that anywhere on the record there appears any trace of this contention, on which this appeal has been argued fully today, having been mentioned. It is quite clear that in the lower Court the appellant primarily went to attack the sale on the ground of the several irregularities to which my learned brother has referred. He also argued that owing to the alleged uncertainty of the 2nd defendant's position his rights, if any, in this property came within the provisions of S. 60 (*m*) of the Code of Civil Procedure, being in the nature of *spes successionis* and therefore something that could not be attached. The order invoked to set aside the sale was O. 21, r. 90, and it is worthy of mention that there is no reference to S. 47. The appellant is now asking us to order an enquiry into a state of fact which was peculiarly within his own knowledge and which we are satisfied was never mentioned to the lower Court. He is saying now that the decree-holder is seeking to execute the decree against part of a vast estate. I am certain that this was never mentioned to the lower Court. I am equally clear that it cannot be raised before us. The Judicial Committee have on two occasions dealt with positions similar to that which arises before us to day. In *Arunachalam Chetty* v. *Arunachalam Chetty*[1], their Lordships, referring to another decision of the Board in *Olpherts* v. *Mahabir Pershad Singh*[2], said that if there was really a ground of complaint and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. Their Lordships proceed:

> "It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated."

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1. (1888) I.L.R. 12 Mad. 19: L.R. 15 I.A. 171 (P.C.).
2. (1882) I.L.R. 9 Cal. 656: L.R. 10 I.A. 25 (P.C.).

Shanmugham Chettiar *v.* Nagaswami Aiyar & Co.

Mockett, J.

I respectfully consider that these remarks are particularly applicable to the case before us. I agree that this appeal should be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kota Ramayya and others ... *Petitioners* (Petitioners)*

v.

Tummalapalli Peda Kotayya and another. *Respondents (Respondents).*

Ramayya *v.* Kotayya.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability.

In S. 23 of Madras Act IV of 1938 the words 'property in which an agriculturist had an interest has been sold' must refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale.

Petitions under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the Court of the District Munsif of Kovvur dated 9th December, 1938 and made in E.A. Nos. 667 and 877 of 1938 respectively (in O. S. No. 434 of 1934 on the file of the Court of the District Munsif of Tanuku).

P. Somasundaram and *P. Suryanarayana* for Petitioners.

V. Viyyanna for Respondents.

The Court delivered the following

JUDGMENT.—It seems to me clear that in S. 23 of Madras Act IV of 1938 the words 'property, in which an agriculturist had an interest has been sold' must refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. Admittedly the property sold in the present case belonged solely to the non-agriculturist defendants. S. 23 has therefore no application. The petitions are dismissed with costs in Civil Revision Petition No. 1039 of 1939.

K. S. *Petitions dismissed.*

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*C. R. Ps. Nos. 1039 and 1040 of 1939. 7th October, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

O. M. P. L. Palaniappa Chettiar and another .. *Plaintiffs**

v.

N. V. E. N. N. Nachiappa Chettiar *alias* Annamalai Chettiar. *Defendant.*

Palaniappa Chettiar *v.* Nachiappa Chettiar.

Limitation Act (IX of 1908), S. 10—Nattukottai Chetti community—Stridhanam for bride—Deposit with a business firm—Deposit—Nature of—Period of limitation for recovery.

At the time of the marriage between the first plaintiff and his wife, who were members of the Nattukottai Chetti community, his father-in-law, S. A. A., provided a sum of money as her stridhanam. Out of this amount a sum of Rs. 2,045-2-0 was deposited in May, 1919 with the defendant in the name of the first plaintiff to the order of S. A. A. The defendant was aware of the nature of the money and its source and the purpose for which it was being deposited, namely, to earn interest and be augmented for the benefit of the children of the marriage, according to the custom of the community. An additional sum of Rs. 417, being the share of the first plaintiff's wife in her mother's property, was deposited with the defendant in July, 1921 similarly. S. A. A., the maraldar died in 1926 and the first plaintiff became entitled to demand the amounts. Demands were in fact made but were not complied with. On the question whether Art. 60 or S. 10 of the Limitation Act will govern a suit for the recovery of the amounts by the first plaintiff and his daughter the second plaintiff (the first plaintiff's wife having died in 1939),

Held, that in the circumstances of the case, the defendant became and remained a trustee of the amounts deposited, for a specific purpose, namely, of interest being earned and the total fund being increased for the benefit of the children of the first plaintiff and his wife, and that S. 10 of the Limitation Act will apply and enable the second plaintiff to recover the amount without any bar of limitation.

Case-law, English and Indian, reviewed.

V. Ramaswami Aiyar and *K. S. Ramamurthy* for Plaintiffs.

K. Krishnaswami Aiyangar and *T. A. Vijayaraghavachari* for Respondent.

The Court delivered the following

JUDGMENT.—The parties to this suit belong to the Nattukottai Chetti community. The first plaintiff married the sister of the defendant and the second plaintiff is their minor daughter who is now represented by her husband as next friend, this marriage having taken place in 1939. The first plaintiff's wife died in 1939. Her father was S. A. A. Adaikalavan Chetti who died in the year 1926.

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* C. S. No. 229 of 1938. 26th March, 1941.

In the plaint it is alleged that two sums, Rs. 2,045-2-0 and Rs. 417-3-3, were deposited with the defendant at interest according to the Madras nadappu rate, on 22nd May, 1919 and 16th July, 1921 respectively. These amounts were credited to the first plaintiff in the defendant's books of account. According to the custom and usage prevailing in the community these deposits were repayable on demand, which, it is alleged, was made on 17th May, 1938. In the plaint claim is made for a sum of Rs. 2,462-5-3 as principal and Rs. 7,539-5-3, interest at the date of suit, totalling Rs. 10,001-10-6 to which sum the first plaintiff alleges he is solely entitled under the law and custom of the community.

In the written statement the defendant denies that he has had any transaction with the plaintiffs or he is in any way bound or liable to pay them on any account or there was any contract or agreement between them. He alleges that the account referred to in the plaint as O. M. P. L. stridhanam account relates to a transaction between himself and his natural father the late S. A. A. Adaikalavan Chetti (to whom it is hereafter convenient to refer as S. A. A.). The transaction between the defendant and his late father was by way of deposit by the latter of a certain sum for purposes known to S.A.A., and was payable to his order and subsequent to his death the account was closed and settled. It is further alleged that the suit is barred by limitation. It is of some significance to point out that neither the sum alleged to have been deposited by S. A. A., nor the purpose for which it was so deposited is mentioned in the written statement.

About a year after the written statement was filed, with the leave of this Court, the second plaintiff filed a supplemental pleading alleging that on the occasion of the marriage of the first plaintiff with the second plaintiff's mother presents were given to her amounting to about Rs. 8,500 and according to the custom of their community it was constituted a fund or *asthi* for the benefit of the children out of which Rs. 2,045-2-0 was entrusted to the defendant on 22nd May, 1919, for investment and accumulation in the name of the first plaintiff and to the order of the bride's father, S.A.A. Further on 16th July, 1921, an additional sum of Rs. 417-3-3 representing the share of *kaluthuru* of the first plaintiff's wife was also similarly entrusted to the defendant for the benefit of the children.

Palaniappa Chettiar *v.* Nachiappa Chettiar.

After the death of the second plaintiff's mother the second plaintiff alleges that she became solely entitled to the moneys deposited with the defendant and as she is a minor and the moneys deposited with the defendant were trust moneys he occupied a fiduciary position, and no question of limitation in regard to the claim for payment of the moneys together with interest in his hands arises.

* * *

[After a discussion of the evidence his Lordship arrived at the following findings of fact].

I find as a fact, after considering all the oral and other evidence placed before me, the following: In May, 1919, at the time of the marriage between the first plaintiff and his wife, the bride's father S.A.A., provided a sum of money as her stridhanam property. Out of this sum, Rs. 2,045-2-0 was deposited in the name of the first plaintiff to the order of S. A. A., with the defendant and the defendant well knew exactly the nature of the money and its source, and the purpose for which it was being deposited. On the death of S.A.A., in 1926 the first plaintiff was entitled to demand and receive payment, he could not utilise the money for his own purposes but he then became, if he was not already so, a trustee. Demand was made by the first plaintiff by letter Ex. P-12 and thereafter on frequent occasions oral demands were made, all of which met with non-compliance. I reject the story that the defendant has repaid this money either before or after the death of his father and I hold that it is still in his hands. I also find as a fact that an additional sum of Rs. 417 was deposited similarly and formed the wife's share in her mother's property. There has been no attempt on behalf of the defendant to distinguish between the first and the second deposits or as to the character or nature of them and the person entitled to receive them; the argument which has been addressed has been on the basis that both the sums were of a similar kind and nature. I also find as a fact that the custom which is pleaded in the supplemental pleading and upon which Vairavan Chetti gave evidence has been established.

The question which now arises is what follows from the facts which I have found. The defendant in his written statement pleads that the suit is barred by reason of the provisions

of the statute of limitation. The money in the hands of the defendant according to the evidence was payable on demand. Art. 60 of the Limitation Act provides a period of three years from the date of demand in respect of moneys for which payment is to be demanded. The evidence of the first plaintiff is that he made oral demands and it is conceded that an oral demand is sufficient. On the date on which Ex. P-12 was written S. A. A., had died and the first plaintiff was the person entitled to demand payment. The limitation period expired from the date of the above letter long before the institution of the suit. Consequently, if the matter rested there, the plaintiffs' claim would inevitably fail.

It now becomes material to consider the plea put forward in the supplemental pleading that the moneys in the hands of the defendant are trust funds and consequently no period of limitation applies in respect of a claim for payment of these moneys. S. 10 of the Limitation Act provides, so far as it is material, as follows:

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose . . . . . . shall be barred by any length of time."

In order that the plaintiffs can avail themselves of the provisions of this section it must be shown that the moneys deposited with the defendant vested in him for a specific purpose. It is convenient when considering this aspect of the case to bear in mind that the defendant well knew that the moneys which were deposited with him formed part of the cash provided by his own father and the father of the bride as her marriage presents or her stridhanam and that they were deposited with him in the name of the husband, the first plaintiff, for the purpose of earning interest and to be augmented for the benefit of the children of the bride and bridegroom and that whoever could demand payment from him, whether it was the maraldar (S.A.A., in his lifetime) or the husband on the death of the maraldar, the fund and its accretions were not personal either to the maraldar or the husband but were the children's property. In other words the maraldar and or the husband were trustees of this fund of which the children were the *cestui que trusts*.

Reference has been made to a number of English authorities in which the question of trusteeship has been considered,

Palaniappa Chettiar v. Nachiappa Chettiar.

In *Spickernell* v. *Hotham*[1], the relevant facts were that in 1825 G. V. Drury borrowed from the executors of a will, a fund which was bequeathed to them in trust for himself for life and then for other persons. Sir W. Page Wood, V. C., said in the course of his judgment at page 289:

"I think that Drury in this case must be taken to have received these moneys into his hands as trust moneys".

In that case the recipient knew when he obtained the loan that the moneys were trust moneys. In *Dixon* In re *Heynes*, v. *Dixon*[2], the trustees of a marriage settlement with the wife's consent lent trust funds in cash, to the husband who took with full notice that it was trust money and liable to investment on interest bearing securities. It was held that he was in the position of an express trustee. In the course of his judgment Webster, M.R., at page 574 said:

"I think that the position of the husband, in taking the money and giving such a bond as this, brings him within the class of those persons who are regarded as bound to a great extent by the same rules as bind express trustees."

Collins, L. J., who delivered a concurring judgment, at page 583 referred to the case of *Spickernell* v. *Hotham*[1], and observed that that case was undistinguishable from the matter then before him. The respondent was aware and knew at the time he received the moneys that they were trust funds. In *Coxwell* v. *Franklinski*[3], the trustees of a marriage settlement advanced a portion of the trust moneys to the husband. The Vice Chancellor at page 154 observed:

"It was a trust fund, known, of course, by the husband to be a trust fund, received by him as part of the trust fund, in his hands as part of the trust money, and, until it was repaid, retaining the character of trust money".

In *Parker* v. *Comptyz*[4], the executors were not in terms appointed trustees but such duties were imposed upon them, and it was held that the executors although not trustees under the provisions of the will may become express trustees by reason of entries in their accounts earmarking certain funds as held for or on account of the persons interested. Warrington, J., as he then was, in the course of his judgment said that the executors put in their books of account explanations indicating that these sums of money were held for individual persons interested under the will to which he referred; in some

1. (1854) 69 E.R. 285.
2. (1900) 2 Ch. 561.
3. (1864) 11 L.T. 153.
4. 55 Sol. Journal 76.

cases they used the words "in trust" and in others "for the account of"; and in the learned Judge's view it made no difference whichever expression was used. The important characteristic of these entries was that the sums of money set apart from the rest were by these entries earmarked and held by the persons who did hold them for or on account of the persons interested. It was equivalent to saying that they were trustees for the other persons. In the present case the Chittas Exs. P-9, P-10, P-13 and P-14 which I am satisfied as I have already said were given by the defendant to his father refer to the investment being stridhanam property. According to the written statement the account was in the name of the first plaintiff and the defendant in his evidence admitted that the account was in the name of the first plaintiff and to the order of the defendant's father. This account is similar to the account referred to in the last authority to which I have referred. Consideration of the provisions of S. 10 of the Limitation Act came before a Bench, of this Court in *Krishtappa Chetty* v. *Lakshmi Ammal*[1] in which it was held by Sir Walter Schwabe, C.J., and Wallace, J., that the phrase in S. 10 "trust for a specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" in English law; and in so holding the Court approved of the decision in *Bhurabhai* v. *Bai Ruxmani*[2]. At page 433 the learned Chief Justice observed as follows:—

"I do not think that the word 'vested' in S. 10 means anything more than properly having control of the property".

The defendant had control of the fund which was placed with him for the specific purpose of interest being earned and the total fund being increased or augmented for the benefit of the children of the first plaintiff and his wife. According to the English authorities to which I have referred, having accepted both the deposits—Rs. 2,045 and Rs. 417—with knowledge that they were trust moneys he became an express trustee. In *Krishtappa Chetty* v. *Lakshmi Ammal*[1] it was laid down that the phrase in S. 10 of the Limitation Act "trust for a specific purpose" is merely a more expanded mode of constituting express trust in English law.

Following the authorities and by reason of the facts to which I have referred I hold that the defendant was and remains still a trustee of this money, that it vested in him for a

1. (1923) 44 M.L.J. 431. 2. (1908) I.L.R. 32 Bom. 394.

Palaniappa Chettiar v. Nachiappa Chettiar.

specific purpose and that the provisions of S. 10 of the Limitation Act apply. Consequently no period of limitation will run to defeat the claim which has been put forward by the second plaintiff to recover moneys in the defendant's hands and I hold that she is entitled to succeed. There is no distinction as I have already pointed out between the two sums which were deposited with the defendant.

The first plaintiff admitted in his evidence that he was not entitled to the benefit of this fund and it was the second plaintiff who was the rightful person to receive it. The claim which he put forward that he alone was entitled to receive it was abandoned. There will be a decree in favour of the second plaintiff for the amount of the claim together with interest which is set out in the plaint. There has been no dispute that the amount claimed for interest upto the date of suit is the correct sum. The total amount will bear interest from the date of suit until today at six per cent. per annum. Hereafter, the decretal amount will carry interest at the same rate.

The question of costs is one which requires a little attention. The original claim for payment to the first plaintiff alone has been, as I have mentioned, abandoned, but the second plaintiff has recovered the total amount for which the suit was instituted. I hold that she is entitled to her costs to be ascertained on the decretal sum. I make no special order, but if the inclusion of the first plaintiff has increased the amount of costs of the suit I direct that they will not be recoverable from the defendant. The amount of costs will bear interest at the rate of six per cent. per annum from the date of taxation.

K. C. —— *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Mangineddi Varadiah Chetty ... *Appellant** (*Plaintiff*)

v.

The Province of Madras represented by the District Collector of Chittoor. *Respondent* (*Defendant*)

Varadiah Chetty v. Province of Madras.

Madras Board of Revenue—Standing Orders—O. 15, Sub-r. (18)—Communal land—Not to be granted on darkhast*—Revisional jurisdiction of Collector—Absence of jurisdiction of Civil Courts.*

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* S. A. No. 342 of 1939. 19th August, 1941.

Varadiah Chetty v. Province of Madras.

Communal land or land required for communal purposes cannot be granted on *darkhast*. Where a *Tahsildar* grants such land or grants mistakenly believing that it is not required for communal purposes, the Collector can interfere in revision and cancel the assignment. Civil Courts have no jurisdiction in such matters and cannot interfere where the orders of the revenue officers are within the scope of their authority.

Appeal against the decree of the District Court of Chittoor in A.S. No. 70 of 1938 preferred against the decree of the Court of the District Munsif of Chittoor in O. S. No. 283 of 1937.

N. C. Vijayaraghavachariar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff challenges the act of the Collector of Chittoor cancelling a darkhast assignment made in his favour by the Tahsildar. He says that the cancellation was illegal and *ultra vires* the powers of the Collector. Having lost in both the Courts below, he has preferred this Second Appeal.

The contention advanced for him is that the revisional power vested in the Collector under Board's Standing O. 15, sub-r. (18) can be exercised by him only if certain conditions therein specified are satisfied but that in this case he exceeded his revisional jurisdiction because no such conditions were satisfied as a matter of fact.

After the Tahsildar had granted the land on darkhast to the appellant, a petition is said to have been filed by some of the villagers objecting to the assignment and stating that the land was required for communal purposes. The Revenue Divisional Officer made a local inspection and found the objection to be well-founded. The Collector took the report of the Revenue Divisional Officer under consideration and apparently gave notice to the appellant asking him to show cause why the darkhast should not be cancelled, for, the order speaks of a petition dated 20th January, 1937 from the appellant which is later than the report of the Revenue Divisional Officer. He also heard the appellant's pleader and ultimately made the order complained against which is in these terms:

"On inspection the Revenue Divisional Officer, Chittoor has found the assignment of Survey No. 9-1 Diguvamasappella village in Chittoor Taluk objectionable as it is required for communal purposes. The assignment is therefore cancelled".

Varadiah Chetty v. Province of Madras.

In other words he accepted the Revenue Divisional Officer's report and acted on it, being satisfied that the land was required for such purposes.

Communal land or land required for communal purposes cannot be granted on darkhast. Such a grant made by the Tahsildar can certainly be described as inequitable or exceeding the powers of the Tahsildar. If the Tahsildar believed that it was not required for communal purposes, while really it was, it would be a case of the order being passed under a mistake of fact. These are some of the conditions specified in sub-rule (18) of Standing O. 15; and it is futile to say that the Collector exceeded his powers in revision in cancelling this assignment for the reasons mentioned by him.

Civil Courts have clearly no jurisdiction in such matters and the orders of the revenue officers acting within the scope of their authority and jurisdiction cannot be reviewed by civil Courts, even though the orders may be wrong, or can be shown to be wrong. This was laid down even in the *Secretary of State for India in Council* v. *Kasturi Reddi*[1], which is frequently relied on by parties in the position of the present plaintiff. The view taken in the 26 Madras case was really responsible for the change in the Board's Standing Orders conferring revisional jurisdiction on the Collector.

The second appeal is dismissed with costs.

(Leave to appeal is refused).

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Paleru Papaiah (died) and others. *Petitioners** (*Petitioners*)

v.

Chebrolu Ramapunniah and another. *Respondents* (*Respondents*).

Papaiah v. Ramapunniah.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Tripartite arrangement known as "havala"—If renewal of earlier debts—Scaling down.

When by a tripartite arrangement known as "havala" a debt due by *A* to *B* is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B's* separate obligation to *C*, this cannot enable *A* to claim under S. 8, that his debt to *C* is a renewal of the debt to *B*. *C* is not the same creditor as *B* nor is he an assign of *B* in respect of *A's* original debt.

1. (1902) 12 M.L.J. 453: I.L.R. 26 Mad. 268.

* C. R. Ps. Nos. 439 and 440 of 1939. 12th February, 1941.

Papaiah *v.* Ramapunniah.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bapatla dated 5th September, 1938 and made in O. P. Nos. 7 and 6 of 1938 respectively in O. S. Nos. 495 and 496 of 1937, District Munsif's Court, Ongole, respectively.

V. Subramanyam for Petitioners.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—It seems to me quite clear that when, by the tripartite arrangement known as *"havala"*, a debt due by *A* to *B* is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B's* separate obligation to *C*, this cannot enable *A* to claim under S. 8 of Act IV of 1938, that his debt to *C* is a renewal of the debt to *B*. *C* is not the same creditor as *B* nor is he an assign of *B* in respect of *A's* original debt. The revision petitions are dismissed with costs —one set in C.R.P. No. 439 of 1939.

K. S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ponnada Mallayya and another .. *Petitioners* (Defendants 1 & 2)*

v.

Ponnada Jagannadhamma and others. *Respondents (Plaintiffs 1 and 2 and 3rd defendant).*

Mallayya *v.* Jagannadhamma.

Suit valuation—Suit for partition by persons in joint possession—Valuation for purposes of jurisdiction.

In a suit for partition by persons in joint possession the valuation for the purpose of jurisdiction is the actual market value of the property in suit. *Vasireddi Veeramma* v. *Butchayya*, (1926) 52 M.L.J. 381: I.L.R. 50 Mad. 646, *Kattiya Pillai* v. *Ramaswamia Pillai*, (1929) 56 M.L.J. 394 and *Karuppanna Nadar* v. *Karuppa Nadar*, (1939) 2 M.L.J. 226, relied on. Accordingly where the value of the plaintiffs' shares will be not less than Rs. 10,000 the suit should be instituted in the Subordinate Judge's Court as the District Munsif has no jurisdiction to entertain it.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Rajahmundry dated 25th January, 1940 and made in O.S. No. 189 of 1939.

*C.R.P. No. 343 of 1940. 18th August, 1941.

Mallayya v. Jagannadhamma.

G. Chandrasekhara Sastri for Petitioners.

P. Satyanarayana Rao and *M. R. Raju* for Respondents.

The Court delivered the following

JUDGMENT.—The suit is for partition by persons in joint possession and it is common ground that court-fee is payable under Art. 17-B of Sch. II of the Court-Fees Act. The dispute is as to the value of the suit for purpose of jurisdiction and as pointed out in *Vasireddi Veeramma* v. *Butchayya*[1], in which all the decisions were considered the valuation to be adopted for the purpose of jurisdiction is the actual market value of the property in suit. To the same effect are the decisions in *Kattiya Pillai* v. *Ramaswamia Pillai*[2], and *Karuppanna Nadar* v. *Karuppa Nadar*[3], and it is found by the lower Court that the value of the shares of the plaintiffs will be not less than Rs. 10,000. This suit should therefore have been instituted in the Subordinate Judge's Court of Rajahmundry and the District Munsif has no jurisdiction to entertain it. The order of the District Munsif is therefore set aside and he is directed to return the plaint for presentation to proper Court. There will be no order as to costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Chettikulam Sri Ekambareswaraswami and Dhandayudapani Swami Temples represented by sole trustee Devaroya Reddiar. *Petitioner** (*1st Defendant*)

v.

Veerappa Gounder and another .. *Respondent* (*Plaintiff & 2nd Defendant*).

Ekambara & Dhandayudapani Swami Temples v. Veerappa Gounder.

Trust—Promissory note by manager of temple—Decree against the temple when can be passed.

Where the manager of a temple borrows money for the expenses of some festival in the temple on a promissory note which contains only a personal covenant to repay without any stipulation that the creditor should look to the temple properties for his money, a suit on the promissory note against the temple is not maintainable and no decree can validly be passed against the temple.

Case-law reviewed and *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1916) 32 M.L.J. 259, followed.

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1. (1926) 52 M.L.J. 381 : I.L.R. 50 Mad. 646.
2. (1929) 56 M.L.J. 394.
3. (1939) 2 M.L.J. 226.

* C. R. P. No. 810 of 1937. 17th September, 1940.

Ekambara & Dhandayudapani Swami Temples v Veerappa Gounder.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Turaiyur in S. C. S. No. 95 of 1936.

A. V. Narayanaswami Aiyar for Petitioner.

M. S. Vaidyanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of this petition is a promissory note executed by one T. D. Palaniappa Mudaliar in favour of the respondent for Rs. 200 on 22nd March, 1933. Palaniappa Mudaliar describes himself in the body of the note as manager of a certain temple in Chettikulam, and states further that he has borrowed the money "for the preliminary expenses of the Panguni Uttiram festival in the said temple", but he has executed the note in his own name, and there is a personal covenant to repay without any reference to the temple funds, such as is found in the note with which I have dealt in *Ekambara and Dandayudhapani Swami Temples* v. *Arunachala Goundar.*[1] The Respondent sued in due course upon this note and has obtained a decree against both Palaniappa Mudaliar personally and the properties of the temple. This is a petition on behalf of the temple in which its liability under the note is contested.

The contention of the petitioner is supported by direct authority which if it has not been overruled and cannot be distinguished is binding upon me. That authority is the decision of a Bench of this Court—*Swaminatha Aiyar* v. *Srinivasa Aiyar.*[2] The headnote runs as follows:

"Where a trustee borrows money for purposes of the trust by executing a promissory note, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property."

And in the body of the judgment it is categorically stated that all that the creditor obtained was a promise on the part of the executant of the note to pay the debt. That statement, in my opinion, certainly applies to the facts of the present case, and unless respondent can show that *Swaminatha Aiyar* v. *Srinivasa Aiyar*[2], is no longer good law, the petitioner here is entitled to succeed. Respondent's learned advocate has cited a number of rulings, but has not been able to convince me that I can refuse to follow *Swaminatha Aiyar* v. *Srinivasa Aiyar*[2].

1. (1941) 2 M.L.J. 587.

2. (1916) 32 M.L.J. 259.

Ekambara & Dhandayudapani Swami Temples *v.* Veerappa Gounder.

The first rulings cited were *Krishna Chettiar* v. *Nagamani Ammal*[1] and *Satyanarayana* v. *Mallayya*[2]. These cases deal with promissory notes executed by mothers as guardians of their infant sons, and lay it down that the provisions of the Negotiable Instruments Act do not stand in the way of decrees being granted upon such notes against the estates of the sons. I do not think there is any reasoning in these judgments, which can be applied to the case of a trustee and a temple.

The next case, *Sundaresan Chettiar* v. *Viswanada Pandara Sannadhi*[3], is directly concerned with a trustee who executed a bond. In that bond, however, it was expressly stipulated that the creditor should be repaid from the temple properties. The learned Judges who decided it not unnaturally refused to follow *Swaminatha Aiyar* v. *Srinivasa Aiyar*[4], because of this vital point of distinction, but they do not in the slightest degree indicate any opinion that it had been wrongly decided. *Subramaniam Pattar* v. *Velu Nair*[5], is a case of a promissory note in which a definite recital is found that the executants promised to pay "in their capacity as uralars of the devasvom" and that the amount was "due from the devasvom". This is precisely the same ground of distinction as in *Sundaresan Chettiar* v. *Viswanada Pandara Sannadhi*[3], and neither of these two cases can be of any assistance to the respondent in the present argument.

No other case has been cited which is concerned with a promissory note or bond, and the only other reference to *Swaminatha Aiyar* v. *Srinivasa Aiyar*[4], which has been pointed out to me occurs in *Venkatabalagurumurthi Chettiar* v. *Balakrishna Odayar*[6]. In that case trustees had purchased goods for temple purposes and it was held that the creditor could recover their value from the temple funds. There is only a passing reference to *Swaminatha Aiyar* v. *Srinivasa Aiyar*[4], as a case which had been distinguished by *Sundaresan Chettiar* v. *Viswanada Pandara Sannadhi*[3]. On p. 94, however, it is found very explicitly that the trustees had contracted with the creditor that the goods should be paid for out of temple funds. All

1. (1915) I.L.R. 39 Mad. 915.
2. (1934) 68 M.L.J. 540: I L.R. 58 Mad. 735.
3. (1922) 43 M.L.J. 147: I.L.R. 45 Mad. 703.
4. (1916) 32 M.L.J. 259.
5. (1925) 49 M.L.J. 717.
6. (1930) 60 M.L.J. 90.

Ekambara & Dhandayudapani Swami Temples *v.* Veerappa Gounder.

these three cases therefore are cases of contract in which the creditor stipulated that he should look to the temple properties for his money. In *Sundaresan Chettiar* v. *Viswanada Pandara Sannadhi*[1] and *Subramaniam Pattar* v. *Velu Nair*[2], the contracts were contained in the documents themselves; in *Venkatabalagurmurthi Chettiar* v. *Balakrishna Odayar*[3], there was no document to prevent the reception of evidence of such a contract. Here, whatever the respondent may say as to previous statements made to him by the temple trustees, the suit must in essence be deemed to be based upon the promissory note, and upon the promissory note alone, since it is clear that there was no antecedent debt in existence. By the promissory note the liability is restricted to the personal promise of Palaniappa Mudaliar to pay, and, having taken a promissory note in these terms, respondent must now abide by them.

Following *Swaminatha Aiyar* v. *Srinivasa Aiyar*[4], therefore, I am of opinion that the decree granted against the temple properties cannot stand, and that respondent's suit as against the temple must be dismissed.

In the view, which I have thus taken it is unnecessary to discuss other objections taken by the petitioner to the validity of the promissory note as against the temple.

I find no trace of the particular point of law upon which this petition has succeeded having been raised before the District Munsif and direct therefore that the petitioner do pay his own costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

C. Kuppiah Chetty .. *Petitioner* (Plaintiff)*

v.

P. Saraswathi Ammal and others .. *Respondents (L. Rs. of 1st defendant & 2nd defendant).*

Kuppiah Chetty *v.* Saraswathi Ammal.

Presidency Small Cause Courts Act (XV of 1882), S. 38—Application for retrial—Heard by two Judges—Judgment signed by another Judge also who

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1. (1922) 43 M.L.J. 147: I.L.R. 45 Mad. 703.
2. (1925) 49 M.L.J. 717.
3. (1930) 60 M.L.J. 90.
4. (1916) 31 M.L.J. 259.

* C. R. P. Nos. 1255 of 1937 and 540 of 1938. 10th December, 1940.

Kuppiah Chetty v. Saraswathi Ammal.

did not hear—If vitiates judgment—Court hearing under S. 38—Not a Court of appeal—Transfer of shares—When complete.

Where an application for a fresh trial under S. 38 of the Presidency Small Cause Courts Act was actually heard by two Judges but the judgment though prepared by the two Judges was signed by them and also by the third Judge who did not hear the application, the superfluous initials of the third Judge cannot be taken to detract from the validity of the judgment.

A Bench of the Small Cause Court hearing an application for a fresh trial under S. 38 does not exercise appellate jurisdiction and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision the proper procedure is not to give fresh findings of fact but to order a retrial at which the facts may be gone into afresh.

A promissory note was executed for cash paid and it was agreed that the promissory note should be returned duly cancelled on the promisor getting 20 shares standing in the name of his father-in-law *R* transferred to the payee or his nominee. *R* executed an agreement Ex. II in which he undertook to transfer to the payee the shares and further added "I herewith hand over to you duly endorsed the share certificates." This agreement was signed by *R* and counter-signed by the payee. The actual share certificate contained an endorsement of transfer signed by *R* transferring the shares to the payee but the spaces for the signature of the transferee and the company's officials had not been filled up. Nothing further was done in the matter of the transfer until the company got into difficulties and went into liquidation after some months.

Held, that the agreement Ex. II would not by itself amount to a transfer deed sufficient to cause title to pass. If *R* not only signed Ex. II but also signed the transfer endorsement and communicated to the transferee the fact that the shares were in a deliverable state so that the transferee could complete the formalities by handing over the cancelled promissory note and getting the transfer registered in the company's books, there would be nothing more for *R* to do and then title in the shares would pass to the transferee.

Petitions under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Full Bench of the Court of Small Causes, Madras dated the 24th August, 1937 and made in F. B. A. No. 427 of 1935 in S.C.S. No. 1724 of 1935.

A. K. Sreeraman for Petitioner in C. R. P. No. 1255 of 1937 and for Respondent in C. R. P. No. 540 of 1938.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Petitioners in C. R. P. No. 540 of 1938 and for Respondent in C. R. P. No. 1255 of 1937.

The Court delivered the following

JUDGMENT.—These revision petitions both arise out of an order of a Bench of the Madras Small Cause Court directing a new trial under S. 38 of the Presidency Small Cause Courts

Kuppiah Chetty v. Saraswathi Ammal.

Act. A preliminary point has been raised in the following rather unusual circumstances. The application for a fresh trial was heard by the Chief Judge and the second judge, the third judge Mr. Padmanabha Aiyangar being then absent. The judgment as signed and issued purports to be a judgment of all the three judges of the Court. A report submitted by the learned Chief Judge makes it clear that the case was actually heard only by the Chief Judge and the second Judge and that these two judges alone were concerned with the preparation of the judgment and they signed it without reference to the third judge. By some regrettable error the judgment thus completed seems to have been placed before the third judge for signature and he also signed it though he had nothing whatever to do with the trial of the case. It is no doubt regrettable that a judge should sign a judgment about which he knows nothing and with which he has no concern; but in the circumstances I am not satisfied that this error can be taken to detract from the validity of the judgment. The case was tried by two judges, the judgment was prepared by those two judges and was signed by those two Judges. The superfluous initials of the third judge cannot be said to make the judgment a judgment of that judge also who initialled it in error.

Turning to the merits of these two revision petitions the facts of the case are that the plaintiff desired to acquire certain shares in a company which were owned by Mr. Ratna Mudaliar who was the father-in-law of the first defendant. The plaintiff therefore paid a sum of money to the defendants and took from them a promissory note which is the basis of the present suit. At the same time he gave them a letter (Ex. I) in which he promises to return the promissory notes duly cancelled as soon as the defendant got Mr. Ratna Mudaliar's 20 shares transferred to the plaintiff or his nominee. This was on the 17th February, 1934. On the 26th February, 1934 Mr. Ratna Mudaliar executed an agreement which is Ex. II in which he undertakes to transfer to the plaintiff the shares in question and the agreement goes on "I herewith hand over to you duly endorsed the share certificates", and there are further recitals as to the liabilities under the transfer. This agreement purports to be signed by Mr. Ratna Mudaliar on the 26th February and to be counter-signed by the plaintiff on the same date. The actual share certificate is Ex. III and this certificate contains an endorsement of transfer signed by Mr. Ratna Mudaliar and

Kuppiah Chetty v. Saraswathi Ammal.

dated the 26th February transferring the shares to the plaintiff; but the spaces for the signature of the transferee and of the company's officials are not filled. A few days after this transaction Mr. Ratna Mudaliar resigned his position in the management of the company and the plaintiff became its chairman. Nothing more was done in the matter of the transfer of the shares until the company got into difficulties and went into liquidation in November. Then we have Ex. IV dated the 20th November, 1934 which is a lawyer's notice to the two defendants claiming payment of the amount due under the promissory note.

The suit on the promissory note was tried by the learned second judge of the Small Cause Court who came to the conclusion that the transfer endorsement on the share certificate Ex. III was not signed by Mr. Ratna Mudaliar on the 26th February, that the agreement Ex. II was taken back by the first defendant from the plaintiff after counter-signature and was never afterwards delivered to the plaintiff, that Ex. III was not delivered or even tendered to the plaintiff and that the plaintiff did not as alleged request the first defendant to keep in his custody Exs. II and III until the return of the promissory note. On these findings the learned Judge came to the conclusion that the ownership of the shares remained with Mr. Ratna Mudaliar, that the defendants had not done that which was obligatory upon them if they wanted the promissory note to be cancelled and that they could not require the plaintiff to take a transfer of the shares after such unreasonable delay when the company had gone into liquidation and that the defendants were therefore obliged to pay the amount due under the promissory note.

There was an application for a fresh trial which, as I have stated was heard by the Chief Judge along with the trial judge. This Bench gives a finding that the share certificate standing in the name of Mr. Ratna Mudaliar was duly endorsed to the plaintiff on the 26th February, 1934 which finding is of course in direct conflict with the conclusion of the trial Judge. They also come to the conclusion that Exs. II and III show that the shares were transferred on the 26th February, 1934 and somehow they seem to think that the crucial question in the case is whether there was a valid agreement to transfer the shares and that this would depend upon whether Mr. Ratna Mudaliar's acceptance of the plaintiff's offer was communicated to the

Kuppiah Chetty *v.* Saraswathi Ammal.

plaintiff. It was for a decision of these questions that a new trial was ordered. It is conceded on both sides before me that the questions formulated for decision at the fresh trial are not the real questions which arise in the case and it is also not seriously disputed that the Bench has given findings of facts which are in conflict with those of the trial Judge and that it is on the basis of these findings of facts that the fresh points for determination have been formulated. It has been held by this Court (*Sai Sikandar Rowther* v. *Ghouse Mohidin Marakayar*[1]), that a Full Bench of the Small Cause Court under S. 38 does not exercise appellate powers and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision the proper procedure is not to give fresh findings of fact but to order a retrial at which the facts may be gone into afresh. Moreover there is no serious dispute between the parties, so far as I have been able to gather, as to the validity of the agreement to transfer these shares or as to the fact of the communication of Mr. Ratna Mudaliar's agreement to transfer to the plaintiff. The real question in issue between the parties is whether Mr. Ratna Mudaliar at the time when this agreement was communicated to the plaintiff completed the endorsement of transfer so far as he was able to do so and thereby appropriate the particular shares for the performance of his contract with the plaintiff and converted those shares into specific goods in a deliverable state so as to satisfy Ss. 20 and 23 of the Sale of Goods Act. If on that date Mr. Ratna Mudaliar not only signed Ex. II but also signed the transfer endorsement and communicated to the plaintiff the fact that the shares were in a deliverable state so that the plaintiff could complete the formalities by handing over the cancelled promissory note and getting the transfer registered in the company's books there was nothing more for Mr. Ratna Mudaliar to do and title in the shares would pass to the transferee (vide *Maneckji Pestonji* v. *Wadilal Sarabhai & Co*[2]). I am not prepared to take the view that Ex. II by itself would amount to a transfer deed sufficient to cause title to pass. It purports to be an agreement of transfer accompanying the actual instrument

1. (1916) 32 M.L.J. 213: I.L.R. 40 Mad. 355.
2. (1926) 51 M.L.J. 1: L.R. 53 I.A. 92: I.L.R. 50 Bom. 360.

Kuppiah Chetty v. Saraswathi Ammal.

of transfer and if the instrument of transfer has not been completed so far as the transferor could complete it, Ex. II by itself would be nothing more than an enforceable agreement to convey and until the transfer endorsement was signed the shares would be unascertained goods and they would not be in a deliverable state. But if on the 26th February, Mr. Ratna Mudaliar signed both the agreement Ex. II and the transfer endorsement on the share certificate and communicated the fact to the plaintiff who counter-signed Ex. II in token of acceptance of the transfer, then it was the plaintiff's fault that he did not cancel the promissory note and get the formalities of the transfer completed. In such circumstances the result would be that title in the shares would pass to the transferee and the plaintiff would be disenabled from suing on the promissory note. It seems to me therefore that in view of the contention that the trial Court's finding of fact regarding the execution of the endorsement on Ex. III is not supported by evidence and having regard to the fact that the trial judge himself sitting with the Chief Judge has arrived at a conclusion on the same materials which is diametrically opposed to the findings of fact in the actual trial it is desirable that there should be a fresh trial in the course of which the essential facts may be found afresh.

The order of the Bench is therefore set aside. There will be a fresh trial in the course of which the trial Judge will decide whether title in these shares passed to the plaintiff on the 26th February, 1934, which question will depend on the further question whether at the time of the execution of Ex. II by Mr. Ratna Mudaliar he also executed the transfer endorsement on Ex. III and communicated to the plaintiff the fact that he had executed the transfer endorsement. The costs throughout will abide the result and the parties will be free to adduce fresh evidence. The Chief Judge will consider the desirability of posting this case before a Judge who has not hitherto been concerned with it.

S.V.V. *Petition allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Sasala Raminaidu .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of Vizagapatam. *Respondent* (*Defendant*).

Madras Hereditary Village Offices Act (III of 1895), Ss. 7 and 23—Dismissal of hereditary village headman without following the procedure prescribed—Remedy only by appeal to Collector and further appeal to Board of Revenue—No right of separate civil suit.

A village officer is given under S. 7 of Madras Act III of 1895 a right to have a charge framed, to have witnesses examined in his presence by the Collector, and to cross-examine them before he can be dismissed. If any of those rights is infringed his only remedy is a right of appeal to the District Collector and a further appeal to the Board of Revenue; whose order will be final and there is no right of separate suit.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in A. S. No. 8 of 1937 preferred against the decree of the Court of the District Munsif of Rajam in O. S. No. 398 of 1933.

B. Jagannadha Das for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The appellant brought the suit out of which this second appeal arises for a declaration that the order of the Sub-Collector, Vizagapatam, dated 16th June, 1926, dismissing him from the hereditary office of village headman of Veeraghattam is *ultra vires* and illegal. Both the lower Courts dismissed the suit holding that the order of the Sub-Collector was not *ultra vires* his powers.

What happened in this case was that there were several complaints against the appellant, none of which was taken serious note of by the authorities. But when complaints persisted to pour in, action was ultimately taken in the year 1926 and the Sub-Collector of the place asked the Tahsildar to hold an inquiry and submit a report. The Tahsildar examined certain witnesses, framed some charges in addition to those that had been framed by the Sub-Collector and called upon the appellant to submit his explanation. He submitted an explanation on

* S. A. No. 1052 of 1938. 8th August, 1941.

Rami-naidu *v.* Secretary of State for India.

the 3rd May, 1926 and the matter was considered by the Sub-Collector who held that the appellant should not remain the village headman of the place. "The Village Munsif", he says:

> "was warned in December last not to identify himself with the factions in the village; and it is clear that he has paid no heed to the warning. Matters have no doubt reached a point when he could hardly do so if he wished. But it is quite clear that to have as a Village Munsif a man who is the leader of a party in his village is prejudicial alike to the peace and good order of the village. I therefore dismiss the Village Munsif."

This order was taken on appeal under S. 23 of Madras Act III of 1895. It was confirmed and a further appeal to the Board of Revenue proved infructuous. The present suit was filed in 1933 for a declaration that the order of the Sub-Collector was *ultra vires* for the reason that the Sub-Collector did not observe the procedure laid down by the Act before dismissing a village officer.

S. 7 of the Act, so far as it is material to this case, runs thus:

> "The Collector may, of his own motion or on complaint and after inquiry .... dismiss the holder of any of the offices forming class (1) in S. 3, for misconduct or for neglect of duty or incapacity or for non-residence in the village or for any other sufficient cause and shall make a record of his reasons for so doing in writing."

The expression "Collector" obviously includes "Sub-Collector." Under S. 23 of the Act from every order passed by a Collector under S. 7 an appeal lies to the District Collector and thereafter to the Board of Revenue within three months from the order of the District Collector on appeal. In this case it cannot be said that the provisions of S. 7 were not complied with. There was an inquiry and the Sub-Collector has recorded what he considers to be a sufficient cause why the appellant should not be allowed to continue as the village headman. What is said, however, is that the provisions of the Board's Standing Order 147, r. 8 have not been followed. That rule provides that in the case of charges preferred against a village officer the witnesses shall be examined in the presence of the accused. In this case it is said that no evidence was recorded by the Sub-Collector and that the examination of the witnesses was not made in the presence of the village officer. This matter has not received the attention that it deserves in the Courts below. What appears is that the Tahsildar examined certain witnesses on a requisition by the Sub-Collector. The Sub-Collector had

Rami-
naidu
v.
Secretary of
State for
India.

framed certain charges; the Tahsildar framed some more. After evidence was taken by the Tahsildar, a notice was sent to the village officer to submit his explanation, which he did. The explanation was considered by the Sub-Collector, who deemed it insufficient and dismissed the village officer. The matter was taken up on appeal under S. 23 to the District Collector, who confirmed the order of the Sub-Collector. A further appeal to the Board of Revenue proved infructuous. It is said that rr. 7 and 8 in the appendix to the Board's Standing Order No. 147 printed on page 873 of Vol. III of Board's Standing Orders were made under the power conferred by the Legislature under S. 20 of Madras Act III of 1895, that therefore the rules made are a part of the Act itself and that a violation of the rules would be a violation of the provisions of the Act.

It is to be observed that there is no specific finding that the evidence which was recorded by the Tahsildar was in the absence of the village officer; but it does appear that the inquiry was made by the Tahsildar. This is said to be irregular for the reason that S. 7 and the rules made under S. 20 embodied in the Standing Orders contemplate an inquiry by the Sub-Collector himself. Assuming that the rules were not strictly followed, the question is whether there is a right of separate suit. The right of the village officer to have a charge framed and then to have the witnesses examined in his presence by the Collector and the right to cross-examine the witnesses are all given under S. 7 of the Act. If any of these rights conferred upon village officers under the Act is infringed, there is a special remedy provided by the Act, namely, the right of appeal under S. 23 to the District Collector and from an order passed by the District Collector a further appeal to the Board of Revenue, and it is said that the order of the Board of Revenue or of the District Collector, shall be final. When a right is given by a special statute and a remedy is provided for the violation of the right in that very statute, ordinarily the person whose right is violated is bound to follow the remedy provided in that Act. In this case S. 23 provides the remedy for a violation of this right and the plaintiff is bound to follow the remedy granted under S. 23, namely, the right of appeal. The plaintiff did prefer an appeal under S. 23 to the District Collector and a further appeal to the Board of Revenue and failed.

Rami-naidu v. Secretary of State for India.

The recent decision of a Full Bench of this Court in *Secretary of State* v. *Jagannadham*[1] makes the position clear.

In the result the second appeal fails and is dismissed with costs. Leave to appeal is refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Parameswara Menon ... *Petitioner* (Respondent-Plaintiff)*

v.

Kotana Narayana Menon ... *Respondent (Petitioner-1st Defendant).*

Parames-wara Menon v. Narayana Menon.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 23—*Foreign decree—Sale in execution of properties in British India—If can be set aside under S.* 23 *of Act IV of* 1938.

A judgment-debtor under a decree of a Court of the Cochin State is not entitled in respect of such decree to the benefits of Madras Act IV of 1938 as the Act has no application to foreign Courts. Accordingly a sale of properties in British India in execution of such a decree cannot be set aside under S. 23 of Act IV of 1938.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of South Malabar dated 11th March, 1939 and made in A. S. No. 278 of 1938 preferred against the order of the Court of the District Munsif of Chowghat dated 8th July, 1938 and made in E. A. No. 1158 of 1938 in E. P. No. 1733 of 1936 (O. S. No. 1074 of 1909, District Munsif Court, Tiruchur).

K. Kuttikrishna Menon for Petitioner.

K. Narayana Menon for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was a decree-holder in a Court of the Cochin State, who executed his decree by the sale of properties in British India. The judgment-debtor applied under S. 23 of Madras Act IV of 1938 to set aside that sale and the lower appellate Court has ordered it to be set aside. It seems to me that the order is wrong. S. 23 is available only to an agriculturist entitled to the benefits of the Act. This must mean that he is entitled to the benefits of the Act with reference

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1. (1941) 2 M.L.J. 47: 54 L.W. 7 (F.B.).

* C. R. P. No. 1401 of 1939. 3rd October, 1940.

to the particular matter and not generally. The judgment-debtor in question having got this sale set aside cannot apply for any benefit under the Act unless he can get the decree amended under S. 19. That cannot be done as the procedure under S. 19 can only be applied by the Court which passed the decree, that is, in this case by the foreign Court to which this Act has no application. It seems to me to follow that the judgment-debtor is not an agriculturist entitled to the benefits of the Act. I may point out that to hold otherwise would still leave it open to the decree-holder to execute his decree again and cause a fresh sale to be held, to which sale S. 23 would have no application. A further objection which was not taken in the lower appellate Court is that no appeal lay—vide *Viswanatha Aiyar* v. *Narayanaswami Aiyar*[1]. But in the view that I have taken on the merits, it is unnecessary to go into that objection.

Parameswara Menon v. Narayana Menon.

The petition is allowed with costs throughout and the application under S. 23 of Act IV of 1938 is dismissed.

K.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AIYAR.

Subbaraya Chettiar ... *Petitioner* (1st creditor)*

v.

The Debt Conciliation Board, Cuddalore, South Arcot District and others. *Respondents.*

Subbaraya Chettiar v. Debt Conciliation Board.

Madras Debt Conciliation Act (XI of 1936), Ss. 7, 8 and 17—Board proceeding under S. 8—Conciliation not possible within twelve months—Debtor moving Board to dismiss application under S. 7 to enable him to file fresh application—Proper procedure—Lacuna in the Act pointed out.

When once a Debt Conciliation Board took an application on file and found no formal defects which would enable the Board to dismiss the petition under S. 7 and the Board proceeded to take steps under S. 8 of the Act, it had thereafter no jurisdiction to go back and dismiss the petition under S. 7 and thereby evade the statutory duty of rejecting the application under S. 17 at the expiry of twelve months which would have precluded a fresh application.

The omission to give the Board power to extend its proceedings beyond twelve months is a defect in the Act which the Courts could not remedy and the remedy lay with the Legislature.

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1. (1939) 2 M.L.J. 398: 50 L.W. 201.

*C. M. P. No. 1548 of 1941. 21st August, 1941.

Subbaraya Chettiar *v.* Debt Conciliation Board.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in D. C. No. 633 of 1939 on the file of the Court of the Debt Conciliation Board, Cuddalore and to quash the proceedings dated 13th November, 1940 and made by the said Board.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Petitioner.

The Government Pleader, and *S. Panchapagesa Sastri* for *T. E. Ramabhadrachariar* for Respondents.

The Order of the Court was pronounced by

Leach, C.J.

The Chief Justice.—This is an application for the issue of a writ of *certiorari* for the purpose of quashing an order of the Debt Conciliation Board, Cuddalore. The record shows that the order complained of has been passed without jurisdiction and the application will be granted.

On the 18th September, 1939, the debtor respondents filed a petition under S. 4 of the Madras Debt Conciliation Act, 1936, asking for the settlement of their debts. S. 5 of the Act states that every application shall be in writing and shall be signed and verified in the manner prescribed by the Civil Procedure Code for signing and verifying plaints. S. 6 sets out the particulars which a debtor must give in his application. If the application does not comply with the requirements of S. 5 or S. 6, S. 7 requires the Board to reject it. When an application has been accepted as complying with the provisions of Ss. 5 and 6 the Board must by reason of S. 8 pass an order fixing a date and place for the hearing of the application and notice of this order must be sent by registered post to the applicant and his creditors. S. 9 gives the Board power to dismiss an application at any stage of the proceedings if the Board does not consider it desirable or practicable to effect a settlement of debts or if in its opinion the applicant fails to pursue his application with due diligence or if it includes a claim which the Board considers is collusive and intended to defraud a creditor. S. 17 states that if no amicable settlement is arrived at under sub-S. (1) of S. 14 within twelve months from the date of the application under S. 4 the Board shall dismiss the application. There is no power to extend the proceedings beyond twelve months.

Subbaraya Chettiar v. Debt Conciliation Board.

Leach, C.J.

In this case the Board dismissed the petition, which the debtor respondents filed on the 18th September, 1939, because of non-compliance with the provisions of S. 6. The order dismissing the petition was passed on the 11th November, 1939. A dismissal under S. 7 does not preclude a debtor from filing a fresh application and this course being open the debtor respondents adopted it five days later. The new petition was found to be in order and the Board took the steps which it was bound to take in view of the provisions of S. 8. The debtor respondents obviously did not proceed to serve their creditors or the legal representatives of deceased creditors with due diligence. The creditor who has instituted the present proceedings alleges that the debtor respondents did not do so because they intended to delay the proceedings as far as they possibly could with the object of being allowed to file a fresh petition at the end of the twelve months. The petitioner is a secured creditor and has obtained a mortgage decree against the debtor respondents. Whether there is some excuse to be found for their failure to serve the creditors or whether they deliberately neglected to do so as the result of a deep laid plot on their part matters not for the purpose of deciding the application now before the Court.

What is important here is that on the 12th November, 1940, four days before the expiration of the twelve months contemplated by S. 17 the debtor respondents filed an application asking the Board to dismiss their petition by an order purporting to be passed under the provisions of S. 7 of the Act and this the Board did. There is no doubt that in taking this action the Board acted contrary to the spirit and the letter of the Act. The second petition having complied with the provisions of Ss. 5 and 6, the Board had no power to reject it under S. 7 and its action in purporting to do so can only be regarded as an evasion of its statutory duty under S. 17. That section leaves no option to the Board. If before the expiration of the twelve months no settlement has been arrived at the debtor's petition must, as already stated, be dismissed. It is common ground that a dismissal under S. 17 would have prevented another petition being filed. It may be that in some cases, especially where there is a large number of creditors and some of them die after the application has been filed, it is not possible to comply within the twelve months with all that the Act contemplates, but that is a defect in the Act which the Court cannot remedy.

Subbaraya Chettiar *v.* Debt Conciliation Board.

Leach, C.J.

The remedy lies with the legislative authority. On other occasions this Court has had to point out defects in this Act. The omission to give a Board power to extend the proceedings beyond twelve months if it considers it right and proper to do so, perhaps, adds another to the list of defects. The fact that the Board considered it to be equitable to give the debtor respondents an opportunity of filing still another petition is, however, a matter which the Court cannot take into consideration. What the Court has to decide is whether the Board had jurisdiction to dismiss the petition under S. 7 of the Act in the circumstances of this case. Obviously it had not the jurisdiction. Consequently the Board's order will be quashed.

The result is that the petition will still be regarded as being on the file and it will be the duty of the Board to pass an order of dismissal under S. 17. The petitioner is entitled to his costs which will be paid by the debtor respondents.

K. S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Koodallor Manakkal Narayanan Nambudiripad. *Petitioner* (Respondent)*

v.

M. Achuthan Nayar (died) and another. *Respondents (Petitioner and Nil).*

Narayanan Nambudiripad *v.* Achuthan Nayar.

Madras Agriculturists' Relief Act (IV of 1938), S.3 (ii), Proviso D—Payment by jenmi *of land revenue exceeding Rs. 500 part of which is in respect of land held under* kanom *or as ryotwari pattadar—Effect.*

Where a jenmi paid as a jenmi land revenue of Rs. 430 but also was liable to ryotwari assessment amounting to about Rs. 300, he cannot be deemed to be an agriculturist. *Nalupurapatti Mammad* v. *Narayana Pattar,* (1940) 2 M.L.J. 934, followed. The same principle covers also the case of a jenmi who pays land revenue exceeding Rs. 500 partly in respect of jenmam land and partly in respect of land held under kanom.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Ottapalam, dated 9th March, 1939 and made in O. P. No. 89 of 1938, etc.

*C. R. P. Nos. 1638 and 1835 of 1939. 20th March, 1941.

D. H. Nambudripad for Petitioner.

Narayanan Nambudiripad *v.* Achuthan Nayar.

P. Govinda Menon for Respondent.

The Court delivered the following

JUDGMENT.—Each of these petitions raises a question as to the effect of proviso (D) to S. 3 (*ii*) of Madras Act IV of 1938. The applicant whose case is dealt with in C. R. P. No. 1638 of 1939 is a jenmi who paid as jenmi just over Rs. 400 land revenue. But he also paid a similar sum as a kanomdar under contracts whereby the obligation to pay land revenue was undertaken by him. It does not appear that there had been any registration under S. 14 of the Malabar Land Registration Act so as to make this obligation to pay the land revenue statutory in respect of the kanom land.

The applicant in the case covered by C. R. P. No. 1835 of 1939 is a jenmi who paid as a jenmi Rs. 430 but also was liable to ryotwari assessment amounting to about Rs. 300.

The question is whether in proviso (D) the words:

"is a jenmi under the Malabar Tenancy Act, 1929 who pays any sum exceeding Rs. 500 as land revenue"

should be taken to refer only to the land revenue paid by the jenmi on his jenmam land and not to include land revenue paid by the jenmi in respect of other lands held on other tenures. So far as C.R.P. No. 1835 is concerned, the matter is covered by a decision of King, J., in *Nalupurapatti Mammad* v. *Narayana Pattar*[1], where the learned Judge held that for the purpose of proviso (D) the total payments of land revenue paid by the jenmi not only in respect of his jenmam land but also in respect of ryotwari land must be taken into consideration.

The position in C. R. P. No. 1638 is rather different, for the lands in respect of which the appellant pays land revenue under the kanom contract are lands in respect of which some other jenmi is under a liability to the Government to pay land revenue, and it would follow if the same principle is to be applied that the land revenue payable by the kanomdar who happens also to be a jenmi might disqualify both him and his own jenmi from the benefits of the Act. But there is no particular reason why if the criterion laid down in the Act is based purely on the amount of land revenue paid, two persons each

1. (1940) 2 M.L.J. 934.

Narayanan Nambudiripad v. Achuthan Nayar.

liable for the same land revenue should not be equally disqualified by the payment of that land revenue to enjoy the benefits of the Act. It is true that in respect of the kanom lands the tenant, in the absence of registration, is not under a statutory liability to pay the land revenue to the Government. But when he makes the payment he does so by virtue of the contract not merely as an agent of his mortgagor but under his contractual obligations and to protect his own interests as well as that of the mortgagor. It cannot be held that one who pays land revenue under a kanom deed does not pay land revenue for himself merely because the payment enures for the benefit of his jenmi. Turning to the words of proviso (D) we find with reference to the jenmi no such qualifying words as are found with reference to the other classes of landholders enumerated. The clause does not restrict the disqualification of a jenmi by saying that a person who pays as a jenmi Rs. 500 is disqualified, or a person who pays in respect of his jenmam land Rs. 500 is disqualified. The plain words of the proviso apply to any jenmi who pays more than Rs. 500 as land revenue. I do not think we are entitled to speculate as to the possible intention of the Legislature to make the criterion not payment of land revenue, but payment of land revenue in the capacity of a jenmi. The words as they stand are plain, and even if there were an ambiguity, on the principle that ambiguities in this measure are to be solved in favour of the person expropriated and not in favour of the expropriator, the decision would have to be such as to give the widest range to the exception contained in that proviso.

I am therefore of opinion that the decision of King, J., is correct and that the same principle covers also the case of the jenmi who pays land revenue exceeding Rs. 500 partly in respect of his jenmam land and partly in respect of land held under kanom. Both the revision petitions are allowed with costs in both Courts and the orders of the Courts below are set aside.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Chettikulam Sri Ekambareswaraswami & Sri Dhandayudhapaniswami Temples, represented by sole trustee, Devaraya Reddiar. .. *Petitioner* (2nd Defendant)*

v.

Arunachala Goundar and another .. *Respondents (Plaintiff and 1st Deft.)*

Ekambara & Dhandayudhapaniswami Temples *v.* Arunachala Goundar.

Trust—Borrowing for—If all the trustees should actually sign the pronote.

There is no rule of law which requires *all* the trustees of an institution actually to sign a promissory note. It is enough if those trustees who do not sign have authorised the transaction.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Turaiyur in S. C. S. No. 592 of 1936.

A. V. Narayanaswamy Aiyar for Petitioner.

M. S. Vaidyanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of this petition is a promissory note executed by one T. D. Palaniappa Mudaliar in favour of the first respondent for Rs. 100 on 14th August, 1933. Palaniappa Mudaliar describes himself therein as managing dharmakartha of a certain temple at Chettikulam, and recites also that he is borrowing the money as manager of the temple and that repayment is to be made "from out of the properties of the said temple". The first respondent sued upon the note and obtained a decree both against Palaniappa Mudaliar personally, and against the properties of the temple. This is a petition by the temple with the contention that it should not have been held liable.

That the money was actually borrowed, and expended for temple purposes, and that the loan was necessary are facts which are not now disputed. Nor can it be seriously urged that if Palaniappa Mudaliar was in fact authorised to borrow, his transaction will not bind the temple. It is contended, however, that he was not so authorised—on two grounds:

(*i*) because the other two trustees did not join in executing the note; and

* C. R. P. No. 809 of 1937. 17th September, 1940.

Ekambara & Dhandayudhapaniswami Temples *v.* Arunachala Goundar.

(*ii*) because he did not obtain the previous sanction of the Temple Committee as he was bound to do under the terms of a scheme which had been framed to regulate the management of the temple.

There is no rule of law which requires *all* the trustees of an institution actually to sign a promissory note. It is enough if those trustees who do not sign have authorised the transaction. It is found as a fact in this case that the two remaining trustees did authorise it. The transaction was therefore the transaction of them all.

The second objection is more substantial, but the respondent meets it by saying that after the loan was incurred it was ratified by the Hindu Religious Endowments Board itself. This ratification is found to be true by the District Munsif. There is no clear indication in the evidence whether the Temple Committee was in existence either when the loan was incurred or when it was ratified—though it is probable enough that the reason why ratification was sought from the Board was the non-existence at that time of the Committee. I need not, I think, pursue this matter further as this is only a revision petition in which interference by this Court is discretionary, and when ratification has been secured from so high an authority there can be no ground for holding that the debt was in any way improper from the point of view of the temple. This petition accordingly fails and is dismissed with costs.

K. S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Narayana Venkatachalamiah ... *Appellant** (*Plaintiff*)

v.

Putika Venkatiah and others .. *Respondents* (*Defendants*).

Venkatachalamiah *v.* Venkatiah.

Transfer of Property Act (*IV of* 1882), *S.* 52—" Lis pendens "—*Applicability to proceedings under S.* 51 *of Madras Co-operative Societies Act* (*VI of* 1932).

The word "Court" as mentioned in S. 52 of the Transfer of Property Act is comprehensive enough to include the Registrar or the arbitrator appointed by him under the Co-operative Societies Act. A reference to the Registrar of Co-operative Societies under S. 51 (1) (*b*) Madras Act VI of 1932 and the proceedings taken thereafter are all substitutes for a suit in a Civil Court and the doctrine of *lis pendens* is applicable to the same.

Accordingly a person taking a mortgage or other alienation of the property in dispute pending proceedings before such Registrar or arbitrator is bound by the order passed in such proceedings.

* S. A. No. 1156 of 1938. 14th August, 1941.

Appeal against the decree of the District Court of Cuddapah in A. S. No. 55 of 1937 preferred against the decree of the Court of the District Munsif of Cuddapah in O. S. No. 285 of 1936.

A. C. Sampath Aiyangar and *S. Krishnamachari* for Appellant.

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant in this second appeal brought a suit for recovery of a sum of money due on a mortgage deed executed by Venkatayya the first defendant, in his favour on 14th November, 1932. The first defendant had executed a mortgage of the items covered by the plaintiff's mortgage and of some other items in favour of the second defendant the Co-operative society on 7th September, 1927. There being some amount due on the mortgage in favour of the second defendant, proceedings were taken under the Madras Co-operative Societies Act of 1932. In terms of S. 51, Cl. (1) (*b*) there being a dispute between the society and a member, the dispute was referred to the Registrar for decision. The Registrar referred the dispute for disposal to an arbitrator under S. 51, Cl. (2) (*c*). The arbitrator gave his decision, which under S. 51, Cl. (6) (*b*) is final and is not liable to be called in question in any Civil or Revenue Court. Thereafter the society itself purchased the property in execution and subsequently transferred it to the third defendant. The plaintiff's mortgage was executed after the dispute between the first and second defendants was referred to the Registrar under S. 51, Cl. (1) (*b*).

The mortgage in favour of the plaintiff being subsequent to the reference to the Registrar under S. 51 (1) (*b*), the question is whether such a transfer is affected by the doctrine of *lis pendens*. S. 52 of the Transfer of Property Act provides that:

"During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose".

Venkata-chalamiah
v.
Venkatiah.

It has been held in a number of decisions of this Court that the Registrar is a Court. This position is not seriously challenged. In *Thadi Subbi Reddi* v. *Emperor*[1], it was held that the Registrar was a Court for the purposes of S. 195 of the Criminal Procedure Code. In *Velayuda Mudali* v. *Co-operative Rural Credit Society*[2], it was held that for the purpose of S. 52 of the Transfer of Property Act, he is a Court. So likewise in *Govada Balabharathi Co-operative Credit Society* v. *Venkatakrishnayya*[3]. It is argued by Mr. Sampath Aiyangar, learned Advocate for the appellant, that the word 'Court' in S. 52 of the Transfer of Property Act does not include a Registrar or an arbitrator appointed by the Registrar under the provisions of the Madras Co-operative Societies Act, 1932. The word 'Court' as mentioned in S. 52 appears to me to be comprehensive enough to include the Registrar or the arbitrator appointed by him under the Act. Reference was made to S. 57-B of the Act (VI of 1932), but that section has no application because it enacts that for certain purposes the Registrar or any person empowered by him in that behalf shall be a Civil Court for the purpose of Art. 182 of the First Schedule to the Limitation Act, 1908, which provides for execution of decrees of Civil Courts. The amendment itself was rendered necessary by a decision of Cornish, J., in *Abdul Razack Sahib* v. *Kilpatti Co-operative Society*[4], which held that the Registrar was not a Civil Court for the purposes of Art. 182 of the Limitation Act. We are not now concerned with the question whether the Registrar is a Civil Court, but whether he is a Court under S. 52 of the Transfer of Property Act. The decision of Walsh, J., in *Velayuda Mudali* v. *Co-operative Rural Credit Society*[2], is a decision directly in point. That was a decision that the Registrar or the authority appointed by him was a Court for the purpose of S. 52 of the Transfer of Property Act. I entirely agree with that decision.

Then it is said that S. 52 refers to a decree or order and that the decision of the Registrar or the arbitrator is not a decree or order. Here the word 'order' is used in general terms. In this case we have an order passed in a proceeding in a Court and therefore this argument has no force. A reference to the Registrar under S. 51, Cl. (1) (*b*) of Madras Act VI of

1. (1930) 59 M.L.J. 229.
2. (1933) 66 M.L.J. 90.
3. (1940) 2 M.L.J. 388.
4. (1935) 70 M.L.J. 31.

Venkatachalamiah *v.* Venkatiah.

1932 and the proceedings taken thereafter are all substitutes for a suit in a Civil Court. A more speedy and effective remedy is given by S. 51, Cl. (1) and the sections following. But for S. 51 of the Act (VI of 1932) a suit would have been filed in the Civil Courts and clearly the doctrine of *lis pendens* would have applied. Any person who takes a mortgage or other alienation subsequent to the institution of a suit or other proceeding cannot say that he is not bound by the decree or order passed in it. In this case, the proceedings under S. 51 of Madras Act VI of 1932 being a substitute for a suit in the Civil Court, it is obvious that reason requires that the same result would follow. Otherwise there will be no finality to a decision of the arbitrator or the Registrar even though such decision was in a proceeding in which a right to immovable property was specifically raised and decided. A right to immovable property being directly in question, the alienation made in favour of the plaintiff cannot prevail over the rights obtained under the decision of the Registrar. The property was subsequently sold as the plaintiff did not care to redeem or to pay up the amount adjudged by the Registrar or by the arbitrator appointed by him and the same was purchased by the second defendant and sold later on to the third defendant. These proceedings are binding on the plaintiff and his suit was therefore rightly dismissed.

The second appeal is dismissed with costs.

Leave to appeal is refused.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

The Official Assignee of Madras. *Appellant** (*Respondent*)

v.

E. V. D'Silva ... *Respondent* (*Applicant*).

Official Assignee of Madras *v.* D'Silva.

Presidency Towns Insolvency Act (III of 1909), Ss. 60 and 52—Insolvent a public servant receiving salary of less than Rs. 100 per mensem—"Prospective order" for payment of a portion of salary to meet his debts—Validity—Salary after its receipt, if falls under S. 52—Discretion of Court to order

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* O. S. A. No. 12 of 1941. 3rd September, 1941.

Official Assignee of Madras *v.* D'Silva.

after such receipt a portion to be paid for benefit of creditors—Civil Procedure Code (V of 1908), S. 60—Principles of—Effect.

When the salary of an insolvent who is a public servant falls below Rs. 100 per mensem, a "prospective order" for payment of a portion of his salary to meet the debts due to his creditors cannot be passed under S. 60 of the Presidency Towns Insolvency Act. But such salary though below Rs. 100 per mensem becomes the insolvent's property when paid to him and therefore falls within S. 52 of the Act. In such circumstances it would be open in law to the Official Assignee to apply *after* the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors. Unless the circumstances are exceptional, the Court might refuse to pass such an order in view of the principle embodied in S. 60 of the Insolvency Act and S. 60 of the Code of Civil Procedure.

On appeal from the judgment and order of the Hon'ble Mr. Justice Krishnaswami Aiyangar dated 3rd February, 1941 and made in the exercise of the Insolvency Jurisdiction of the High Court in application No. 336 of 1940 in I.P. No. 217 of 1939.

K. V. Ramachandra Aiyar, M. A. Srinivasan and *S. Swaminathan* for Appellant.

S. J. S. Fernandes for Respondent.

The Judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—S. 60, sub-S. (1) of the Presidency Towns Insolvency Act, states that, where an insolvent is an officer of the Army or Navy or of the Royal Indian Navy or a person in the Civil Service of the Crown, the Official Assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct. S. 60 of the Code of Civil Procedure provides *inter alia* that the salary of a public officer shall not be attachable to the extent of the first Rs. 100 and one half the remainder of his salary. It has for many years been the practice of the Official Assignee of Madras in all the cases where the assets are insufficient to meet the debts due to the creditors to ask the Court to order an insolvent who is a public servant to pay over to him part of his salary for the benefit of the creditors. The applications and the orders passed thereon have not been limited to public servants in enjoyment of salaries in excess of Rs. 100 per mensem and many orders have been passed by consent when the salary has been far below this figure. The Official Assignee applied to the Master for an order against the respondent (who was adjudicated insolvent on the 23rd November, 1939)

directing him to pay out of his monthly salary of Rs. 60 the sum of Rs. 6 for distribution to his creditors. The respondent who is a clerk in the Public Works Department objected to the proposed order, but, notwithstanding his objection, the Master directed that he should out of his salary pay to the Official Assignee monthly a sum of Rs. 5. The respondent appealed from the order of the learned Master to the learned Judge sitting in Insolvency (Krishnaswami Aiyangar, J.) who held that the objection was well founded and set aside the Master's order. This appeal is from the order of the learned Judge.

By virtue of S. 17 of the Presidency Towns Insolvency Act, on adjudication an insolvent's property vests in the Official Assignee. S. 52 provides that the property owned by an insolvent at the time of his adjudication and property which he has acquired subsequently, but before his discharge, shall be divisible among his creditors. It is common ground that apart from S. 60 there is no statutory provision which enables an Official Assignee to acquire a right in an insolvent's future earnings by way of salary. Of course once his salary has been paid over to him the money comes within the category of after acquired property. There is, however, no obligation on the part of an insolvent to deliver to the Official Assignee property acquired by him after his adjudication, unless called upon by the Official Assignee to do so.

S. 60 has been inserted to enable the Official Assignee to obtain what is known as a 'prospective order', but he cannot obtain such an order when the salary of the insolvent falls below Rs. 100 per mensem. The section is clearly a bar in such a case. In answer to a question put by the Court, Mr. K. V. Ramachandra Aiyar on behalf of the Official Assignee stated that the order which was passed by the learned Master against the insolvent must be deemed to have been passed under S. 60, because there is no other section under which such an order could have been passed. Therefore it was passed contrary to the provisions of the Act and rightly set aside by Krishnaswami Aiyangar, J. Of course, where an insolvent consents to an order of this nature being passed against him there is no reason why the Court should not accede to his wishes. He is merely showing that he is an honest debtor. But when he does not consent it is an entirely different matter.

Official Assignee of Madras *v.* D'Silva.
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Leach, C.J.

While there can be no doubt about the correctness of the order which the learned Judge has passed, it is necessary to refer to a passage in his judgment to which special exception has been taken. The passage is as follows:

"If the Official Assignee cannot intercept it at the source, it is difficult to see how he can intercept it afterwards unless it be that he or his emissaries waylay the insolvent when returning home after receiving the salary or seize it immediately thereafter while it still remains unspent in his pocket. Theoretically no doubt he may be able to do this but even then I doubt whether the law will permit him to do so, for it seems to me that it is against the fundamental principle underlying S. 60 of the Insolvency Act and S. 60 of the Code of Civil Procedure to allow him to seize any portion of an insolvent's salary which is below the attachable limit, as such a limit appears to my mind to have been fixed on public grounds to ensure the proper and efficient discharge of duty by a public servant."

In view of these remarks it is perhaps necessary to carry the matter a little further. S. 60 is a section which enables the Official Assignee to get a prospective order. It is an enabling section and nothing more, and the aid which it gives the Official Assignee is limited. The section does not, however, interfere with the provisions of S. 52 of the Act. The salary received by a public servant, though it be below Rs. 100 per mensem, becomes, as we have already pointed out, his property when paid to him and therefore falls within S. 52. In these circumstances it would be open in law to the Official Assignee to apply *after* the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors, but by the time such an application came on for hearing probably all the salary would have been spent. The Court might or might not pass such order, but unless the circumstances were exceptional, we consider that it might very well refuse to do so in view of the principle embodied in S. 60 of the Insolvency Act and S. 60 of the Code of Civil Procedure that small salaries should not be attached.

The appeal fails and will be dismissed, but we make no order as to costs.

K.S. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

K. C. Pandalai .. *Appellant** (*Applicant*)

v.

The South Indian General Assurance Company Ltd, (in Liquidation) by its Official Liquidator. *Respondent* (*Respondent*).

Pandalai *v.* South Indian General Assurance Co. Ltd.

Company—Share-holder creditor—Right to arrange for set off against future calls—Such creditor a director and managing agent—Not entitled to vote for resolution authorising set off.

It is open to a company to agree with a share-holder to whom it owes money that the debt shall be set off against future calls. But where such share-holder creditor is himself a director and the managing agent he cannot validly vote for a resolution authorising such set off. The resolution will be invalid when the necessary quorum is lacking without such director's vote. Accordingly on liquidation such a share-holder can be placed in the list of contributories in respect of the unpaid share money.

On appeal from the order of the Honourable Mr. Justice Gentle dated 28th February, 1941 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 36 of 1941 in O. P. No. 206 of 1940.

O. T. G. Nambiar and *K. N. Pandalai* for Appellant.

The Official Liquidator for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This is an appeal from an order passed by Gentle, J., confirming the action of the Official Liquidator of the South Indian General Assurance Company, Ltd, in placing the appellant's name in the list of contributories. The company was formed in the year 1929. On the 29th August, 1940, this Court passed an order directing that it be wound up compulsorily. During the eleven years the company was operating, it never made a profit. Each year, in fact, showed a loss and long before the winding up order was passed, the company was in a precarious position. The appellant was a director of the company and was also its managing agent. The managing agents were stated to be K. C. Pandalai and Company, but it is common ground that the appellant is the sole proprietor of that firm. In 1936 the company owed the appellant a sum of Rs. 16,000. The appellant held 120 preference and 220 ordinary shares of Rs. 50 each in respect of

* O. S. A. No. 18 of 1941. 14th August, 1941.

Pandalai *v.* South Indian General Assurance Co. Ltd.

Leach, C.J.

which only Rs. 15 per share had been paid up. The appellant's brother, Mr. K. S. Pandalai, was also a director of the company. He held some 200 shares and these also were only paid up to the extent of Rs. 15 per share. Mr. K. S. Pandalai was not a creditor of the company, but he had lent a considerable sum of money to his brother and admittedly this money was utilised for the purposes of the company.

Art. 29 of the Articles of Association stated that the directors might, if they thought fit, receive from a member all or any part of the capital due upon shares held by him beyond the sums actually called for, and permitted the directors to pay interest on any sum so received. On the 15th December, 1936 a meeting of the Board was held and was attended by the appellant, his brother and Mr. P. E. Raman Menon, who was also a director. They purported to pass the following resolution:

"Resolved that as per Art. 29 of the Articles of Association of the company the Managing Agents be hereby authorised, if they think fit, to receive from any member willing to advance the same, all or any part of the capital due upon the shares held by him beyond the sums actually called for; and upon the amount so paid or satisfied in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, to pay interest at six per cent. per annum."

There can be no doubt that this resolution was passed in order that an arrangement might be entered into relieving the appellant from liability in respect of his shares. This is obvious from what happened on the 31st December, 1936. On that date the appellant purported to set off Rs. 11,900, out of the amount due to him from the company against what he owed in respect of the shares and consequently called upon the Registrar of Joint Stock Companies to record that his shares had been fully paid up. When the company went into liquidation the validity of this transaction was questioned by the Official Liquidator and he decided that the appellant should be placed on the list of contributories in respect of Rs. 11,900. The appellant objected and asked the Court to strike out his name from the list, but this Gentle, J., refused to do. The appellant as a director and the managing agent of the company was in a fiduciary position and in the circumstances the learned Judge held that he was not in a position to decide whether it was fit and proper from the company's point of view that there should be this arrangement. The learned Judge relied on the

Pandalai
v.
South
Indian
General
Assurance
Co. Ltd.

Leach, C.J.

decision of the Privy Council in *Pratt (Bombay) Ltd. M. T. Ltd. and Sasson and Co.* v. *Pratt (Bombay) Ltd*[1], where the Judicial Committee held that the provisions of S. 91-B of the Companies Act as it was before the amendment of 1936 was a concise statement of the general rule of equity. The Judicial Committee approved of these observations of the Court of Appeal in England in *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co*[2]:

"Where a director of a company has an interest as share-holder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion, within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestuis que* trust as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the *cestui que* trust, upon which subject no enquiry is permitted."

When the case was before Gentle, J., it appears to have been accepted that the resolution of the 15th December, 1936 was validly passed. The only point taken by the Official Liquidator was that the appellant could not act upon the resolution in respect of his own shares. It is, however, manifest that the validity of the resolution is open to question. S. 91-B (1) of the Indian Companies Act, as it stood at the time read as follows:

"No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted."

At the time this resolution was passed there were five directors, but only three of them attended and two of those present, the appellant and his brother, were not in a position to vote on the question as they were personally interested. Art. 113 fixes the quorum for a director's meeting at three. As the appellant and his brother were not competent to vote and as the third director present, acting alone, could not give authority to the appellant to apply the provisions of Art. 29 the transaction cannot be regarded as binding upon the company. If three directors who had no interest in the matter had resolved that

1. I.L.R. (1938) Bom. 421 (P.C.).
2. (1914) 2 Ch. D. 488 at page 503.

Pandalai *v.* South Indian General Assurance Co. Ltd.

Leach, C.J.

the debt due to the managing agent should be set off to the extent of the Rs. 11,900 against the appellant's liability on his shares or the company in general meeting had so decided the position would have been different. It is open to a company to agree with a share-holder to whom it owes money that the debt shall be set off against future calls. This is well settled law. See *Adamsons' case*[1], and In re *Jones, Lloyd and Co., Ltd*[2]. But here the appellant applied the provisions of Art. 29 without lawful authority and consequently he cannot take advantage of what he has done. Even assuming the resolution to have been lawfully passed there is still the objection pointed out by Gentle, J.

The appeal fails and will be dismissed. There will be no order as to costs as the Official Liquidator appears in person.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Prabhulal Madhavlal Desai ... *Appellant**

v.

Messrs. Jeshing Bhai Bala Bhai & Sons, and others. *Respondents (Petitioning-Creditors).*

Madhavlal Desai *v.* Bala Bhai & Sons.

Insolvency—Practice—Creditor's petition for adjudication—Allegation of notice of suspension of payment made in petition and facts proving it set out in verifying affidavit—If sufficient compliance with law.

Where the petition for adjudication states that the debtor has given notice to his creditors that he has suspended or is about to suspend payment of his debts and the affidavit verifying the petition shows that this is in fact the case, there is compliance with the law's requirements.

The petition and the affidavit should be read together and if the petitioning creditor sets out in detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit.

C.A.P.C.S. Chettiar Firm v. *V.V.R. Chettiar Firm,* (1935) I.L.R. 13 Rang. 686 not approved.

On appeal from the order of the Hon'ble Mr. Justice Krishnaswami Aiyangar dated 17th February, 1941 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 284 of 1940 in I. P. No. 159 of 1940.

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1. (1874) L.R. 18 Eq. cases 670 2. (1889) 41 Ch. D. 159.

* O. S. A. No. 11 of 1941. 20th August, 1941.

Madhavlal Desai v. Bala Bhai & Sons.

Leach, C.J.

B.K.B. Naidu and *S. Athmanathan* for Appellant.

T. V. Srinivasan and *The Official Assignee of Madras* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant and one Ramanlal Trikamlal Desai carried on business in partnership in Madras under the style of Prabhulal Madhavlal Desai. On the 14th October, 1940 the first and second respondents filed a petition in this Court asking for an order adjudicating the appellant and his partner insolvents. On the 17th February, 1941 an order of adjudication was passed. This appeal is against that order. It may be mentioned that the correctness of the order has not been challenged by Ramanlal.

In the petition three acts of insolvency were alleged namely:—(1) with intent to defeat and delay the firm's creditors Ramanlal had absented himself from the firm's usual place of business; (2) with similar intent he had secluded himself so as to deprive the creditors of the means of communicating with him and (3) the debtors had intimated that they had suspended payment of their dues. The learned Judge sitting in Insolvency (Krishnaswami Aiyangar, J.) has found that all these allegations are true. The appellant contends that the action of his partner in absenting himself from the place of business and in secluding himself cannot affect him, but he concedes, as he must, that if the appellant's partner gave notice of suspension of payment, the law allows both of them to be adjudicated. The appellant, however, says that there was no notice of suspension of payment. It is not necessary to consider whether there is any substance in the appellant's first contention because it is obvious that in this case notice of suspension of payment was given.

Before considering the evidence relating to the notice of suspension of payment it is necessary to deal with a preliminary argument advanced on behalf of the appellant to the effect that the petition is defective in so far as it relates to the third act of insolvency. The allegation in the petition is couched in these words:

"On the evening of the 5th October, 1940 the debtors intimated that they had suspended payment of their dues".

In paragraph 3 of the affidavit which was filed in support of the petition it is said,

Madhavlal Desai *v.* Bala Bhai & Sons.

Leach, C.J.

"On the evening of the 5th October, 1940 the second debtor when pressed for payment intimated to me and Mr. Vallabhdas, a partner of Vallabhdas and Brothers, another creditor, that the firm was no longer in a position to meet its dues and that it had suspended payment of debts due by it and that he intended to file an insolvency petition".

It has been argued by Mr. Naidu on behalf of the appellant that the actual words used by Raman Lal should have been set out in the petition and that a defect of this nature is not cured by anything contained in the affidavit filed in verification. In this connection Mr. Naidu has drawn our attention to the decision of the Rangoon High Court in *C. A. P. C. S. Chettiar Firm* v. *V. V. R. Chettiar Firm*[1]. In that case the petition merely alleged that the debtors had given notice to the petitioners as well as to their other creditors that they had suspended or were about to suspend payment of their debts, but in the affidavit which verified the petition the deponent made this statement:

"I say that the debtors' manager and *kartha* further told me that they were not in a position to pay in full to their creditors".

The Court held that the act of insolvency alleged in the petition was not couched in terms sufficiently clear and precise to be the basis of an insolvency petition or to justify the Court in passing an order of adjudication. It was also held that an affidavit filed in verification could not be read in conjunction with the petition in order to supply a deficiency in the petition itself. With great respect, we are unable to accept this judgment as representing a correct statement of the law. In our opinion technicality is here carried too far. Where the petition states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts and the affidavit verifying the petition shows that this is in fact the case, there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit. The Court has to be satisfied that there has been notice of suspension of payment or that the debtor has intimated to his creditors that he is about to suspend payment and the supporting affidavit is filed for that purpose. In the present case Krishnaswami Aiyangar, J., held that the petition was

1. (1935) I.L.R. 13 Rang. 686.

sufficiently clearly worded and we are in full agreement with him.

Turning now to the facts, the evidence is that Mr. Babu Bhai, a partner in the first respondent's firm, met Ramanlal on the evening of the 5th October, 1940 and demanded payment of Rs. 7,000, which was due to his firm by the insolvents. Thereupon, Ramanlal replied:

"My firm is not in a position to pay your moneys. I am not going to pay any one anything. I want to file my insolvency".

A clearer intimation of suspension of payment is hardly possible to imagine; but it has been contended that the Court should not give these words their plain and ordinary meaning because Mr. Babu Bhai renewed his demand the next day. It is said that the renewal of the demand shows that he did not regard Ramanlal's statement to him on the 5th as being an intimation of suspension of payment. Mr. Babu Bhai was asked in cross-examination why he made a demand after the notice which he received on the 5th October. His reply was that he made the demand "hoping against hope", but that the statement of the day before convinced him that the insolvents would not pay.

We consider that there is no substance in this appeal which consequently will be dismissed with costs in favour of the first and second respondents. The costs will come out of the estate.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Swaminatha Pillai ... *Appellant** (*Appellant*)

v.

Krishna Padayachi and others. ... *Respondents* (*Respondents*).

Transfer of Property Act (IV of 1882), *S. 41—Applicability of principles to movables—Y, one of the judgment-debtors a surety—Y discharging decree and getting it transferred to his benamidar—*Bona fide *purchaser of decree for value from benamidar—Right to execute against Y—C. P Code, O.* 21, *r.* 16*—Circumvention—Effect.*

Y was a surety for money owing by *X* and a decree was obtained against both. In order to avoid execution proceedings being instituted against him

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*L. P. A. No. 36 of 1940. 20th August, 1941.

Swaminatha Pillai *v.* Krishna Padayachi.

Y paid the decree-holder, but in order to recover the amount from *X* the principal debtor without recourse to a fresh suit he arranged with the decree-holder to transfer the decree to *M*, a benamidar for himself. *M* sold the decree for valuable consideration to *K* who acted in good faith and in ignorance of *Y*'s interest. *K* sought to execute the decree against *Y*.

Held, that *M* being *Y's* benamidar the transfer of the decree to him meant the transfer to *Y* himself and *Y* was guilty of what in law amounts to a fraud to circumvent the provisions of O. 21, r. 16 of the Civil Procedure Code. The principle embodied in S. 41 of the Transfer of Property Act can be applied to movable property also. *X* having allowed *M* to hold himself out as the holder of the decree, *Y* cannot be preferred to *K* who bought the decree for valuable consideration and in good faith. Accordingly *Y* cannot avoid liability to pay the decretal amount to *K*.

Decision of King, J., affirmed.

Appeal under Cl. 15 of the Letters Patent against the judgment and order of King, J., dated 17th September, 1940 and passed in A. A. A. O. No. 251 of 1938 preferred to the High Court against the order of the Court of the Subordinate Judge of Kumbakonam dated 7th October, 1938 and made in A. S. No. 67 of 1936 preferred against the order of the Court of the District Munsif of Kumbakonam dated 8th August, 1936 in E. P. No. 424 of 1933 in O. S. No. 181 of 1929.

T. V. Muthukrishna Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question involved in this appeal is whether the appellant shall be allowed to profit by a scheme (for which he himself was responsible) to defeat the provisions of r. 16 of O. 21 of the Code of Civil Procedure. One Srinivasa Aiyangar obtained a money decree against the appellant and one Idumban Chettiar. The appellant had become the surety for money owing by Idumban Chettiar and the decree was obtained in a suit filed to enforce repayment of the loan. In order to avoid execution proceedings being instituted against him the appellant paid the decree-holder, and naturally he desired to recover the amount from the principal debtor. Instead of adopting the proper course, which was to file a suit against Idumban Chettiar, the appellant arranged with the decree-holder to transfer the decree to one Murugesa Padayachi. The decree-holder, having been paid, raised no objection to this course. It has been established that Murugesa was acting as the benamidar for the appellant, who hoped that with the decree standing in the name of a stranger to the suit he would be able

Swaminatha Pillai v. Krishna Padayachi.

Leach, C.J.

to execute it against Idumban Chettiar. The second proviso to r. 16 of O. 21 of the Code of Civil Procedure states that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. As Murugesa was actually the appellant's benamidar the transfer of the decree meant the transfer to the appellant himself. The appellant was not entitled to do something in the name of a dummy which the law does not allow him to do in his own name.

While Murugesa was the ostensible owner of the decree he sold it to Krishna Padayachi, the respondent. The respondent paid Rs. 1,000 as the consideration. He had no inkling of the appellant's claim and throughout acted in good faith. At any rate, that is the effect of the finding of the first appellate Court and its decision on the question of fact is binding upon us. The respondent having become the transferee of the decree he wished to execute it against the appellant and accordingly instituted execution proceedings in the Court of the District Munsif of Kumbakonam. The District Munsif held that he was not entitled to an order in execution, but on appeal to the Subordinate Judge of Kumbakonam this decision was reversed. The appellant then appealed to this Court, but King, J., agreed with the Subordinate Judge and dismissed the appeal. The present appeal has been filed under the provisions of clause 15 of the Letters Patent, the learned Judge having given the necessary certificate.

Mr. T. V. Muthukrishna Aiyar conceded that in obtaining a transfer of the decree in the name of Murugesa the appellant was guilty of what in law amounts to a fraud. His object was no doubt to escape the payment of the court-fee which a suit to recover from the principal debtor would involve, but in view of the very emphatic provision contained in the second proviso to r. 16 of O. 21 the appellant was clearly not entitled to do what he endeavoured to do. The reason given by King, J., for dismissing the appellant's appeal was that he had allowed Murugesa to appear as the owner of the decree and consequently the principle embodied in S. 41 of the Transfer of Property Act applied. That section only relates to immovable property, but the principle has been applied where movable property has been sold to a *bona fide* purchaser for value by the ostensible owner. The learned Judge in the course of his judgment drew

Swaminatha Pillai v. Krishna Padayachi. Leach, C.J.

attention to the judgment in *Gregg* v. *Wells*[1]. That the principle can be applied to movable property as well as to immovable property cannot be doubted. In fact the principle is embodied in S. 27 of the Sale of Goods Act.

Even if it were to be assumed that the appellant's action in obtaining a transfer of the decree in the name of Murugesa was justifiable and that he can be regarded as an innocent party this would not help the appellant. The principle stated in *Lickbarrow* v. *Mason*[2], would then apply. Wherever one of two innocent persons has to suffer by the act of a third person the person who has enabled the third person to occasion the loss must sustain it. The appellant certainly allowed Murugesa to hold himself out as the holder of this decree and having done so he cannot be preferred to the respondent who bought the decree for valuable consideration and in full good faith. The appellant has only himself to blame for the position in which he finds himself. He could have avoided having to pay the decretal amount twice over, as he now has got to do, if he had not attempted to get round the provisions of O. 21, r. 16. We consider that the decision of King, J., is in accordance with law and consequently this appeal must be dismissed with costs in favour of the first respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

The Nagore Durga represented by its Managing Trustees S. Sultan Kaliba Sahib and another. ... *Appellants** (*Plaintiffs*)

v.

Chatram Manager Kannu Pillai ... *Respondent* (*Defendant*).

Nagore Durga v. Kannu Pillai.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 17—*Extended period of limitation for recovery of rent—Availability against non-agriculturist tenants also.*

S. 17 of Act IV of 1938 covers any suit in respect of arrears of rent accrued for fasli 1345 or any prior fasli and it is not restricted to such a suit filed against an agriculturist. Accordingly the section saves limitation in

1. (1839) 10 Ad. & E. 90: 113 E.R. 35.
2. (1787) 2 T. R. 63 at 70: 100 E.R. 35.

* S. A. No. 1039 of 1939. 14th August, 1941.

Nagore Durga *v.* Kannu Pillai.

respect of a suit for arrears of rent for fasli 1344 due from a non-agriculturist.

Appeal against the decree of the District Court of East Tanjore at Negapatam dated 17th August, 1939, in A. S. No. 62 of 1939 preferred against the decree of the Court of the Sub-Collector of Negapatam dated 23rd February, 1939, in S. S. No. 77 of 1939.

K. V. Ramachandra Aiyar for Appellants.

R. Sundaralingam for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The only question in this second appeal is whether S. 17 of Madras Act IV of 1938 saves limitation in respect of a suit for arrears of rent for fasli 1344 due from a non-agriculturist. The arrears in question accrued due on the 1st July, 1935, the suit was filed on the 1st December, 1938, and would clearly be barred by limitation unless the plaintiffs-appellants here are entitled to the benefit of S. 17 of the Act. S. 17 says:

"Notwithstanding anything contained in the Madras Estates Land Act, 1908, or the Malabar Tenancy Act, 1929, or in any law of limitation or procedure in force for the time being, no suit or execution proceedings in respect of arrears of rent accrued for fasli 1345 or any prior fasli which, under the existing law, would become barred between the 1st October, 1937 and the 30th September, 1938, shall be so barred and the landholder............ shall be entitled to file a suit or institute execution proceedings for recovery thereof, on or before the 31st December, 1938..........".

Then follows a provision extending the period for filing suits in cases where the rent for fasli 1347 has been paid within the time stipulated and the section concludes with a proviso covering cases in which applications under sub-S. 4 of S. 15 are pending on the 31st December, 1938, or the 31st December, 1939, as the case may be, extending the period of limitation to two months from the date of the order on such applications. Now the plain language of this section covers any suit in respect of arrears of rent accrued for fasli 1345 or any prior fasli and it is not restricted to such a suit filed against an agriculturist.

In Act IV of 1938 there are various sections dealing with decrees which are affected by the procedure under the Act. S. 18 deals expressly with a decree passed against an agriculturist. S. 19 deals with a decree for the repayment of a debt which has to be scaled down on the application of an agriculturist judgment-debtor. But this section certainly applies to a

Nagore Durga v. Kannu Pillai.

Wadsworth, J.

decree which is passed against both agriculturists and non-agriculturists, though the relief may be confined only to the former. S. 20 expressly applies only to a decree passed against an agriculturist. Ss. 22 and 23 dealing with sales are not confined to decrees against agriculturists, but their operation is confined to cases in which the properties of agriculturists have been sold. It will thus appear that under the scheme of the Act the Legislature has distinguished between those judicial proceedings which are only against agriculturists and those judicial proceedings not necessarily taken against agriculturists solely but which affect the economic position of agriculturists. Having regard to the distinction so made it is at least arguable that the use of general language in S. 17 was not accidental and that the fact that this section comes within an Act intended to benefit agriculturists and is closely connected with another section intended to benefit agriculturist tenants, is not of itself a sufficient warranty for restricting the scope of the section to suits against agriculturists. Moreover the proviso to the section which imports the consideration of sub-S. 4 of S. 15 may itself come into effect where a non-agriculturist has instituted proceedings. Suppose a non-agriculturist made a deposit under sub-S. 4 of S. 15 claiming to be an agriculturist and claiming the benefits of that clause and his claim is resisted (as we understand happened in the present case) it would be difficult to deny to the landholder the benefits of the proviso to S. 17 merely because the contest on the application under S. 15 (4) ultimately ended in a decision that the applicant is not an agriculturist. The object of S. 17 is clearly to save the landholders from the necessity of filing large numbers of suits which would be met by payments under S. 15 and a claim for the cancellation of the earlier arrears. The landholders are permitted to stay their hands in order to give the tenants an opportunity of taking advantage of the provisions of S. 15 so that unnecessary litigation may be avoided. In large estates there will be a very obvious difficulty in ascertaining which of the many thousands of defaulters are entitled to the benefits of the Act and it is not unreasonable to suppose that the Legislature intended to discourage unnecessary litigation by allowing the landholders an extended period of limitation for all suits in respect of arrears of rent which are likely to be affected by the new statutory provisions without imposing upon the landholder the necessity of ascertaining positively in every case

whether the defaulter would or would not be entitled to the benefits of the Act.

Nagore Durga *v.* Kannu Pillai.

Wadsworth, J.

We have therefore a section the plain words of which would include suits against all defaulting tenants, agriculturists or non-agriculturists, and the section read in its plain terms does not appear to run contrary to the general object of the Act. Nor is this interpretation of it unreasonable or improbable. In such circumstances there seems to be no justification for adding to this section words which would restrict its scope beyond the actual terms of the section. We are therefore of opinion that the appellant in this case was entitled to the benefit of S. 17 to save limitation in respect of arrears of rent for fasli 1344.

We allow the second appeal with costs and remand the suit to the trial Court for ascertainment of the amount due for fasli 1344 and for passing a decree in accordance with the finding. Court-fee paid on the Memorandum of second appeal will be refunded.

K.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AIYAR.

The Province of Madras, represented by the District Collector, Vizagapatam. *Appellant** (*1st Defendant*)

v.

Messrs. Boddu Paidanna and Sons, represented by Boddu Seetharamaswami. *Respondents* (*Plaintiffs*).

The Province of Madras *v.* Paidanna & Sons.

Madras General Sales Tax Act (IX of 1939)—First sales of goods manufactured in the Province—Tax on, is in the nature of excise duty and therefore ultra vires *the Provincial Legislature—Government of India Act, 1935—Federal List, Entry No. 45 and Provincial List, Entry No. 48.*

The Provincial Legislature can levy a tax on the sale by a person who obtains the goods from the manufacturer or producer and so on when the goods pass from hand to hand but it has no power to tax a sale by the manufacturer or producer himself as this would be an imposition of excise duty and the assumption of a power vested only in the Centre.

Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into the latter Entry a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the Province.

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* Appeal No. 102 of 1941. 5th September, 1941.

The Province of Madras *v.* Paidanna & Sons.

Notwithstanding that the tax imposed by the Madras General Sales Tax Act is based on turnover it is in fact a tax on sales and in so far as it imposes a tax on first sales of goods manufactured or produced within the Province it is *ultra vires* the Provincial Legislature.

Appeal against the decree of the Court of the District Munsif of Vizianagaram dated 25th November, 1940 and made in O.S. No. 128 of 1940.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *N. Rajagopala Aiyangar* for Appellant.

T. R. Venkatarama Sastri instructed by *King and Partridge, V. Govindarajachari* and *V. V. Raghavan* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a suit filed by the respondents in the Court of the District Munsif of Vizianagaram for a declaration that the Madras General Sales Tax Act, 1939, and the Turnover and Assessment rules framed thereunder are *ultra vires* the Provincial Legislature, a permanent injunction restraining the Provincial Government from collecting any tax from the respondents on the sales by them of groundnut oil and groundnut cake and an order directing the refund of Rs. 163-11-0, the amount which the respondents alleged they had been unlawfully compelled to pay in respect of sales of groundnut oil and groundnut cake during the month of October, 1939. The respondents are members of a joint Hindu trading family carrying on business at Vizianagaram. They purchase groundnuts in the shell, and having decorticated the nuts they proceed to extract the oil from the kernels for the purpose of sale. Out of the residue they make groundnut cake, which they also sell. The assessing authority constituted by the Madras General Sales Tax Act assessed the respondents to the tax imposed by the Act both in respect of their purchases of groundnuts and their sales of groundnut oil and groundnut cake. The assessing authority regarded the business of manufacturing groundnut oil and groundnut cake as distinct from their business as buyers of groundnuts.

The Government of India Act, 1935, vests in the Central Legislature the power of imposing duties of excise on goods manufactured or produced in India, subject to certain exceptions which do not include the goods dealt in by the respondents. The power of imposing taxation on the sale of goods is given to the Provincial Legislatures. When the respon-

dents first came into Court their case was that a tax on the sale of goods is in all cases an excise duty and therefore the Madras Legislature had exceeded its power in enacting the General Sales Tax Act. In view of the decision of the Federal Court In re *The Central Provinces and Berar Act XIV of 1938*[1], where it was held that an Act of a Provincial Legislature levying a tax on retail sales of motor spirit and lubricants was not *ultra vires* the Provincial Legislature, it was impossible for the respondents to maintain that the Madras General Sales Tax Act was invalid in its entirety, but the question whether a tax on the first sale of goods manufactured or produced within the Province constituted an excise duty remained open to them. Consequently at the hearing the respondents confined themselves to this question in their attack on the validity of the Act. The respondents also raised the question whether the assessing authority was entitled to impose the tax both on their purchases of groundnuts and their sales of groundnut oil and groundnut cake, relying here on a proviso to S. 3 of the Act to the effect that in respect of the same transaction the buyer and the seller shall not both be taxed, but only one of them, and that when the amount for which goods are bought by a dealer has been included in his turnover, the amount of the sale price shall be excluded. They averred that the goods which they bought and the goods which they sold were the same goods and therefore they could not be taxed both as buyers and sellers.

The District Munsif held that a tax on the first sale of goods manufactured in the Province was an excise duty within the meaning of the Act and consequently granted a declaration to the effect that the Act and the rules framed thereunder in so far as they impose a tax on such sales are *ultra vires* the Provincial Legislature. The District Munsif did not grant an injunction, because he considered that there could be no reasonable doubt that the Provincial Government would honour a decree of a Court of law, and naturally this has been accepted to be the case. The District Munsif also accepted the respondents' plea that groundnut oil and groundnut cake were for the purposes of the Act the same goods as the groundnuts out of which they were made and therefore the respondents could not, in any event, be taxed both on their pur-

1. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons.

Leach, C.J.

chases of groundnuts and on their sales of the goods made therefrom. The result was that the claim for a refund of the Rs. 163-11-0 was accepted by the District Munsif.

The Provincial Government appealed to the District Court of Vizagapatam, but the Advocate-General of Madras applied for an order transferring the appeal to this Court. The application was not opposed and in view of the importance of the case this Court granted the application. The appellant's contentions may be summarised as follows:

(1) An excise duty implies only a tax on the manufacture or production of goods before they leave the hands of the manufacturer or producer and as such a tax can be imposed before any sale takes place, there is no conflict of power. The Federal Legislature has free scope to impose an excise duty before a sale takes place, leaving the Provincial Legislature the power to impose a tax when a sale in fact takes place.

(2) The tax imposed by the Madras General Sales Tax Act is a tax on turnover and such a tax cannot be classified as an excise duty.

(3) The rules framed under the Act are *intra vires* and the respondents have not been subjected to double taxation, the two sides of their business being quite distinct.

(4) While a suit will lie for a declaration that the Act and the rules are *ultra vires*, if *intra vires* the validity of an assessment can only be raised before the tribunals constituted by the Act and not in a Court of law.

While not disputing that the rules fall within the scope of the Act, assuming the Act to be *intra vires*, the respondents join issue on all these contentions. The most important question is the first of those just enumerated. If a tax on the first sale of goods manufactured or produced within the Province is an excise duty then the Act is *ultra vires* to this extent, and there is a corresponding defect in the rules framed under the Act, which means that the respondents cannot lawfully be taxed on their sales of groundnut oil and groundnut cake, and the third and fourth questions will not arise. The third question is bound up with the first. In the course of the hearing, Mr. Venkatarama Sastriar intimated that his clients were only concerned with the levy of the tax on their sales.

The entry in the Federal List relating to duties of excise is Entry No. 45, which reads as follows:

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*) of this entry."

The power of imposing excise duties on the excepted goods is given to the Provincial Legislature by Entry No. 40 of the Provincial List. If such goods are manufactured or produced in the Province the Provincial Legislature may levy 'duties of excise' on them; if manufactured or produced elsewhere in India it may impose "countervailing duties" at the same or lower rates. The Entry in the Provincial List regarding taxes on sales is Entry No. 48 and is in these words:

"Taxes on the sale of goods and on advertisements".

The question of what is meant by a duty of excise was fully discussed in the judgments of the Federal Court in *The Central Provinces Case*[1]. Broadly speaking, an excise is a duty imposed on goods manufactured or produced in the country as opposed to a customs duty, which is levied on goods imported from other countries, but this broad distinction will not suffice here. In the United Kingdom such taxes as the entertainment tax and the dog tax are regarded as duties of excise, and so are licence fees. Therefore a tax on the sale of goods manufactured or produced within the United Kingdom would undoubtedly fall within the definition of excise, but it is to be remembered that in the United Kingdom there is no division of legislative powers. Parliament stands alone. According to Blackstone, [Stephen's Commentaries (1928) edition, Vol. IV, page 420] and economists excise duties may be imposed at any stage from manufacture to consumption, as was pointed out in *The Central Provinces Case*[1], although Gwyer, C.J., maintained that the primary and fundamental meaning in English of an excise duty is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption and that the Government of India Act, 1935 did not intend to give the words 'duties of excise' an extended meaning. The learned Chief Justice of India observed (page 47):

"In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connexion with, manufacture or production and extends no further."

He did not, however, proceed to discuss the problem whether a tax on the first sale, that is, the sale by the manufacturer or producer, is a duty, imposed in connection with the

1. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons.

Leach, C.J.

manufacture or production, because the question did not arise in that case.

Sulaiman, J., was also of the opinion that the wider meaning given by commentators and economists and accepted in England may be inapplicable to the Indian Constitution and in the course of his judgment said (page 77):

"The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If a duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and may not be leviable if they are transferred in some other form. Thus a duty on goods manufactured or produced is distinct and separate from and independent of a duty on their sale and, (except probably at the stage of the first sale) there seems to be no good reason why the two may not co-exist without overlapping."

In excepting the first sale, Sulaiman, J., had in mind the decision of the High Court of Australia in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia*[1], to which we shall refer presently.

In the opinion of Jayakar, J., a tax on the sale of goods manufactured or produced in a country is an excise duty, but he considered that by the insertion of Entry No. 48 in the Provincial List Parliament meant to reserve to the Provincial Legislature the power of imposing a tax on sales for the purposes of consumption, and the only question in *The Central Provinces Case*[2], was whether a tax levied by the Provincial Government on the sale to the consumer was lawful. Jayakar, J., laid great stress on Entry No. 16 in Schedule I of the Devolution Rules made under S. 45-A of the previous Government of India Act. The relevant portion of that entry read as follows:

"16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs and the levying of excise duties and licence fees on or in relation to such articles."

1. (1927) 38 Com.L.R. 408.
2. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons.

Leach, C.J.

The learned Judge considered that there was no escape from the conclusion that the definition of "excise" in Entry No. 16 of the Devolution Rules and the expression "duties of excise" in Entry No. 40 of the Provincial List in the present Act bear a wide signification, and include all duties levied on the consumption of the excisable commodity in the Province at any stage from production to sale. He expressed his conclusion in these words (page 116):

"On a careful review of the whole question, I am therefore inclined to hold that Parliament intended:

(1) That, as regards goods centrally excisable, taxes on their sale within the Province for purposes of consumption, when such taxes are in no way connected with their production, manufacture, etc., within the Province, but are imposed on their sale in the Province merely as existing articles of trade and commerce, should be exclusively within the competence of the Provincial Legislature.

(2) That, save as aforesaid, all duties of excise on those goods whether levied and collected at the stage of manufacture, production or any subsequent stage upto consumption (exclusive of sale in the Province as stated above), should remain exclusively within the competence of the Centre. A corollary of this rule will be that the residuary powers, if any, of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature".

As we read the judgments delivered in the *Central Provinces Case*[1], the learned Chief Justice of India was of the opinion that a tax on the sale of a commodity cannot be an excise duty unless it is connected with its manufacture or production, but he expressed no opinion on whether a tax on the sale by the manufacturer or producer should be classified as an excise duty. Sulaiman, J., was substantially in agreement with the learned Chief Justice in his definition of excise duty, but he thought it probable that a tax on the first sale should be classified as an excise duty. Jayakar, J., was definitely of the opinion that a tax on the first sale was an excise duty and taxes on subsequent sales, excluding the last sale, should be similarly classified. He made an exception in the case of the last sale, because Entry No. 48 in the Provincial List indicated that this was the intention of Parliament. It cannot be disputed, in fact it has been conceded by both sides, that the judgments of the Federal Court in *The Central Provinces Case*[1], leave open the question whether a tax on the sale by the manufacturer or producer constitutes an excise duty, but, of course, even when *obiter*

1. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons. Leach, C.J.

the observations of the Federal Court must be treated with great respect.

At this stage it will be convenient to discuss the judgments delivered by the High Court of Australia in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia*.[1] The constitution of the Australian Commonwealth has been built on different lines from those of the Indian constitution and in interpreting the Government of India Act, 1935 the Court can only have regard to the provisions contained therein; but this does not mean that the Court is precluded from examining the judgment in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia*[1], in order to see whether they throw light on the meaning to be attached to the words "excise duties" used in the Government of India Act, 1935, and we consider that these judgments do render great assistance in solving the first of the problems with which this Court is now confronted. The Act of the South Australian Parliament imposed a tax of three pence on every gallon of motor spirit sold within the State (excluding spirits sold for delivery in or transportation to any place outside the State) and the vendor was authorised to add the amount of the tax to the price agreed to be paid. Six of the seven judges who constituted the Court were of the opinion that the Act was *ultra vires*, because it violated the power of the Commonwealth Parliament to impose duties of excise. With the one exception the learned Judges were all of the opinion that a tax on the first sale amounted to an excise duty. The basis of their decision was that a tax on the first sale was a tax on the production of the article.

In citing this case and in an endeavour to find support for his argument that even a tax on the first sale is not an excise duty the learned Advocate-General laid great stress on this passage in the judgment of Isaacs, J., (page 426):

" Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the articles sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of the goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of Governmental power outside the true content of the words "excise duties" as used in the Constitution. Such taxing regulations are, in my opinion, not "with-

1. (1927) 38 Com.L.R. 408.

The Province of Madras v. Paidanna & Sons.

Leach. C.J.

drawn" from the States, however they might stand in presence of relevant Commonwealth Legislation respecting foreign or inter-state trade. I agree with the reasoning in *Peterswald* v. *Bartley*[1]. Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter-state operation of trade or commerce it would not be open to the challenge here made. That, however, is not the nature of the Legislation".

These remarks do not help the learned Advocate-General. The distinction which Isaacs, J., here draws is the distinction between the stage of production and the stage when the goods produced have become part of what has been described as the general stock of the Province. In other words, if the tax is imposed while the goods are in the hands of the producer, it is a tax on the production and therefore an excise duty; but if the tax is imposed after the goods have left his hands it is not. This is made clear by the following passage in the judgment of Isaacs, J., (page 430):

"The first sale of motor spirit, after its production either by primary or later processes, is naturally and in the ordinary course of business a sale by the producer, and a sale by him is certainly included. A tax on that sale, so described, is essentially a burden and a tax on the production of the goods. Production of motor spirit is with a view to sale; and the tax, having direct reference to a sale so described as to be intimately related to production, is a matter which affects the producer as such, because it burdens the trade for which his production is the essential preparation. A tax laid expressly on the production alone of goods would affect every one who produced them even for personal use or consumption. But it is all one in reality whether the tax is expressed to be on production followed by sale, or, as here, on the sale immediately following production".

Higgins, J., also said that a tax on the sale of an article is a tax on the article itself and in accepting the definition in Mill's Political Economy, 4th Edition, Vol. II, page 434, that "taxes on the sale of consumable commodities are simply taxes on those commodities". Starke, J., said the same thing.

The learned Advocate-General has accepted the proposition stated by the learned Chief Justice of India in *The Central Provinces Case*[2], that a tax connected with the manufacture or production of goods within the Province constitutes an excise duty, and in our opinion, the correctness of the proposition is not open to doubt. Therefore what the Court has to decide, in the first place, is whether a tax on the sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise duty. The High Court of Australia has said that a tax imposed on the first sale

1. (1904) 1 Com.L.R. 497.
2. (1939) 1 M.L.J. (Supp.) 1: (1939) F.C.R. 18.

The Province of Madras v. Paidanna & Sons.

Leach, C.J.

of goods is so connected with their production that it is an excise duty and no reason has been advanced in the course of the arguments in this case to induce us to think otherwise. The tax operates on the goods themselves and it is imposed before they leave the hands of the manufacturer or producer. In the normal course he is certainly not going to part with his goods until a contract of sale has been entered into. This being the case it seems to us that the tax is intimately connected with the manufacture or production of the goods. We hold that a Provincial Legislature in India has no power to tax a sale by the manufacturer or producer as, for the reasons given, this would mean the imposition of an excise duty and the assumption of power vested only in the Centre.

Where an entry in the Provincial List overlaps an entry in the Federal List, the Federal List must prevail. Where the interests can be reconciled this must be done, because obviously Parliament could never have intended that there should be a conflict. Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the Province. On this basis the Provincial Legislature can levy a tax on the sale by the person who obtains the goods from the manufacturer or producer and so on when the goods pass from hand to hand. It has been said that there is nothing to prevent the manufacturer or producer opening a shop to sell his goods retail. This is so, but it is exceptional and as pointed out by Sulaiman, J., on Privy Council authority it is the pith and substance of the Act which is the decisive factor.

It is now necessary to decide whether the Madras General Sales Tax Act does impose a tax on first sales. The learned Advocate-General has said that the tax is is imposed on a dealer's turnover and that it is not in reality a tax on sales. In this connection he has pointed to an argument advanced by the Advocate-General of India in *The Central Provinces Case*[1], to the effect that the only power given to the Provincial Legislature by Entry No. 48 is a power to impose a tax on turnover. The

1. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons. — Leach, C.J.

contention of the Government of India was that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act constituted an infringement of the power of the Central Legislature and the argument of the learned Advocate-General of India was advanced in support of this contention. The Federal Court refused to accept the argument, but this does not mean that this decision implied that a tax on turnover does not mean a tax on sales. Under the Madras General Sales Tax Act, the tax is undoubtedly based on the dealer's turnover. "Turnover" is defined by S. 2 (1) as meaning the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, is excluded from his turnover. By an amending Act, which received the assent of the Governor on the 4th March, 1940, the tax is now Rs. 4 per month if a dealer's turnover does not exceed Rs. 20,000 and one-quarter of one per cent. of the turnover if it exceeds Rs. 20,000. Any dealer whose turnover in any year is less than Rs. 10,000 is not liable to pay the tax for that year.

A tax on a dealer's turnover is, in effect, a tax on his purchases or sales as the case may be. Whether the Legislature makes him pay a tax on each transaction or whether it makes him pay a lump sum when the sales for a particular period have been ascertained, the result is the same—a tax on his purchases or sales. The whole includes the part. And the very title given to the Act implies that it is a tax on sales. Moreover it is to be remembered that a Legislature cannot do indirectly that which it has no power to do directly. In fact the learned Advocate-General did not appear to be pressing his second point, although he did suggest that the Court should accept the contention of the learned Advocate-General of India in *The Central Provinces Case*[1] that Parliament merely intended to give to the Provinces the power to impose a tax on turnover and not a power to tax individual transactions, but in doing so he overlooked the fact that the decision in *The Central Provinces Case*[1] makes such an argument untenable. Notwith-

1. (1939) 1 M.L.J. (Supp.) 1: (1939) 1 F.C.R. 18.

The Province of Madras v. Paidanna & Sons. — Leach, C.J.

standing that the tax imposed by the Madras General Sales Tax Act is based on turnover, we hold that it is in fact a tax on sales and that in so far as it imposes a tax on the first sales of goods manufactured or produced within the Province, it is *ultra vires* the Provincial Legislature. This means that we consider that in calculating a dealer's turnover for the purposes of the Act the sale by him of goods which he has manufactured or produced must be excluded.

In view of these findings it is not necessary for us to decide the third and fourth questions stated by the learned Advocate-General.

As it has not been suggested that in ordering the refund of Rs. 163-11-0 the District Munsif committed any error, assuming his decision on the main issue to be correct, the decree passed by him will stand. Consequently the appeal will be dismissed with costs and a certificate for two counsel granted. A memorandum of cross-objections has been filed by the respondents, but they have not pressed it and it will also be dismissed, in this case without costs.

As this judgment involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate will issue in accordance with the provisions of S. 205 of that Act.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Nallappa Goundan ... *Petitioner* (Accused)*

v.

Chinnammal ... *Complainant.*

Nallappa Goundan v. Chinnammal.

Criminal Procedure Code (V of 1898), S. 195—Defamation by person in the witness-box—Complaint—If to be filed by the Court in which the statement was made.

The provisions of S. 195, Criminal Procedure Code, do not apply to defamation and a person who is defamed by a witness when in the witness-box is at liberty to file a complaint against the defamer under the provisions of the Indian Penal Code. The mere fact that the defamation is committed in or in relation to, criminal proceedings in a Court is not a reason for

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* Crl. R. C. No. 163 of 1941. 2nd September, 1941.
(Crl. R. P. No. 156 of 1941.)

Nallappa Goundan v. Chinnammal.

requiring the sanction of that Court or for requiring that Court to prefer a complaint.

Shanmughasundaram Pillai v. *Manicka Mudaliar*, (1939) 1 M.L.J. 412, overruled.

Venkataramanjulu Chetti v. *Kanniah Chetti*, 1933 M.W.N. 1263 and *Tiruvengada Mudali* v. *Tripurasundari Ammal*, (1926) 51 M.L.J. 112: I.L.R. 49 Mad. 728 (F.B.), followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Trichinopoly Division dated 18th September, 1940 and passed in C. A No. 66 of 1940 preferred against the judgment of the Court of the Joint Magistrate, Karur, in C. C. No. 64 of 1940.

G. Gopalaswamy for Petitioner.

Complainant not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Order of the Court was pronounced by

Leach, C.J.

The Chief Justice.—The petitioner was convicted by the Joint Magistrate of Karur under S. 500 of the Indian Penal Code for the defamation of his wife. He was ordered to pay a fine of Rs. 100 and in default of payment to undergo simple imprisonment for three months. The defamatory words had been uttered by the petitioner when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. In the course of his evidence in support of the complaint he accused his wife of unchastity. They had quarrelled and she was living separately, but in the same building. The conviction of the petitioner was confirmed by the Sessions Judge of Trichinopoly on appeal. The petitioner now asks this Court to set aside the conviction on the ground that a complaint of defamation which is based on a statement in Court can only be filed by the Court in which the statement was made. There are conflicting decisions of this Court on the question. In three cases Lakshmana Rao, J., has expressed the opinion that the complaint must be filed by the Court, while Burn, J., has expressed an opinion to the contrary.

The first of the decisions by Lakshmana Rao, J., was given in *Shanmughasundaram Pillai* v. *Manicka Mudaliar*[1]. In that case the petitioner charged the son-in-law of the respondent with theft of certain documents and records and in an affidavit filed in support of an application for a search warrant stated

1. (1939) 1 M.L.J. 412: 1939 M.W.N. 192.

Nallappa Goundan v. Chinnammal.

Leach. C.J.

that some of the articles had been secreted in the house of the respondent. A search warrant was issued and in accordance with this authority the respondent's house was searched. Nothing was, however, found there and the son-in-law was ultimately discharged. The learned Judge considered that as the complaint of defamation was founded on false evidence the offence would fall within S. 193 of the Penal Code and was only cognizable on a complaint by the Court. In support of his order Lakshmana Rao, J., relied on the decision of this Court in *Appadurai Nainar* In re[1], to which reference will be made presently. The learned Judge expressed a similar opinion in *Ganapati Asari* v. *Kuppuswami Asari*[2] and in *Ramaswami Konar* v. *Nachiar Ammal*[3].

The opinion of Burn, J., was stated in *Venkataramanjulu Chetti* v. *Kanniah Chetti*[4] and is to be gathered from the following excerpt from his judgment:

"The mere fact that the defamation is committed in, or in relation to, criminal proceedings in a Court is not a reason for requiring the sanction of that Court or for requiring that Court to prefer a complaint . . . . . . The petitioner in this case has complained of the acts which have, according to him, caused harm to his reputation; he has no concern with the same acts in so far as they may have constituted an offence against public justice."

The provisions of S. 195 of the Code of Criminal Procedure do not apply to defamation. This Court has held in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[5], that a person who is defamed by a witness when in the witness-box is at liberty to file a complaint against his defamer under the provisions of the Indian Penal Code. When such a right exists it can only be taken away by an express statutory provision to that effect. There is nothing in S. 195 of the Code of Criminal Procedure, or in any other part of that Code, or in any other enactment which takes away this right.

We consider that an examination of the judgment in *Appadurai Nainar*, In re,[1] does not render real support for the opinion that when a person is defamed in evidence given in support of an offence which falls within the purview of S. 195 of the Code of Criminal Procedure, the Court in which the defamation takes place must lay the complaint charging the witness with defamation. In *Appadurai Nainar*, In re,[1] the facts were

1. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.
2. (1939) 1 M.L.J. 614: 1939 M.W.N. 320.
3. (1940) 2 M.L.J. 491: 1940 M.W.N. 867. 4. (1933) M.W.N. 1263.
5. (1926) 51 M.L.J. 112; I.L.R. 49 Mad. 728 (F.B.).

Nallappa Goundan v. Chinnammal.

Leach, C.J.

these. A Civil Court had held that a promissory note had been fabricated and had dismissed the suit. Thereupon the defendant, without asking the aid of the Civil Court, filed a complaint charging the maker, the writer and the attestors of the instrument with forgery, an offence falling in the circumstances within the mischief of S. 195 of the Criminal Procedure Code. On a preliminary objection being taken to the effect that the maker of the instrument could not, in view of the provisions of S. 195 (1) (*c*) of the Criminal Procedure Code, be charged, except on the complaint of the Court, the complaint so far as the maker was concerned was dismissed, but the Magistrate proceeded with the charge against the attesting witnesses. Madhavan Nair and Burn, JJ., held this to be wrong and stated that parties should not be allowed to evade the provisions of S. 195 (1) (*b*) of the Code of Criminal Procedure by filing a complaint under another provision of the Penal Code if an offence under S. 193 of that Code or of any other of its sections mentioned in S. 195 (1) (*b*), Criminal Procedure Code, had been committed. In that case the complaint was based on a forged instrument which had been given in evidence, and we do not read the judgment as placing in the same category a charge of defamation which is an entirely personal matter. That question was not under consideration.

We consider that the opinion expressed by Burn, J., in *Venkataramanjulu Chetti* v. *Kanniah Chetti*,[1] is preferable and it is to be remembered that Burn, J., was a member of the Bench which decided *Appadurai Nainar* In re[2]. It is also in point to mention that the opinion of Burn, J., in *Venkataramanjulu Chetti* v. *Kanniah Chetti*[1] accords with a much earlier decision of this Court and one given by a Bench. (See *Krishna Rao* v. *Appasami Aiyar*[3].) There a Magistrate had held that the sanction of the Court was required to a proceeding for defamation in respect of a statement made in Court and as sanction had not been accorded dismissed the complaint filed by the person alleged to have been defamed. The complainant applied to this Court to correct the order in revision and this was done. In fact no attempt was made to support the Magistrate's order which was described by this Court as being untenable.

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1. (1933) M.W.N. 1263.
2. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.
3. (1891) 1 Weir 585.

Nallappa Goundan *v.* Chinnam mal.

Leach, C.J.

It may be mentioned that opinions which have been expressed by other High Courts support the opinion of Burn, J. See *Satish Chandra Chakravarthi* v. *Ram Dayal De*[1], *Mohamed Isa* v. *Nazim Hussain*[2], *Mst. Binia* v. *Crown*[3] and *Chotelal* v. *Phulchand.*[4]

The petition will be dismissed.

K. S. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Hamidgani Ammal (one of the L. Rs. of the deceased first respondent) — *Appellant** (*Plaintiff*)

v.

Ammasahib Ammal (died) and others — *Respondents* (*Defendants 1 and 3 and L. Rs. of 4th Defendant*).

F.B.

Hamidgani Ammal *v.* Ammasahib Ammal.

Civil Procedure Code (*V of 1908*), *S. 47—Scope—Legal representative added in execution proceedings—If bound to set up his independent title—Right of separate suit to establish title—Not barred by S.* 47.

When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or (as in the present case) he had been dismissed from the suit his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose.

Kuriyali v. *Mayan,* (1883) I.L R. 7 Mad. 255 overruled.

Kumaretta Servaigaran v. *Sabapathy Chettiar,* (1906) 16 M.L.J. 545: I.L. R. 30 Mad. 26, *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupathi, etc., Devasthanams,* (1909) 19 M.L.J. 401: I.L.R. 32 Mad. 429 and *Kelu Achan* v. *Parasu Pattar,* (1916) 5 L.W. 158 and *Lakshmadu* v. *Ramudu,* I.L.R. (1940) Mad. 123, followed.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvarur in A. S. No. 55 of 1936 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 39 of 1935.

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1. (1920) I.L.R. 48 Cal. 388 (S.B.).
2. I.L.R. (1940) All. 314.
3. I.L R. (1937) Nag. 338.
4. I.L.R. (1937) Nag. 425.

* S. A. No. 305 of 1938. 25th August, 1941.

F.B.

Hamidgani Ammal *v.* Ammasahib Ammal.

K. V. Ramachandra Aiyar for Appellant.

P. V. Rajamannar and *R. Sundaralingam* for Respondents.

This appeal coming on for hearing, the Court, (*Abdur Rahman, J.*) made the following

ORDER OF REFERENCE TO THE FULL BENCH.*

The suit out of which the present appeal arises was one for possession of 7/72 share in the suit properties on the ground that the plaintiff and defendants 1 to 3 are the heirs of one Zainambu Nachial. The suit lands were originally sold by one Habib Muhammad Maracair on the 15th August, 1879, under Ex. A to his step-mother Bathuma Ghani (Fatima Ghani) but the vendor got a power-of-attorney Ex. C on the 21st May, 1885 from his step-mother and looked after them in that capacity. Fatima Ghani bequeathed these properties to her brother Manjur Sah's (Manzur Shah) daughter's children Sainambu Nachial (Zainab Bi) and Amma Sahib Ammal who were girls of 7 and 5 respectively at the time when the bequest was made. These minors' names appear to have been brought on the revenue records in pursuance of the gift and they were shown to be in possession as owners (Exs. D and E). Habib Mohammad Maracair, the original vendor of these lands, as will be seen from the pedigree table in the District Munsif's judgment, was no other than the father of these minors. Having got the property as the agent of his step-mother, he began to manage them on behalf of his own children subsequently. Zainambu Nachial died in 1921 after she had been married to the second defendant leaving her surviving a son (defendant 3), a daughter (the plaintiff), Habib Muhammad Maracair (father) and the second defendant (husband). Habib Muhammad Maracair appears to have exceeded his rights and entered into a contract with the fourth defendant to sell the whole of the property that he had once sold to Bathuma Ghani in 1879 and in which he had become a sharer on account of his daughter Zainambu Nachial's death. A suit for specific performance of the contract on the basis of that agreement to sell was brought against him (O. S. No. 12 of 1931) in the Court of the Subordinate Judge of Negapatam. The plaintiff disputed her father's right to convey the whole of the property and asked to be impleaded as a party to that suit. She was impleaded in spite of the plaintiff's objection but on an issue raised on that point, she was held by the Court at the time when the judgment (Ex. II) was pronounced to be neither a necessary nor a proper party. Habib Muhammad Maracair died after this decree

* 13th March 1941.

Hamidgani Ammal *v.* Ammasahib Ammal.

had been passed and the plaintiff and the other heirs were brought on the record as legal representatives in E. P. No. 79 of 1934. Apparently in view of the decision by the Subordinate Judge of Negapatam holding the plaintiff to be neither a necessary nor a proper party, the plaintiff remained *ex parte* and did not contend that her father had no right to alienate the whole of the property in excess of his share under the Mahomedan Law which he had got as an heir to his daughter Zainambu Nachial. She brought, on the other hand, the present suit. One of the points taken in defence was that the present suit was not maintainable and was barred by the provisions of S. 47 of the Civil Procedure Code. This prevailed in both the lower Courts and a second appeal has been preferred to this Court.

One of the main points urged on behalf of the appellant thus is that a separate suit was maintainable and was not barred by the provisions of S. 47 of the Code of Civil Procedure. It was contended in the first instance that a legal representative who was brought on the record after the passing of even a mortgage decree did not possess the right of getting his paramount title adjudicated in execution in the same way as he could not have advanced it if he had been brought on the record as a legal representative before the decree was passed. In other words, the contention was that what could not have been agitated at the instance of a legal representative if he had been brought on the record during the continuance of the proceedings in a suit was not bound to be raised by him in execution. The first reason given by learned counsel for the appellant in support of this contention was that a legal representative could, after he was made a party to the suit as such, only raise such a defence under O. 22, r. 4 (2) of the Code of Civil Procedure as was appropriate to his character as a legal representative of the deceased defendant. The provisions contained in O 22, r. 4 have not however been made applicable by r. 12 of that order to execution proceedings. It would, therefore, follow that a person who was not entitled to raise a defence in a suit cannot be held to be debarred from raising the same defence in execution if he is bound to do so, under S. 47 of the Code of Civil Procedure. Whether he is bound so to do or not would depend upon the terms of that section. The second reason advanced in support of the contention that a legal representative was not bound to plead a paramount title in execution of the mortgage decree was that since the decree directed a sale of the property, it would not be possible for a Court in execution to go behind the decree and hold on the legal representative's objection that the property was not liable to be sold either wholly or partially. Reliance was placed in support of this contention on the decisions

F.B.

Hamidgani Ammal v. Ammasahib Ammal.

in *Venkatakrishnayya* v. *Venkatanarayana Rao*[1], *Lloyds Bank Ltd. Lahore* v. *Mt. Rehmat Bibi*[2] and *Lakshmadu* v. *Ramudu*[3], to the last of which I was a party myself. I had occasion in a second appeal (S. A. No. 191 of 1938) to discuss these cases and pointed out to a divergence that existed between *Venkatakrishnayya* v. *Venkatanarayana Rao*[1], and another Division Bench decision reported in *Govindarajulu Naidu* v. *Chinnathambi Padayachi*[4], to which the same learned Judge, who delivered the judgment in the former case, was a party. There were two more decisions in *Chinnathayee* v. *Lakshmi*[5] and *Peer Bathummal Beevi* v. *Nagur Meerammal Beevi*[6], which had taken more or less the same view as was taken in *Govindarajulu Naidu* v. *Chinnathambi Padayachi*[4]. I also commented on the Lahore decision and tried to point out that a legal representative who pleaded a paramount or independent title was not challenging the validity of the decree but was putting forward his right to the property and since the sale of the property, wholly or in part, was being objected to, it would be a matter which related to the execution of the decree and would have to be adjudicated at the instance of a legal representative in execution. The line that I was trying to draw between the two cases was, it must be admitted, a thin one although it was quite distinct in my opinion. If a legal representative attacked the validity of a decree, he was not entitled or bound to get the matter decided in execution; but if he did not challenge the decree but merely asserted that he had a right in the property which could not be sold in execution, this would be a matter which would relate to execution and fall within the ambit of S. 47 of the Civil Procedure Code. In the same way, if a legal representative was found to be advancing a contention that the decree to which he was not *eo nominee* a party did not bind him for reasons like those of immorality or illegality or the non-existence of the debt in respect of which it was passed and that his father did not represent him in the suit in which the decree was passed against him, he would not be entitled or bound to raise these questions in execution and must get them decided by a separate suit. In a case like this, the legal representative would be wishing to get the scope of the decree adjudicated and this is beyond the province of an execution Court. It may be that the effect of these contentions raised by a legal representative in a separate suit as to his not having been represented by his father in the suit or as to his not being under a pious obligation to pay a debt on account of its non-existence in fact or, even if in exis-

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1. A.I.R. 1936 Mad. 733.
2. A.I.R. 1939 Lah. 178.
3. I.L.R. (1940) Mad. 123.
4. A.I.R. 1928 Mad. 1270.
5. (1936) 71 M.L.J. 511.
6. (1936) 71 M.L.J. 725.

F.B.
——
Hamidgani Ammal
v.
Ammasahib Ammal.

tence, on account of its being illegal or immoral, may ultimately result in the son's share not being held liable and may be said in a way to relate to the execution of a decree—but is it not beyond the scope of the execution Court to go behind the decree to find whether it was passed against the father in his representative capacity or otherwise or whether the nature of the debts was such that the sons could not be held liable to pay?

There is bound to be a certain amount of overlapping as the decree-holder wishes to make a son liable under the decree to which he was no party *eo nominee* and the son is trying to avoid his liability by methods legally available to him. In the same way, if an objection by a legal representative is accepted in execution and the property or any of its share is exonerated, it would, to that extent, affect the decree indirectly; but as long as in the latter case, the legal representative does not purport to attack the validity of the decree directly and in the former case, the legal representative does not raise questions which would relate to execution of the decree directly, there would be no unwarranted inroad on or evasion of the provisions of S. 47 of the Code of Civil Procedure.

Secondly it was contended by learned counsel for the appellant that even if a legal representative was bound to advance his independent or paramount title in execution of a mortgage decree he was not bound so to do in the case of a decree for specific performance where his only duty as a legal representative was to execute a sale deed in favour of the decree-holder in pursuance of a contract which was alleged to have been made by his ancestor in excess of his rights and which resulted in a decree for specific performance. Learned counsel for the appellant argues that in a decree for specific performance, it is impossible for a Court in execution to give effect to an objection by a legal representative that his ancestor had exceeded his rights in entering into a contract and that the decree for specific performance passed by the Court was, for that reason, inexecutable. It is contended, on the other hand, that the decree for specific performance stands more or less on the same basis as a mortgage decree and if a legal representative is bound to raise his paramount title in execution of the mortgage decree, so would he be bound to raise his independent title in the decree for specific performance. The point is not free from difficulty, although as at present advised, I was inclined to the view that a decree for specific performance was of a peculiar character and could not be compared to a decree based on a mortgage. But in view of divergent views taken in regard to mortgage decrees themselves, even if a decree for specific performance is treated

on the same basis as a mortgage decree and in view of a reference made by a Division Bench in Appeal No. 149 of 1938 for a decision by a larger Bench that could not materialise on account of the matter having been compromised, I am prepared to accede to the request made by the learned counsel for the parties to submit this case for a decision by a larger Bench, if my Lord the Chief Justice so considers desirable. The reasons given by my learned brother King, J., in Appeal No. 149 of 1938 may be considered as a part of this reference.

I may add that I have given such facts as they were narrated to me by learned counsel for the appellant and have not heard the parties on other facts which may arise for decision. It was agreed by learned counsel for the parties that if the question as to the liability of a legal representative to raise the question of a paramount or independent title in execution is settled by this Court authoritatively, it would facilitate other matters that arise for decision in the case.

(This appeal came on for hearing before a Full Bench in pursuance of the aforesaid Order of Reference)

K. V. Ramachandra Aiyar for Appellant.

P. V. Rajamannar and *R. Sundaralingam* for Respondents.

The Court expressed the following

Leach, C.J.

OPINION. *The Chief Justice.*—The question which arises in this appeal is whether a person who has been brought into Court in execution proceedings merely as the legal representative of the judgment-debtor is compelled to have his own claims to the property in suit decided in the execution proceedings or whether he can establish his rights by a separate suit.

On the 24th November, 1927 one Habib Muhammad Maracair agreed to sell certain wet lands to one Vaidhialinga Mudaliar, who was the fourth defendant in the suit out of which this appeal arises and is now represented by the third and fourth respondents. The vendor failed to execute a conveyance and the purchaser instituted a suit in the District Court of Negapatam for a decree for specific performance. The suit was subsequently transferred to the Subordinate Judge's Court for hearing. The appellant was made a party to that suit because she claimed a share (7/72) in it. She was made a party on her own application, which was opposed by the plaintiff. An issue was then framed

F.B.

Hamidgani Ammal v. Ammasahib Ammal.

Leach, C.J.

on the question whether she was a necessary party to the suit and it was decided that she was not. Consequently her name was struck off the record. On the 8th August, 1931 a decree for specific performance was granted to the plaintiff, but before it could be executed the vendor died. The result was that the appellant was made a party as his legal representative. The application for execution then proceeded and eventually the Court executed a conveyance in favour of the purchaser.

In the course of the execution proceedings, but before the conveyance was signed the appellant instituted in the Court of the District Munsif of Tirutturaipundi the present suit. The purchaser challenged her right to institute it. He maintained that her claim should have been decided in the execution proceedings and it was now too late to raise it. The District Munsif accepted this argument and dismissed the suit. His decision was concurred in by the Subordinate Judge of Tiruvarur. The appellant then appealed to this Court and the second appeal came before Abdur Rahman, J., who has made the reference which this Full Bench is now called upon to consider.

The reference became necessary because there are conflicting decisions of this Court on the question involved. The first case to which our attention has been called is that of *Kuriyali* v. *Mayan*[1]. That appeal arose out of a mortgage suit and in execution proceedings the legal representative of the mortgagor claimed an interest in the mortgaged property. The claim was investigated by the District Munsif in execution proceedings, but on appeal to the District Court it was held that the District Munsif had no power to decide the legal representative's title and that the proper course was for the decree-holder to attach the property and for the legal representative to make a claim. This course was adopted and resulted in the legal representative's claim being rejected. Thereupon he brought a suit to cancel the sales which had taken place in the course of the execution of the decree and it was held that the suit did not lie. The Court did not, however, consider a very important question, namely, whether it is open to a legal representative with a claim of his own to challenge in execution proceedings the

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1. (1883) I.L.R. 7 Mad. 255.

F.B.

Hamidgani Ammal v. Ammasahib Ammal.

Leach, C.J.

validity of a mortgage decree which has been passed against the person he is representing.

A decision running counter to the judgment in *Kuriyali* v. *Mayan*[1], was given by another Bench of this Court in *Kumaretta Servaigaran* v. *Sabapathy Chettiar*[2]. In that case the appellant was the defendant in a mortgage suit and in an application for a final order for sale which was made in execution proceedings (the Civil Procedure Code of 1882 then being in force) the appellant sought to stop the sale on the ground that the decree which had been passed against him was not binding on the property; because since the passing of the decree he had been adopted into the family of another person to whom the property belonged. The Subordinate Judge overruled his objection and made an order for the sale of the property. This was held by Boddam and Wallis, JJ., to be right. In the course of the judgment they pointed out that the objection taken by the appellant was that, though the decree to which he was a party was a decree for the sale of specified immovable property, he was entitled to object in execution to the sale of the property; in other words the appellant's objection was an objection to the decree itself and not to the execution, discharge or satisfaction of the decree. Reference was made to the decision in *Kuriyali* v. *Mayan*[1], and the defect in that judgment was indicated.

Dissent from *Kuriyali* v. *Mayan*[1], was also expressed in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati etc., Devasthanams*[3], which was decided by White, C.J., and Abdur Rahim, J. There a mortgage decree was passed against the holder of an impartible estate. On the death of the mortgagor his son sought to set up in execution proceedings a contention that the mortgage was not binding upon him. It was held that this course was not open to him. After stating that there was abundant authority to support the proposition that the decree in a mortgage suit directing sale could not be impeached in execution proceedings the Court observed:

"The case of *Kuriyali* v. *Mayan*[1], no doubt supports the contention that the rights of the judgment-creditors who have obtained mortgage decrees can be determined in execution proceedings, but as Mr. Sundara Aiyar pointed in that case the Court would seem to have overlooked the fact that the decree itself contained a direction for sale and that notwith-

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1. (1883) I.L.R. 7 Mad. 255.
2. (1906) 16 M.L.J. 545: I.L.R. 30 Mad. 26.
3. (1909) 19 M.L.J. 401: I.L.R. 32 Mad. 429.

F.B.

Hamidgani Ammal v. Ammasahib Ammal.

Leach, C.J.

standing the decree for sale the properties had been attached as if the proceedings had been in execution of a money decree. Apparently all the cases in which *Kuriyali* v. *Mayan*[1], is cited with approval are cases in which the decree sought to be executed was a simple money decree or, at any rate was not a mortgage decree and the question we have to determine did not arise."

The decision in *Kuriyali* v. *Mayan*[1], was criticised by Ayling and Seshagiri Aiyar, JJ., in *Kelu Achan* v. *Parasu Pattar*[2]. On the other hand it receives support from the judgments given by Madhavan Nair and Stodart, JJ., in *Chinnathayee* v. *Lakshmi*[3], by Cornish, J., in *Peer Bathummal Beevi* v. *Nagur Meerammal Beevi*[4], and by Ramesam and Jackson, JJ., in *Govindarajulu Naidu* v. *Chinnathambi Padayachi*[5]. It is, however, significant, that in these cases no reference was made to the decisions in *Kumaretta Servaigaran* v. *Sabapathy Chettiar*[6], *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati etc., Devasthanams*[7] and *Kelu Achan* v. *Parasu Pattar*[2], Cornish, J., did refer to certain other decisions, but the decisions related to proceedings in execution of money decrees, where the considerations are not the same as they are here or in proceedings in enforcement of a mortgage decree. The latest decision of this Court was given by Venkataramana Rao and Abdur Rahman, JJ., in *Lakshmudu* v. *Ramudu*[8] and their judgment supports the judgments which dissent from *Kuriyali* v. *Mayan*[1].

We are firmly of the opinion that *Kuriyali* v. *Mayan*[1], was wrongly decided and that the law on the question now before the Court is correctly expressed in *Kumaretta Servaigaran* v. v. *Sabapathy Chettiar*[6], *Zamindar of Karvetnagar* v. *Trustees of Tirumalai Tirupati etc., Devasthanams*[7], *Kelu Achan* v. *Parasu Pattar*[2] and *Lakshmudu* v. *Ramudu*[8]. When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or, as in this case, he had been dismissed from the suit, his rights will be entirely unaffected and he will be in a posi-

1. (1883) I.L.R. 7 Mad. 255.
2. (1916) 5 L.W. 158.
3. (1936) 71 M.L.J. 511.
4. (1936) 71 M.L.J. 725.
5. A.I.R. 1928 Mad. 1270.
6. (1906) 16 M.L.J. 545: I.L.R. 30 Mad. 26.
7. (1909) 19 M.L.J. 401: I.L.R. 32 Mad. 429.
8. I.L.R. (1940) Mad. 123.

F.B.

Hamidgani Ammal v. Ammasahib Ammal.

Leach, C.J.

tion to enforce them in a suit instituted by him for that purpose.

S. 47 of the Code of Civil Procedure only requires to be decided in execution proceedings those questions which arise between parties to the suit in which the decree has been passed or their representatives and which relate to the execution, discharge or satisfaction of the decree. Where a stranger to the suit claims as his, immovable property which has been the subject-matter of a decree, that claim cannot in law be regarded as being a question relating to the execution, discharge or satisfaction of the decree. There are decisions of this Court to the effect that in execution proceedings arising out of money decrees questions relating to the property attached must be decided in execution proceedings and not by a separate suit, but this is an entirely different matter because the correctness of the decree is not called into question. Therefore the correctness of such decisions does not arise. We are here dealing with a case where it is said that a person who is not a party to the suit, but is brought into Court in execution proceedings as the legal representative of a deceased party, can in those proceedings be allowed to challenge the decree and if he fails to do so he has for ever lost the right claimed by him in the suit property. Obviously the answer must be that he cannot in execution say the decree is wrong, and he has his remedy by suit.

It follows that we hold that the District Munsif and the District Judge erred in dismissing the appellant's suit on the ground that it did not lie. The case will be remanded to Abdur Rahman, J., to decide the other questions which arise in the appeal. The costs of this reference will be made costs in the appeal.

K.S. — *Opinion expressed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Kangati Mahanandi Reddi .. *Appellant** (*Petitioner*).

v.

Panikalapati Venkatappa and another. *Respondents* (*Respondents*).

Mahanandi Reddi v. Venkatappa.

Civil Procedure Code (*V of* 1908), *S.* 146 *and O.* 21, *r.* 16—*Transferee of decree which has not yet come into existence—Right to execute it after it is passed.*

*C. M. A. No. 93 of 1940. 8th April, 1941.

Mahanandi Reddi v. Venkatappa.

A transferee to whom a future decree (and nothing else) has been expressly assigned can execute the decree which is subsequently passed. An application for execution may be made by the transferee under S. 146, Civil Procedure Code though not under O. 21, r. 16 which cannot apply when there was no decree in existence at the time of the assignment.

Muthiah Chettiar v. *Govinddoss Krishnadoss*, (1921) 41 M.L.J. 316: I.L.R. 44 Mad. 919 (F.B.), applied.

Appeal against the order of the District Court of Kurnool dated 4th September, 1939 and made in E. P. No. 28 of 1939 in O. S. No. 15 of 1938 on the file of the Court of the Subordinate Judge of Kurnool.

M. Ranganatha Sastri for Appellant.

K. Krishnaswami Aiyangar and *K. S. Jayaram* for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—The respondent 1 in this appeal was the plaintiff in two suits which came finally to be numbered as O. S. No. 15 and O. S. No. 24 of 1938 on the file of the Subordinate Judge of Kurnool. These were suits mainly, and in O. S. No. 15 wholly, for the recovery of money due on promissory notes. The claim in O. S. No. 15 was for Rs. 21,788, that in O. S. No. 24 for Rs. 4,698. While these suits were pending respondent 1 on 1st November, 1937 executed a deed of transfer in favour of the present appellant. By this deed he assigned to the appellant 'the entire amounts due in respect of the two suits' for a consideration of Rs. 8,000. The consideration was to be paid within fifteen days of the passing of the decrees in the two suits, but in no case before a date in February 1938. It was also provided that if a decree were not granted in the more important suit (O. S. No. 15) payment of the Rs. 8,000 would not be due, and any payment which might actually have been made should be refunded. On the same day (1st November, 1937) appellant executed in favour of respondent 1 a promissory note for Rs. 8,000 which was expressed as payable on demand.

Decrees in the two suits were in due course passed that in O. S. No. 15 on 22nd September and that in O. S. No. 24 on 25th November, 1938. The sum of Rs. 8,000 was not paid by the appellant within the fifteen days stipulated, and has not yet been paid. On 9th March, 1939 respondent 1 sent a lawyer's notice to the appellant repudiating the transfer on the ground of the non-payment of the consideration within the stipulated

Mahanandi Reddi *v.* Venkatappa.

King, J.

time. In April, 1939 appellant applied under O. 21, r. 16 and S. 146, Civil Procedure Code to execute the decree in O. S. No. 15. The judgment-debtor (respondent 2) remained *ex-parte* but respondent 1 opposed his application. The learned District Judge of Kurnool held that appellant could not execute the decree both because respondent 1 did not in fact transfer the decree to him, and also because O. 21, r. 16 and S. 146 gave him no right to do so. Against this order the present appeal has been filed.

That the decree was in fact transferred by respondent 1 to appellant seems to us beyond all dispute. In the deed respondent 1 says:

"I have this day transferred to you the entire amounts due in respect of the two suits".

This language is appropriate only to a completed transaction, and the expression 'sums due in respect of the suits' can mean only 'sums decreed in the suits.' That this is so is made clear by a later passage in the deed where the respondent 1 says:

"The amounts due under the decrees in the said two suits are due to you only".

It is difficult to understand what exactly the learned Judge's findings are in this matter but he appears in some way to have convinced himself both that the deed does not mean what it says and that it was not meant to be acted upon. On the former point he refers to discrepancies between the deed and the promissory note, but it is obvious from the references to the promissory note in the deed that it is the deed which embodies the agreement between the parties as to how the promissory note is to be treated, so that any discrepancies are of no importance. On the latter point the District Judge emphasises the fact that after the decrees were passed appellant did not pay and respondent 1 did not demand payment of, the Rs. 8,000 which was due; but this proves nothing whatever as to the intentions of the parties *in November, 1937.* This case is merely another example of the all too common practice of the purchaser of property refusing to pay for it, even though he enjoys, or claims to enjoy it.

The learned judge has also introduced into his judgment various irrelevant comparisons with the transactions of the betting-ring, and has stigmatised the bargain between respondent 1 and appellant as undesirable speculation in the result of

Mahanandi Reddi v. Venkatappa. King, J.

litigation. We can see no justification for this criticism. The situation as disclosed by the documents is a simple one in which when the agreement was made no blame appears to us to attach to any one. Respondent 1 was prepared to prosecute his suits and obtain decrees but in view of the trouble and uncertainty involved in realising his money after the decrees, he sold the right to execute them to the appellant for a sum which both men must have thought to be reasonable and it is also reasonable that payment should be postponed until after the decrees were in fact granted.

The case for the respondent 1 at the arguments before us was that the deed of 1st November, 1937 embodied not a completed transaction but only an *agreement* to transfer. As we have already pointed out such a case is directly contrary to the plain terms of the document.

That such a transaction as is embodied in the transfer deed is perfectly valid is clear on the authority of *Glegg* v. *Bromley*[1], and this position has not been challenged by the learned Advocate for the respondent 1.

The question then arises whether appellant as transferee of the decree, has a right to execute it. It is contended first on his behalf that he can do so under O. 21, r. 16. Much might perhaps be said for this contention were the matter *res integra*, but it was decided as long ago as 1906 in *Bhandari* v. *Ramachandra*[2], that the language of S. 232 (the equivalent in the old code of our present r. 16) cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. Appellant's learned Advocate has not been able to show us that this interpretation has been overruled or dissented from in the thirty-five years which have elapsed since it was given, or convince us that the slight modifications in the present r. 16 have any bearing upon it. We are not, in these circumstances prepared to hold that the present appellant can execute this decree under r. 16.

We think however the appellant can undoubtedly execute the decree under the provisions of S. 146. That section so far as it applies here provides that 'save as otherwise provided by this Code, where an application may be made by any person; that application may be made by a person claiming under him;

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1. (1912) 3 K.B. 474. 2. (1906) 17 M.L.J. 391.

Mahanandi Reddi v. Venkatappa

King, J.

What then is the meaning of 'save as otherwise provided by this Code?' According to the learned Advocate for respondent 1 where the transferee of a decree desires to execute it definite provisions are laid down by r. 16; and therefore he can do so only if his case conforms to those provisions. The learned Advocate for the appellant interprets the phrase more liberally as permitting applications under S. 146 which do not *conflict with* the provisions of the Code.

Of these two diverse views we prefer to choose the latter, and indeed are bound to do so by virtue of the decision of a Full Bench of this Court reported in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[1]. That was a case no doubt where a decree was already in existence at the date of the transfer, but what was transferred was not in the words of r. 16 '*the* interest' of the decree-holder but a fraction only of that interest. The learned Judges in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[1], were inclined to hold that r. 16 might apply to the case before them, but they went further and held that even if it did not, the transferee must be permitted to execute it under S. 146 or perhaps even under S. 151 (*vide* the headnote, and passages in particular on pages 923, 924 and 932). It is true that the learned judges recognise that if r. 16 *prohibits* a particular application it cannot be made under S. 146 or S. 151. The question then is 'Does r. 16 prohibit the present application?' We are unable to hold that merely because r. 16 has been interpreted as applying only to decrees in existence at the time of the transfer, it prohibits an application by a transferee who obtained the transfer of a decree, a transfer which is legally valid and is embodied in a written deed (as r. 16 requires), before the decree was actually passed. To permit execution by such a transferee, in our opinion, in no way violates the principles which are embodied in r. 16 or in O. 21 generally. The appellant here is the true owner of the decree, and he has his written title-deed, and that is all that the law requires.

The learned District Judge has not in our opinion correctly understood the ruling in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[1], and has relied upon the rulings of other High Courts. Though these were again cited before us, it is unnecessary to examine them in detail, though we may point out that they all deal with the assignment of something more

1. (1921) 41 M.L.J. 316: I.L.R. 44 Mad. 919.

Mahanandi Reddi v. Venkatappa.

King, J.

than a future decree. It cannot therefore be argued against the present appellant that the terms of his assignment deed would compel him to make an application under O. 22, r. 10. There is no case which lays down the proposition that a transferee to whom a future decree (and nothing else) has been expressly assigned cannot execute it. But whatever the views of other High Courts may be, our own High Court has negatived the proposition that O. 21, r. 16 is all-inclusive in this matter and following the principles laid down in *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[1], we hold that the appellant is entitled to execute the present decree. The appeal is accordingly allowed and E. P. 28 of 1939 will be restored to file and disposed of according to law. Respondent 1 must pay appellant's costs here and in the Court below.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Uppinangadi Sri Sahasra Lingeshwara Devara Bhandaram, represented by its Adalthe Moktessor Arai Rai. *Appellant** *(Plaintiff)*

v.

Tholadara Nagappa *alias* Ramakrishna Shanbhogue (died) and others. *Respondents* *(2nd defendant and L.Rs. of 1st defendant).*

Lingeshwara Devara Bhandaram v. Nagappa.

Trust—Failure of special trustee in possession of properties, charged with the performance of a charity in a temple—Right of general trustee of institution to perform the charity and recover the expenses from the special trustee and the properties charged.

Where the performance of *santarpane* (feeding) in a temple on particular occasions, is made a charge on some properties, the general trustee of the temple is sufficiently interested in the performance of the charities and it is his duty to see that all the festivals and charities are duly performed. Where the special trustee in possession of properties so charged does not perform the charity, the general trustee can perform it out of the funds of the temple and recover the cost from the special trustee and the properties over which there is the charge.

Vythilinga Pandarasannadhi v. *Somasundara Mudaliar,* (1893) I.L.R. 17 Mad. 199, followed.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in A. S. No. 109 of 1937 preferred

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1. (1921) 41 M.L.J. 316: I.L.R. 44 Mad. 919.

* S. A. No. 1212 of 1938. 19th August, 1941.

against the decree of the Court of the District Munsif of Puttur in O. S. No. 61 of 1936.

K. Y. Adiga and *K. P. Adiga* for Appellant.

K. Vittal Rao for Respondents.

The Court delivered the following

JUDGMENT.—The trustee of Sri Sahasralingeshwara temple filed the suit out of which this appeal arises for recovery of a sum of Rs. 288-1-6 under the following circumstances. Two brothers Narayana Bhat and Keshava Bhat executed a Karar (Ex. A.) in favour of the plaint institution on the 18th of July, 1899 undertaking to perform certain charities or *viniyogams* as they are called in the suit temple every year. Some properties of the brothers were charged with the performance of these *viniyogams* at a cost of Rs. 60 every year. These *viniyogams* were not performed during the years 1932, 1933, 1934 and 1935 by the defendants and thereupon the temple performed them and seeks to recover the sum of Rs. 288-1-6 and to enforce the charge over the properties mentioned in the plaint schedule. The trial Court granted a decree but the appellate Court reversed it holding that Ex. A., was not valid either as a trust or a contract and that the plaint institution has no right to sue.

The plaintiff appeals and the only question that arises for decision is whether the plaintiff is entitled to perform the *viniyogams* and recover the amount from the plaint properties. Ex. A., is a registered agreement executed by two persons Narayana Bhat and Keshava Bhat in favour of the plaint institution. It recites that it was executed and delivered to the Bhandhara of Uprangady Sri Sahasralingeshwara Devaru in Kerikar village. Bhandara, it is agreed means a trustee. The material portion of it runs as follows:

" Our senior paternal uncle Venkapa Bhatta, the son of Hennal Puttanna Bhatta, residing at Ulamogra of Adethala village, Bandadi Magane, has this day conveyed to us through Moktyarname, the immovable property of the beriz of Rs. 2-8-0 and valued at about Rs. 600 out of the *warg* entered in the name of Hemal Subbayya, bearing Muli No. 12 of the said Hirebandi village and movable properties of the value of about Rs. 400 executed by him and executed Moktyarname. As mentioned therein, we have to maintain him properly in future and in accordance with this direction, we shall, for the welfare of our family, perform Brahmanasantarpane for Brahmins (feeding of Brahmins) at an expense of Rs. 60 on the day following Poornima Makha of every year, in the said temple, on the liability of the property lying within the undermentioned boundaries of the beriz of Rs. 15-8-5, *warg* of which is entered in the name of Kesa *alias* Thimmayya, bearing Muli No. 5 of Illan-

Lingesh-wara Devara Bhandaram *v.* Nagappa.

tila village, Uprangadi Magane, Uprangadi Sub-District, South Kanara District. Further, we shall also give *gangamrita* (water) to the persons gathering on the occasion of three makha festivals every year in the said temple. We shall also give dakshina (present) according to (our) mite to the Brahmins who gather at the santarpane (feeding) at not less than one pie for each (Brahmin)".

The properties mentioned in the schedule attached to this document are clearly charged with the performance of the feeding of Brahmins in the temple and of payment of a small sum as a present to the Brahmins who gather at that feeding ceremony at not less than one pie per Brahmin. The agreement is addressed to and is executed in favour of the plaint institution represented by its trustee. The lower appellate Court is clearly in error in holding that there was no consideration for the undertaking in this agreement to feed the Brahmins in the temple. The Subordinate Judge says:

"There is no legal connection established between the transaction of conveyance by the uncle to the nephews and the undertaking in Ex A. There is nothing to show that the uncle conveyed his property on the promise of Narayana Bhat and Keshava Bhat to perform the ceremonies."

This is a clear misreading of Ex. A. After referring to the settlement made by the paternal uncle of his properties on the executants, the document says:

"As mentioned therein, we have to maintain him properly in future and in accordance with his direction, we shall, for the welfare of our family, perform Brahmanasantarpane for Brahmins (feeding of Brahmins) at an expense of Rs. 60".

This clearly means that the undertaking to perform the feeding was part consideration for the settlement by the uncle. That is the plain and obvious inference of the sentence just set out and no further evidence is necessary to show that the uncle conveyed his property on the promise of Narayana Bhat and Keshava Bhat to perform the feeding. There was no need in the plaint to set out anything further than that Ex. A, provides for the performance of this feeding by the two brothers. The property mentioned in the schedule attached to Ex. A is not wholly dedicated to the trust but the performance of the feeding in the temple was made a charge on those properties. There may be a partial dedication as pointed out in Ganapathi Aiyar's Religious Endowments, p. 76.

In such a case, the general trustee of the institution is sufficiently interested in the performance of these charities and in fact it is his duty to see that all these festivals and charities

Lingeshwara Devara Bhandaram v. Nagappa.

are properly performed. It would be a breach of his duty if he did not do so. In *Nellaiyappa Pillai* v. *Thangama Nachiyar*[1], Subrahmaniya Ayyar and Benson, JJ., say this on p. 408:

"In our opinion the Subordinate Judge has overlooked the circumstances that the plaintiff in this case was the general trustee of the temple and as such held a special position in regard to the protection of its interests. In that character it was not only his right, but his duty to see that the temple funds in the hands of special trustees were duly appropriated."

It cannot be said that where the special trustee in possession of the properties charged with the performance of the charities does not perform a particular festival which he is bound to do, the general trustee cannot perform it out of the funds of the temple and recover it from the special trustee and from the properties over which there is the charge. In *Vythilinga Pandarasannadhi* v. *Somasundara Mudaliar*[2], the general trustees carried out certain repairs for which there was a special endowment in charge of a special trustee. The general trustee was held entitled to sue the special trustee for recovery of the sum spent from the general funds. On p. 202 they say:

"There is also no doubt that as dharmakartas, respondents are bound to see that the temple is kept in proper repair by those who are bound to do so according to usage."

The decision in *Venkatachala Pillai* v. *The Taluq Board, Saidapet*[3], relied on by the lower appellate Court has no application to this case. There the only question was whether the provision in a will that butter-milk, betel and nuts, fans and sugar should be given to people attending a festival in a temple was a religious trust or merely a charitable trust. There was no feeding to be done in the temple itself. It was held that the trust was not religious in character. This decision has no application to the present case. Feeding of devotees in the temples is a well-known thing as pointed out by Muttusami Ayyar, J., in *Vythilinga Pandarasannadhi* v. *Somasundara Mudaliar*[2], at p. 200. The point is when there is such a trust performable in a temple, is the general trustee entitled to perform it if the persons who are primarily to do it do not do so and recover the cost from the properties?

On the authority of the decision in *Vythilinga Pandarasannadhi* v. *Somasundara Mudaliar*[2], I hold that the general

1. (1897) I.L.R. 21 Mad. 406: 8 M.L.J. 119.
2. (1893) I.L.R. 17 Mad. 199.
3. (1911) I.L.R. 34 Mad. 375: 21 M.L.J. 305.

Lingeshwara Devara Bhandaram v. Nagappa.

trustee can recover the sum in question and I reverse the decree of the lower appellate Court and restore that of the first Court with costs here and in the lower appellate Court.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Konda Boyan .. *Appellant* (1st Defendant—Appellant)*

v.

Palaniswami Goundan .. *Respondent (Plaintiff—1st Respondent).*

Konda Boyan v. Palaniswami Goundan.

Promissory note—Promisor in jail—Suit on forged duplicate note—Subsequent suit on real note—Fraud discovered later by promisor—Suit for cancellation of decree on forged note—When Court can set aside the decree.

The first defendant had obtained two decrees, one on a forged promissory note supported by two witnesses each of whom must have been personating some one else, and the other on the true promissory note supported by three witnesses who were deliberately kept in ignorance of the earlier suit. The plaintiff who was then in jail was hoodwinked into not defending either suit by the trick which was played upon him, of filing the suits and issuing notices in rapid succession, so that in the circumstances in which he was placed, he was led to believe that both notices related to the same suit. Having got the decrees and collected the amount due under the earlier decree by executing it, the first defendant proceeded to execute the later decree obtained upon the true note and it was when the plaintiff received notice of execution in respect of a decree, which he thought was a single decree already fully satisfied, that he had enquiries made and learnt of the fraud and lodged the present suit for cancellation of the decree obtained on the forged note earlier.

Held: A decree will not be set aside merely on proof that it was obtained by perjury or that the document upon which it was based was a forged one. The question of perjury or forgery was a matter which should be taken to have been decided upon in the suit itself, and even if wrongly decided and a decree given, the Court in the interests of finality will refuse to reopen the matter in a subsequent suit between the same parties.

Where however the allegation was one of a deliberate conspiracy of a number of people not only to hoodwink the Court into passing a wrong decree but also to deceive the defendant therein as to the nature of the suit and by a trick to prevent him from resisting the suit, the allegation, if true will amount to a case of fraud extrinsic to the matters adjudicated upon in that suit so as to justify the cancellation of that decree in a later suit brought for that purpose.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, dated the 8th September, 1939 and made

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* S. A. No. 979 of 1939. 21st January, 1941.

in A. S. No. 31 of 1939 (A. S. No. 448 of 1938, District Court, Coimbatore), preferred against the decree of the Court of the District Munsif of Dharapuram dated 12th September, 1938 and made in O. S. No. 304 of 1937.

N. Swaminatha Aiyar for Appellant.

K. S. Ramamurthi for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought for the cancellation of one of two decrees obtained by the present appellant, the first defendant in the Court of first instance against the plaintiff. The facts which have been found by the Courts below make out a very unusual story. The plaintiff was a convict in jail. He had executed a promissory note in favour of the second defendant, which promissory note had been transferred to the first defendant and a small payment had been made to the first defendant after the assignment. It has been found by the Courts below that the first defendant evolved a very cunning conspiracy whereby his claim against the plaintiff was duplicated in such a way as not to arouse the suspicion of the plaintiff and to prevent him from defending the two suits, one filed upon a forged promissory note and the other filed upon the genuine promissory note. According to the findings of fact the first defendant, knowing that the plaintiff was in jail forged what is almost a duplicate of the genuine promissory note, making it of the same date for the same amount with the same attesting witnesses, together with one additional attestor, and transferred at the same time to the same first defendant. It is found that, when the suit on the forged promissory note Ex. G was filed, the summons was served upon the plaintiff in jail on 7th August, 1935 and he, thinking that this was a suit on the genuine promissory note to which he had no defence, took no action to contest the suit. A decree followed on 7th September, 1935. About a fortnight before this decree a second suit, O. S. No. 592 of 1935, was filed on the basis of Ex. A, the genuine promissory note and the summons in the second suit was served on the present plaintiff in jail on 5th September, 1935, that is to say, nearly a month after the previous summons and two days before the decree in the earlier suit. The present plaintiff not having the summons in the previous suit in his custody because of jail rules, was under the impression that the second summons was another summons in the first suit and did

Konda Boyan v. Palaniswami Goundan.

not notice the difference in the suit number and the slight difference in the amount. Consequently the plaintiff thought that no purpose would be served by doing anything about this second summons. The second suit was also decreed. It is found by the Courts below that the evidence upon which the second decree was obtained was the genuine evidence of the original promisee and the attesting witnesses who were quite innocent of any knowledge that a fraud had been played in the earlier suit. The decree in the earlier suit is found to have been obtained by putting forward some person unknown who impersonated the promisee and gave evidence in support of the forged promissory note and also by putting forward another individual as the third attestor to the promissory note whose name and address did not correspond to those of any known person. An attempt was made on behalf of the defence to establish the fact that this third witness to the forged promissory note was an individual who had died shortly before the trial of the present suit. The Courts below have rejected this story and have refused to believe that the person alleged to have died in a place some seventeen miles away was the same person as the witness who is put forward as having signed this promissory note. According to the findings, therefore, the first defendant got two decrees, one on a forged note supported by two witnesses each of whom must have been personating some one else and the other on the true promissory note supported by three witnesses who were deliberately kept in ignorance of the earlier suit and the present plaintiff was hoodwinked into not defending either suit by the trick which was played upon him, of filing the suits and issuing notices in rapid succession so that in the circumstances in which he was placed he was led to believe that both notices related to the same suit. Having got these decrees, the first defendant proceeded to execute the earlier decree and the plaintiff in jail hearing of this execution, still thinking that it was a decree to which he had no answer, instructed his relatives to satisfy the decree. After collecting the amount of this decree the first defendant proceeded then to execute the second decree obtained upon the true note and it was when the plaintiff received notice of execution in respect of a decree, which he thought was a single decree already fully satisfied, that he had inquiries made and learnt of the fraud and lodged the present suit.

It is not open to me sitting in second appeal to go into the correctness of the findings of fact reached in the Courts

Konda Boyan v. Palaniswami Goundan.

below. Both Courts are agreed that the promissory note in the first suit was a forgery, that the person who gave evidence in that suit in the name of the promisee, the second defendant here, was some individual who impersonated the second defendant and that the other witness was some unknown person whose name had been added in order to avoid the complication of having to examine the attestors to the genuine promissory note in both the suits. It has also been found as a fact that the promisee, the second defendant, was speaking the truth when he says that he took only one promissory note from the plaintiff and endorsed only one promissory note to the first defendant and that he never gave evidence in the suit on the other promissory note and that the thumb prints appearing on that promissory note and also on the deposition in the suit on that promissory note are not his thumb prints. Taking all these findings of fact to be true, do they amount to a case of fraud extrinsic to the matters adjudicated upon in the earlier suit so as to justify the cancellation of that decree on the ground that it has been obtained by fraud? It is not necessary to set forth the authorities on the question of the nature of the fraud which must be established in order to set aside a decree. They are summarised in a decision in *Chinnayya* v. *Ramanna*[1], which has been followed in many other cases. It is, I think, established that a decree will not be set aside merely on proof that it was obtained by perjury or that the document upon which it is based is a forged document. The questions whether there was perjury or forgery are matters which must be taken to have been decided in the suit itself and even if they have been decided wrongly and a decree has been given as the result of forgery or perjury or both, the Court in the interests of finality will refuse to reopen the matter in a subsequent suit between the same parties. It has been urged by the appellant that the present case is nothing more than a case in which the Court is asked to set aside a decree on the basis of findings that the document on which the suit was based is a forgery and that the evidence with which the decree was obtained is perjured evidence. But it seems to me that the case put forward by the plaintiff goes much further than this. The plaintiff alleges that there has been a deliberate conspiracy of a number of people not only to hoodwink the Court into passing a wrong decree, but also to deceive the defendant as to the

1. (1913) 25 M.L.J. 228; I.L.R. 38 Mad. 203.

Konda Boyan v. Palani-swami Goundan.

nature of the suit and by a trick to prevent him from resisting that suit. It is not merely a case of an allegation of forgery or perjury but of an allegation that a suit on the forged promissory note was deliberately filed in such circumstances that it might be mistaken for the suit on the genuine promissory note and that the suit on the genuine promissory note was filed in such circumstances that the defendant would not be apprised of the trick which had been played upon him in the earlier suit, so that he might canvass the matter in appeal. It is also alleged that the two main witnesses who supported the forged promissory note were both individuals who were impersonating the proper witnesses and that the whole scheme whereby these two suits were conducted was so devised that neither the debtor nor the true witnesses should realise the nature of the trick which was played. Such a case is to my mind a case of fraud much wider than the scope of the matters decided in the actual suit wherein the wrong decree was obtained and one in which a trick was played upon the Court and also upon the debtor and the witnesses to prevent the truth being discovered. In law therefore the decision of the Courts below is in my opinion correct.

I wish to make it clear in view of the criminal proceedings which are said to be pending that I express no opinion as to the correctness of the findings of the Courts below on the questions of fact upon which it is not open to me to give a contrary decision.

In the result therefore the appeal is dismissed with costs of the first respondent.

Leave refused.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Peeram Chenna Reddi and others .. *Petitioners** (*Respondents*).

Chenna Reddi, *In re.*

Civil Procedure Code (V of 1908), O. 47, r. 1—First appeal heard by two Judges—Review application—Only one of the Judges available—If can be heard by him alone or if it should be by a Bench of two Judges.

Where after the disposal of an appeal by a Bench of two Judges an application for review is made when only one of the Judges who heard the appeal remained attached to the Court, the application can be heard by the remaining Judge alone. *Aubhoy Churn Mohunt* v. *Shamont Lochun Mohunt,*

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* C. M. P. Nos. 3269 and 3901 of 1941. 19th August, 1941.

(1889) I.L.R. 16 Cal. 788 and *Maksud Mahi* v. *Secretary of State*, (1911) 9 I.C. 532, relied on.

It is the practice of the Madras High Court that even in first appeals the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent, by the other Judge sitting alone.

Application under O. 47, r. 1 and S. 151 of the Code of Civil Procedure for review of the judgment of the High Court dated 20th January, 1941 and passed in A. S. No. 344 of 1938 preferred against the decree of the Court of the Subordinate Judge of Guntur in O. S. No. 40 of 1936.

V. Kachapesvara Aiyar, P. V. Rajamannar and *K. Subba Rao* for Petitioners.

The Court made the following

ORDER.—It is argued that this application for review can be heard only by a Bench as it relates to a decree in a first appeal. The point is directly covered by the decisions of the Calcutta High Court in *Aubhoy Churn Mohunt* v. *Shamont Lochun Mohunt*[1] and *Maksud Mahi* v. *Secretary of State*[2]. Both cases related to second appeals which were heard by two Judges as they used to be even in this Court till a few years ago. In the former case the Judges say this at pages 792 and 793:

"As I said just now, at the time this rule was returned Mr. Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and, consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails."

This is in accordance with the invariable practice of this Court. Even in first appeals, the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent by the other Judge sitting alone. Appeal No. 196 of 1928 was decided by Reilly and Burn, JJ. C. M. P. No. 516 of 1934 was filed for review of that decree. Burn, J., ordered notice and directed that the review application should be posted before a Bench. It was accordingly posted before Burn and Mockett, JJ. Apparently it was then discovered that even after notice, the review petition should be disposed of by Burn, J., alone.

1. (1889) I.L.R. 16 Cal. 788. 2. (1911) 9 I.C. 532.

Chenna Reddi, *In re.*

Then this order was passed on 7th December, 1939:

". . . . Adjourn this to some day next year when I have time to deal with it myself. This is not yet a matter for a Bench."

Thereafter it was heard by Burn, J., alone and disposed of finally on 30th January, 1940. The application was dismissed on the merits. I hold that this application can be heard by me. On the merits, I hold that there are no grounds for granting the review asked for. The petition is accordingly dismissed.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Pothula Sattiraju ... *Petitioner* (Plaintiff)*

v.

Polisetti Venkataratnam and others. *Respondents (Defendants).*

Sattiraju *v.* Venkataratnam.

Madras Estates Land Act (I of 1908), Ss. 131, 189 and 213—Fraudulent conspiracy to get improper decree—Payment made to avert sale—Suit for damages—Jurisdiction of Civil Court—Measure of damages.

S. 213 of the Madras Estates Land Act gives a right of suit before the Collector to any person deeming himself aggrieved by any proceedings taken under colour of the Act and such a suit will lie at the instance not merely of the registered pattadar or other person actually impleaded as the defaulter in the original proceedings but also of any other person coming within the category of those who under S. 131 of the Act have a right to set aside the sale on deposit of the amount due.

Where the plaint alleged a fraudulent conspiracy to secure an improper decree as a result of which a sale was held and the plaintiff having been obliged to pay money to avert the consequences of that conspiracy sued for recovery of damages,

Held, that the Civil Court had jurisdiction to entertain the suit in view of the provisions of Ss. 213 and 189 of the Madras Estates Land Act,

Held, further, that the claim was purely one in tort and the measure of the damages was the amount which the plaintiff was obliged to pay to save the land in which he was interested from the consequences of the conspiracy.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Cocanada in C. M. A. No. 1 of 1936 preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 54 of 1933.

G. Balaparameswari Rao for Petitioner.

D. Narasaraju for Respondents.

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*C. R. P. No. 339 of 1937. 24th July, 1940.

Sattiraju *v.* Venkataratnam.

The Court delivered the following

JUDGMENT.—This revision petition is preferred against a judgment in appeal dismissing a suit as one of which the Civil Courts have no jurisdiction with reference to the terms of Ss. 189 and 213 of the Madras Estates Land Act.

The petitioner (plaintiff) had a decree under a mortgage binding lands in an estate. Defendants 3, 4 and 5 represented the mortgagors owning the kudivaram in the land. The first defendant was the zamindar. In 1929 the first defendant obtained an *ex parte* decree against defendants 3 to 5 for water cess alleged to be due on their land which was an inam. Under the decree a sale was held and a portion of the land was purchased in revenue sale by the second defendant. The plaintiff came to know of the sale and deposited the amount due thereunder which was a little over Rs. 1,300 and got the sale set aside. This was on 17th January, 1930. On 17th January, 1933, he filed the present suit in the District Munsif's Court in which he alleged a fraudulent conspiracy between the first defendant (the landholder) and defendants 3 to 5 (the tenants) whereby a decree was obtained for an amount not due and the land was sold to the second defendant, a friend of the parties. Plaintiff therefore claimed the right to get back from the first defendant and from the defendants 3 to 5 the amount which he was obliged to pay to get the sale set aside. Paragraph 12 of the plaint after setting out this claim based on fraud also says that if the amount for which the decree was passed was really due, it was due from defendants 3 to 5 and that as they defaulted with the result that part of the plaintiff's hypotheca was sold, the plaintiff was obliged to deposit the amount due and defendants 3 to 5 are bound in law to make good the said sum with interest. The trial Court treated the suit as one purely for damages for a fraudulent conspiracy carried out under colour of a proceeding under the Estates Land Act and applying S. 213 held that the suit was one cognizable only by a Revenne Court. The lower appellate Court did point out that there was an alternative claim against defendants 3 to 5 under S. 69 of the Contract Act. Nevertheless, it dismissed the appeal and confirmed the dismissal of the suit.

Now in so far as the suit was one for damages or compensation flowing from the tortious act of the defendants in conspiring to bring about an improper sale under

Sattiraju v. Venkataratnam.

colour of the Estates Land Act, it seems to me quite clear that S. 213 applies. It is true that in the case reported at *Rajah of Vizianagaram* v. *Narasimharaju*[1] there was a difference of opinion between the two learned Judges on the question whether S. 213 of the Estates Land Act has any application to a suit for damages brought by a person who is not a tenant suing his landlord. With all respect to the learned Judge who held otherwise, it seems to me clear that S. 213 in terms gives a right of suit before the Collector to any person deeming himself aggrieved by any proceedings taken under colour of this Act and that such a suit would lie at the instance not merely of the registered pattadar or other person actually impleaded as the defaulter in the original proceedings but would apply to a suit brought at the instance of any other person coming within the category of those who under S. 131 have a right to set aside the sale on deposit of the amount due. The Act contemplates proceedings against the registered pattadar but gives to other persons having an interest in the land a right to intervene and pay any amount which may be due and in a very large number of cases under this Act the registered pattadar is not in fact the person who pays the rent. It must have been the intention of the Legislature in using the wide term "any person aggrieved" to give the remedy under S. 213 to any person who had any interest in the land on which the arrear was claimed.

It has also been contended that the suit as against the first defendant is not really a suit for damages or compensation but is a suit for a refund of an illegal exaction. The contention is supported by the citation of the case in *Municipal Council, Dindigul* v. *Bombay Co., Ltd., Madras*[2]. I do not think this case has any bearing on the present facts. The learned Judges were dealing with an illegal recovery by a public body from a person alleged to be liable to tax and they held that in a suit by the person who paid the tax once the illegality was established, there was an equitable right to demand a refund of the excess and that such a refund was not damages. The present suit is not a suit of that nature. The decree stands and there is no question of a demand for recovery of a tax paid under protest. What the plaint alleges is a fraudulent conspiracy to secure an

1. (1916) 3 L.W. 517.
2. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.

Sattiraju *v.* Venkataratnam.

improper decree as a result of which a sale has been held and the plaintiff has been obliged to pay money to avert the consequences of that conspiracy. This claim sounds purely in tort and the measure of the plaintiff's damages will be the amount which he has been obliged to pay to save the land in which he is interested from the consequences of the conspiracy. It has been pointed out in the Full Bench decision in *Narayanaswamy* v. *Venkataramana*[1] that the word 'damage' used in S. 213 is used in a general way to specify pecuniary compensation in contrast to reliefs such as an injunction or a decree for which a more elaborate form of suit lies in the Civil Courts. There is also the authority of Pandalai, J., for the view that a suit for the refund of any excessive collection under colour of the Act from a tenant would itself be a suit for damages under S. 213. (Vide *Rajah of Ramnad* v. *Ramanatha*[2].) But as I have said this is not a suit for a refund of an illegal collection, but it is a suit for compensation for a payment which the plaintiff was obliged to make owing to the tortious act of the defendants under colour of the procedure laid down in the Madras Estates Land Act. In so far as the plaint seeks relief against the first defendant and in so far as it seeks relief against defendants 3 to 5 on the ground of fraud under colour of the Act, the Civil Courts clearly have no jurisdiction having regard to the terms of Ss. 213 and 189 of the Madras Estates Land Act.

But the alternative prayer, based presumably on S. 69 of the Contract Act, as against defendants 3 to 5, was one which the Civil Court could entertain and which the Revenue Court could not entertain. It is not clear why the learned Subordinate Judge did not remand the suit for the trial of this alternative claim. There was no point in returning the plaint for amendment for the suit so far as it should have been filed in a Revenue Court was barred by limitation. The proper course therefore was to dismiss the suit so far as it claimed damages from the first defendant and defendants 3 to 5 on the ground of fraud and proceed with the trial of the suit as against defendants 3 to 5 only on the alternative relief under S. 69 of the Contract Act. Unfortunately, defendants 3 to 5 are not represented before me, but I can see no reason why the suit as against them under the alternative relief should have been dismissed.

1. (1915) 29 M.L.J. 607 : I.L.R. 39 Mad. 239 (F.B.).
2. A.I.R. 1931 Mad. 609 and 743.

Sattiraju v. Venkataratnam.

The revision petition is therefore dismissed as against the first defendant with costs. As against defendants 3 to 5 the petition is allowed in part and the trial Court will be directed to proceed with the trial of the suit against them in so far as the alternative prayer under S. 69 of the Contract Act is concerned. The costs as against defendants 3 to 5 will abide the result.

B. V. V. *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

S. Sankaranarayana Aiyar ... *Petitioner* (Petitioner)*

v.

Paramasivam Pillai and another. *Respondents (Respondents).*

Sankaranarayana Aiyar v. Paramasivam Pillai.

Civil Procedure Code (V of 1908), S. 55 (4)—*Security bond under—Surety—If entitled to be released from his bond at his pleasure.*

A person who becomes a surety under S. 55 (4), Civil Procedure Code, cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed by a surety under S. 55 (4), Civil Procedure Code and a continuing guarantee as defined in S. 129 of the Contract Act.

Subroya Chetty v. *Ragammall,* (1904) 14 M.L.J. 482: I.L.R. 28 Mad. 161, applied; *Siraj-ud-Din* v. *Guranditta Mal,* A.I.R. 1934 Lah. 962, dissented from; *Alagammai* v. *Arunachalam,* A.I.R. 1935 Mad. 543, referred to.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 19th January, 1937 and passed in E.A.No. 683 of 1936 in S.C.S. No. 100 of 1936.

R. Ramamurti Aiyar for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Additional Subordinate Judge, Tinnevelly, refusing to discharge the petitioner from his suretyship under a security bond executed by him under S. 55 (4) of the Civil Procedure Code.

The facts are simple and not in dispute. The first respondent obtained a decree against the second respondent and had him arrested in execution thereof. When the latter was brought before the Court under arrest, the petitioner deposited Rs. 500 as cash security and executed a surety bond on the strength of

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*C.R.P. No. 710 of 1937. 1st August, 1940.

Sankara-narayana Aiyar *v.* Parama-sivam Pillai.

which the Court released the judgment-debtor from arrest. The bond runs as follows:

"In case the respondent (that is the judgment-debtor) fails to apply to be declared an insolvent within one month from this date, and in case the said respondent fails to appear, when called upon in any proceeding upon such application or upon the decree in execution of which the said respondent was arrested, the Court may direct the cash security to be realised, but not personally from the depositor."

The second respondent then applied to be adjudicated insolvent and was adjudged accordingly. A few months later, when those proceedings were still pending, the petitioner applied to the executing Court under Ss. 55 and 151 of the Civil Procedure Code offering to produce the judgment-debtor before the Court on any day that might be fixed and praying for discharge from his suretyship, as he did not like to continue as surety any longer. The Court below rejected this application on the ground that, in view of the terms of the security bond, the petitioner could not claim release from his obligation as surety, and there was nothing in S. 55 of the Code to justify such release. The petitioner has challenged the validity of this order.

He contends that a security bond given under S. 55 (4) of the Code is in the nature of a continuing guarantee for the production of the judgment-debtor whenever required by the Court, and when the surety offers to produce the judgment-debtor and desires to be absolved from further liability under the bond, the Court is bound to cancel the bond and discharge the surety. His learned counsel did not suggest that S. 130 of the Contract Act which entitles the surety to revoke a continuing guarantee as to future transactions was in terms applicable to the present case, but it was said that the principle of that section applied by way of analogy. It is difficult to see what analogy there is between a security bond executed by a surety under S. 55 (4), Civil Procedure Code and a continuing guarantee as defined in S. 129 of the Contract Act. In the former case, there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. In *Subroya Chetty* v. *Ragammall*[1] a Bench of this Court held that a security bond given by a surety under S. 78 of the Probate and Administration Act for the due administration of an estate

1. (1904) 14 M.L.J. 482: I.L.R. 28 Mad. 161.

Sankara-narayana Aiyar *v.* Parama-sivam Pillai.

could not be revoked as to future acts of administration by the surety giving notice to the Judge or other officer of the Court. I can see no distinction between a security bond of the kind dealt with in that decision and the one now before me so far as the applicability of S. 130 of the Contract Act or its principle is concerned. It is clearly provided by the terms of the security bond in this case which is in conformity with S. 55 (4) of the Code, that the security deposited by the petitioner should be realised if the judgment-debtor did not apply to be declared an insolvent within a month from that date or did not appear when called upon to do so in the proceedings on such application or in execution of the decree. It would be contrary to this stipulation to release the petitioner from his undertaking and set free his security deposit, and I can find nothing in the Code or under the general law to warrant such procedure. This conclusion derives further support from a comparison of S. 55 (4) with the provisions of O. 38, rr. 2 and 3. These rules expressly provide that a person who becomes a surety for the appearance of a defendant may at any time apply to the Court to be discharged from his obligation and that the Court shall direct his discharge on such application when the defendant is either produced by the surety or appears in pursuance of a summons or warrant issued by the Court. The markedly different terms of S. 55 (4) and the absence of any provision for the discharge of the surety at any stage before he has fully carried out his undertaking point clearly, in my view, to the conclusion that a person who becomes a surety under this section cannot claim to be released from his obligation at his pleasure.

Petitioner's learned counsel placed reliance on a decision of a single Judge of the Lahore High Court in *Siraj-ud-Din* v. *Guranditta Mal*[1], which no doubt supports his contention but with all respect I am unable to agree with it. I was also referred to a decision of Pandrang Row, J., in *Alagammai* v. *Arunachalam*[2] which, I find, however, is no authority on the point now under consideration. The question for decision in that case did not relate to the right of a surety to be released at any time from his liability on production of the judgment-debtor, but to the extent of his liability under a bond executed under S. 55 (4) when the judgment-debtor did not file the insolvency

1. A.I.R. 1934 Lah. 962. 2. A.I.R. 1935 Mad. 543.

petition within a month. The learned Judge held, on the terms of the bond before him, that the only liability of the surety was to produce the judgment-debtor before the Court and that he was entitled to be given an opportunity of producing the judgment-debtor in Court on a date fixed by it before his security could be realised. It may be that, in the present case also, the petitioner would be entitled to an opportunity of producing the judgment-debtor if the latter does not appear as required by the Court, before the security furnished can be realised. This is not, however, the question before me and the decision cited above has no application. Sankaranarayana Aiyar *v.* Paramasivam Pillai.

The civil revision petition fails and is dismissed.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

A. R. M. T. T. Muthukaruppan Chettiar ... *Appellant* (1st Defendant)*

v.

S. P. L. Subbiah Chettiar and another ... *Respondents (Plaintiff and 2nd Defendant).*

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 4 (d)—Scope. Muthukaruppan Chettiar *v.* Subbiah Chettiar.

Where on 1st October, 1937, there was a debt already contracted on the security of house property alone in a municipality which by the terms of S. 4 (*d*) of Act IV of 1938 is excluded from the operation of the Act, the addition of security of other agricultural property on 23rd July, 1938, that is at a date after the Act came into force, cannot retrospectively make it a debt contracted on the security of property "other than municipal house property" so as to bring into force Ss. 7 and 8 of the Act and exclude S. 4 (*d*).

Appeal against the decree of the Court of the Subordinate Judge of Devakottai dated 19th October, 1938, in O.S. No. 154 of 1937.

K. Rajah Aiyar and *N.G. Krishna Aiyangar* for Appellant.

R. Gopalaswamy Aiyangar for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal arises out of an application by the appellant to scale down a preliminary decree on a mortgage. The mortgage in question was originally contracted on Wadsworth, J.

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* Appeal No. 22 of 1939. 29th August, 1941.

Muthukaruppan Chettiar v. Subbiah Chettiar. — Wadsworth, J.

5th January, 1931, on the security of house property situated within a municipality. The suit was filed on the mortgage in 1937, resulting in a preliminary decree dated 26th February, 1938 and it is that preliminary decree which the appellant sought to scale down under S. 19 of the Act. In 1938 the decree-holder, not being satisfied with the security given under the mortgage, filed two applications: one for the appointment of a receiver and the other for the attachment of certain agricultural lands belonging to the judgment-debtor. By way of defence to these applications the judgment-debtor came forward with an offer to give the agricultural lands, of which attachment was claimed, as additional security for the amount of the debt. This offer was accepted and on the execution of a bond (Ex. D) dated 23rd July, 1938, both the receiver application and the attachment application were dismissed. The contention upon which the application under S. 19 is based is that by reason of the terms of Ex. D the mortgage-debt, in respect of which the preliminary decree has been passed, becomes a debt contracted not only on house property within a municipality but also on the security of agricultural property so as to rule out the exception in S. 4 (*d*) of the Act.

The security bond (Ex. D) provides that:

> " The mortgagor has agreed to give the said property as security along with the property originally mortgaged for the amount of the said decree. The mortgagor hereby mortgages to the mortgagee the undermentioned property as additional security for the debt under the said decree".

There is also a clause empowering the mortgagee to realise the entire debt not only out of the original hypotheca but also out of the additional security and prescribing that the additional security is liable to be sold in execution of the decree through Court in the same manner as the property mentioned in the decree. No doubt the effect of this bond is to give to the decree-holder a right to execute his decree against both sets of property in any order he pleases in respect of the whole amount of the decree. But we cannot see in this bond any contract whereby the parties agree that the mortgage debt shall be deemed to have been secured on both sets of properties with effect from the date of the original contract. Nor do we see in the bond any agreement whereby the additional security shall be deemed to be part of the hypotheca covered by the preliminary decree. The truth is that when Act IV of 1938 came

Muthukaruppan Chettiar v. Subbiah Chettiar.

Wadsworth, J.

into force on the 22nd March, 1938, there was in existence a preliminary decree for the enforcement of a mortgage secured on a municipal house property alone. On the 1st October, 1937, the date on which under S. 8 the outstanding interest is to be cancelled, there was also a debt contracted on the security of house property alone. By the terms of S. 4 (*d*) of the Act such a debt is excluded from the operation of the Act. It is difficult to see how any addition of security at a date after the Act came into force can have retrospectively created a debt contracted on the security of property other than municipal house property so as to bring into force Ss. 7 and 8 of the Act and to exclude S. 4 (*d*).

In the result therefore we agree with the conclusion taken by the lower Court and dismiss the appeal with costs of the 1st respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Raja Velugoti Venkata Rajagopala Krishna Yachendra Bahadur Varu ... *Petitioner** (*Respondent*).

v.

Kuram Venkata Seshacharlu ... *Respondent* (*Petitioner*).

Venkata Rajagopala Krishna Yachendra Bahadur Varu v. Venkata Seshacharlu.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 15 (4) and 19—Relative scope.

Though S. 19 of Act IV of 1938 provides only for the scaling down of a decree for the repayment of a 'debt' which term does not strictly speaking include a liability for rent, a procedure analogous to that laid down in S. 19 of the Act should be followed with reference to decrees for rent. When there is a decree of a Civil Court determining the amount of rent payable for the relevant period, there is no room for any application to the Revenue Court under S. 15 (4), the object of which is to enable a tenant to ascertain the extent of his liability for rent as scaled down and pay it into the Revenue Court in order to prevent an unnecessary suit. Where however a decree has been passed by a Civil Court for rent the proper course for the judgment-debtor is to apply under S. 19 of, Act IV of 1938 to the Court which passed the decree for relief.

Petition under S. 115 of Act V of 1908 and S. 205 of the Government of India Act, praying that the High Court will be pleased to revise the order of the Court of the Special Deputy Collector of Chandragiri dated 12th January, 1939 and made in M.A. No. 227 of 1938.

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* C. R. P. No. 1705 of 1939. 20th March, 1941.

Venkata Rajagopala Krishna Yachendra Bahadur Varu *v.* Venkata Seshacharlu.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is preferred by the landholder against an order of the Special Deputy Collector of Chandragiri purporting to have been passed under S. 15 (4) of Madras Act IV of 1938. The applicant before the learned Deputy Collector was the owner of a 3/16 share in an *agraharam* and he claimed the right to get the *jodi* scaled down on the basis of a deposit of the arrears for faslis 1346 and 1347, not of the whole *jodi* of the *agraharam* but of the proportionate arrears due on his 3/16 share. The learned Deputy Collector, accepting evidence that in practice the applicant had been paying his proportionate share of the rent separately from the other *agraharamdars* and that these payments had been received, held that the liability of the applicant was only a liability for 3/16 of the total *jodi* and allowed the application. It does not appear to have been realised in the Court below that the question whether the liability of the applicant was a joint and several liability or a separate liability for a proportion of the whole *jodi* was concluded so far as these particular faslis are concerned by the decisions which led up to decrees which decrees in fact the applicant was trying to get modified.

It has been recognised that one of the *lacunae* in Act IV of 1938 is that no procedure is laid down for scaling down decrees for rent. S. 19 provides only for the scaling down of a decree for the repayment of a 'debt' which term does not, strictly speaking, include a liability for rent. But it has been held in *Ramadoss Reddiar* v. *Munuswami Reddiar*[1] that a procedure analogous to that laid down in S. 19 of the Act should be followed with reference to decrees for rent and that view has been adopted in subsequent decisions. It seems to me apparent that, when there is a decree of a Civil Court determining the amount of rent payable for the relevant period, there is no room for any application to the Revenue Court under S. 15(4). The object of S. 15 (4) is clearly to enable a tenant whose liability for rent has not yet come into Court to ascertain what is the extent of that liability as scaled down and pay it into the Revenue Court in order to prevent an unnecessary suit. To

1. (1940) 2 M.L.J. 825.

Venkata Rajagopala Krishna Yachendra Bahadur Varu *v.* Venkata Seshacharlu.

permit this procedure to be used when another Court has already passed a decision as to the liability for rent, would be to sanction the existence of two conflicting judicial orders, neither of which would necessarily govern the other. It is moreover apparent that any procedure for reducing the amount due under a decree passed before Act IV of 1938 came into force with a view to giving the relief laid down under S. 15 cannot be treated as an opportunity to alter the decree apart from the process of reduction provided in the Act. I held in *Ramamurti Pantulu* v. *Sri Lakshmi Narayana Harischandra Jagadev Raju Bahadur*[1], which was a similar case though on slightly different facts to the present that the petitioner cannot under the guise of scaling down a decree for rent, get that decree amended so as to give effect to a defence which should have been put forward in the suit and was not put forward or, if put forward, was not accepted. Still less can the same result be obtained by ignoring the decree and going to the Collector with an application for scaling down the rent on a basis which has been found to be untenable in the decree for the rent of the relevant period.

Turning to the facts of the present case, the application dealt with the arrears of *jodi* for Faslis 1340 to 1345. These faslis are admittedly covered by two decrees, one O. S. No. 229 of 1934 and the other S. C. No. 473 of 1937 of the District Munsif's Court of Tirupati. The judgment in the latter case has been exhibited and that judgment expressly negatives the contention of the present applicant that by reason of separate possession of the 3/16 share and separate collection of the rent for that share he was liable only to 3/16 of the *jodi* of the whole *agraharam*. The learned District Munsif repels this contention on the ground that the decision in O. S. No. 229 of 1934 has decided that the third defendant is liable jointly and severally with the other *agraharamdars* for the whole of the *jodi*. That is the suit covering the earlier faslis in reference to which this present application is presented. It follows therefore that both of the decrees which covered the relevant faslis proceeded upon a judicial decision binding upon the present respondent to the effect that he is liable jointly and severally for the whole of the rent of the *agraharam*. So long as these two decrees are in full force and effect, it is not open to

1. C. R. P. No. 2169 of 1939 [(1941) 1 M.L.J.N.R.C. 51.]

Venkata Rajagopala Krishna Yachendra Bahadur Varu v. Venkata Seshacharlu,

the respondent to contend in proceedings for scaling down the rent of those faslis that his liability is only for 3/16 of the rent. I doubt very much whether the learned Deputy Collector was right in entertaining the application at all when the matter was covered by Civil Court's decrees. In my opinion the proper course would have been to refer the applicant to the Court which passed the decrees. But even assuming that the procedure taken by the respondent is one open to him, he clearly cannot be allowed to use the right to scale down the rent as a right to re-open the question of joint or several liability which has been finally decided for those particular faslis by decrees of a competent Court. In the result therefore the revision petition is allowed with costs and the application is dismissed with costs throughout.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Narayanan Chettiar .. *Petitioner* (Respondent-Plaintiff)*

v.

Ottu Veeru Goundar and another .. *Respondents (Petitioners—5th and 1st Defendants).*

Narayanan Chettiar v. Veeru Goundar.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Promissory note, dated 4th January, 1931 and letter of guarantee in respect of the note by others dated 7th August, 1933—Compromise decree—Scaling down—Principles.

Defendants 1 and 2 executed a promissory note on 4th January, 1931 and defendants 3 to 5 gave a letter of guarantee, dated 7th August, 1933, in respect of the debt. There was a compromise decrce for Rs. 5,000 for the debt including interest and costs against all the defendants. Subsequently defendants 1 and 5 applied by separate applications for scaling down the decree debt.

Held, (1) that the fifth defendant was entitled to have his liability under the letter of guarantee scaled down with reference to S. 9 and not with reference to S. 8 of the Agriculturists' Relief Act;

(2) that a decree on a compromise is substantially the same as a decree on any other contract and to the extent to which the compromise is a renewal of a pre-existing debt the decree has to be scaled down with reference to the

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* C. R. P. No. 1905 of 1940. 15th October, 1940.
(A. A. O. No. 72 of 1939 converted into)

principal originally advanced. *Ramamurthi* v. *Sitaramayya,* (1940) 2 M.L.J. 293: I.L.R. (1940) Mad. 947, followed;

Narayanan Chettiar *v.* Veeru Goundar.

(3) that it is not proper for the Court to re-open the compromise, tax the costs and appropriate the payment first towards the costs under the proviso to S. 19. *Syama Rao* v. *Hanumantha Rao,* (1940) 2 M.L.J. 476; followed;

(4) that the proviso to S. 19 applied only to the costs as originally decreed and not to costs in execution. *Venkatammal* v. *Ramaswami Aiyar,* (1940) 2 M.L.J. 685, followed.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Dindigul dated 25th August, 1938 and made in E. A. Nos. 169 and 269 of 1938 in E. P. No. 5 of 1938 in O. S. No. 46 of 1935.

T. P. Gopalakrishnan for Petitioner.

C. A. Seshagiri Sastri for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This matter has been brought before us as a civil miscellaneous appeal but owing to the doubt regarding the existence of a right of appeal against an order under S. 19 of Madras Act IV of 1938 we have treated the appeal as a revision petition.

The appellant was the decree-holder in a suit on a promissory note. There were five defendants. Defendants 1 and 2 were impleaded as promisors. Defendants 3 to 5 were impleaded as liable under a letter of guarantee. The date of the promissory note was 4th January, 1931. The date of the letter of guarantee was 7th August, 1933. The suit ended in a compromise decree whereunder an amount of Rs. 5,000 and odd was agreed to be due for the debt including interest and costs. There were two applications before the lower Court, one by the first defendant and the other by the fifth defendant. There were no applications by defendants 2 to 4 nor was any evidence adduced that they were entitled to the benefits of the Act. The plaintiff asks us to hold that the defendants 2 to 4 are not entitled to the benefit of the scaling down operation. As we read the order of the lower Court that order purports only to scale down the decree so far as the two applications are concerned. Had it expressly conferred any benefit on defendants 2 to 4 it would obviously have been necessary to implead those defendants in the appeal before that benefit was taken away; but we do not find that any benefit was in fact conferred under this order upon those defendants who were not parties to the appli-

Narayanan Chettiar *v.* Veeru Goundar. — Wadsworth, J.

cations. Secondly the plaintiff contends that the fifth defendant became liable only on 7th August, 1933 and that his liability under the decree must therefore be scaled down under S. 9 of the Act and not under S. 8, though the principal debtor's liability has to be scaled down under S. 8. It is objected that the liability of the surety must be co-extensive with the liability of the principal debtor with reference to S. 128 of the Contract Act and that the order of the lower Court treating both the principal and surety in the same way is therefore correct. It seems to us that in applications under S. 19 of Madras Act IV of 1938 the Court is entitled only to proceed in accordance with the provisions of that Act. In accordance with the provisions of that Act the fifth defendant is entitled to have his liability scaled down with reference to S. 9 and not with reference to S. 8 of the Act. It may be that under the general law he will have a right to resist execution on the ground that the full amount due from the principal debtor has been paid. But that is a plea the adjudication on which cannot properly form part of proceedings under S. 19 of this special Act. We therefore leave it open to the fifth defendant in execution to raise any contention which may be available to him with reference to S. 128 of the Contract Act. We do not think it necessary to say anything on the further contention of the plaintiff that the decree on the compromise is to be the starting point in the scaling down operation. We have made it clear in our decision reported in *Ramamurthi* v. *Sitaramayya*[1] that a decree on a compromise is substantially the same as a decree on any other contract and that to the extent to which the compromise is a renewal of a pre-existing debt the decree has to be scaled down with reference to the original principal. It has not been shown before us that the decision of the lower Court treating this compromise as a renewal of the pre-existing liability under the promissory note is out of harmony with the principles just referred to.

It has been brought to our notice by the respondents that the lower Court has gone wrong in regard to its treatment of costs. The compromise did not separately allocate any portion of the payment towards the costs in the suit. In accordance with the decision in *Syama Rao* v. *Hanumantha Rao*[2] it is not

1. (1940) 2 M.L.J. 293: I.L.R. (1940) Mad. 947.
2. (1940) 2 M.L.J. 476.

proper for the Court to re-open the compromise, tax the costs and treat the payment of the sum so taxed as the amount first to be provided for with reference to the proviso to S. 19 of the Act. This proviso relates only to costs as originally decreed to the creditor. There is no decree for costs as such. Similarly it has been settled by a decision of this Bench (vide *Venkatammal* v. *Ramaswami Aiyar*[1] that the proviso applies only to costs as decreed and not to costs in execution. The lower Court is therefore wrong in directing payment to be made towards execution costs before the scaling down process was to start.

Narayanan Chettiar *v.* Veeru Goundar

Wadsworth, J.

In the result therefore the appeal, treated as a revision petition, is allowed and the case is remitted to the trial Court for fresh disposal in the light of this judgment. The first defendant will be entitled to his costs as against the plaintiff. The plaintiff and the fifth defendant will bear their own costs. The appellant will pay the deficient court-fee.

K.S. *Appeal treated as revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Venkatachalam Chetty .. *Appellant** (*Accused-Prisoner*).

Venkatachalam Chetty, *In re.*

Penal Code (Act XLV of 1860), Ss. 302 and 328—Victim recovering from dhatura *poison and then dying of pneumonia—Conviction of accused for murder—Propriety.*

Where the death of the victim was due not to the dhatura poison found to have been administered by the accused, but to pneumonia consequent upon exposure occasioned by coma or unconsciousness produced by the poison, and in fact the victim died of pneumonia after recovering from the dhatura poisoning the accused ought to be convicted not under S. 302 but under S. 328 of the Indian Penal Code.

Emperor v. *Nanhu,* (1923) I.L.R. 45 All. 557, distinguished.

Appeal against the order of the Court of Session of the Coimbatore Division in C. C. No. 30 of 1941.

Appellant not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant was tried by the learned Sessions Judge of Coimbatore on a charge of murder (S. 302) and two charges of administering poison with intent to commit an

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1. (1940) 2 M.L.J. 685.

* Crl. Appeal No. 357 of 1941. 28th August, 1941.

Venkatachalam Chetty, *In re.*

offence. The facts found against him were that on the night of the 6th December last at Pollachi he gave some food with which dhatura was mixed to three Malayalees in order that he might rob them of whatever they had on their person. The three men were found next morning lying out in the open and they were taken to the hospital. The medical evidence showed that all of them had been given dhatura. Two of them recovered completely. The third developed pneumonia and died on the 13th December.

There is no reason to differ from the finding of the learned Sessions Judge with regard to these facts. The learned Public Prosecutor has taken me through the evidence of the important prosecution witnesses, P.Ws. 1 and 2. These are the two men who recovered from the dhatura poisoning. P.W. 1 is the son of the deceased. This man identified the accused at parades held on different dates some time after the occurrence. The accused at the trial merely pleaded that he knew nothing and that the case was false. He was not able to say why any of the witnesses should have given false evidence against him.

The only point that needs discussion is whether the conviction of the accused for the offence of murder is correct. The conviction for the two offences under S. 328 of poisoning P. Ws. 1 and 2 is clearly correct and the sentences of seven years' rigorous imprisonment passed upon the accused for those offences are not excessive. With regard to the person who died the learned Sessions Judge has convicted him of murder finding that he died of pneumonia consequent upon the exposure occasioned by coma or unconsciousness produced by the poison. The learned Judge refers to a case reported in *Emperor* v. *Nanhu*[1]. There is however one important difference between the Allahabad case and this. In the Allahabad case it was proved that the deceased died within a very short time of the dhatura poisoning and the learned Judges held that the accused ought to have been charged under S. 302, Indian Penal Code, and that his offence clearly fell within the third and fourth paragraphs of S. 300. In the present case however death was not due to dhatura poisoning. The doctor's evidence is clear that the victim recovered from dhatura poisoning and that he died of pneumonia. The question therefore is whether pneu-

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1. (1923) I.L.R. 45 All. 557.

Venkatachalam Chetty, *In re.*

monia was a likely consequence of the administration of dhatura. If it was likely that the victim after being given dhatura and thereby being rendered unconscious would develop pneumonia, a disease which is very often fatal, then the pneumonia can be said to be so connected with dhatura poisoning that the act of the accused in administering dhatura had caused the death of the victim. But there is no evidence that pneumonia was a probable consequence of sleeping out at Pollachi on the night of the 6th December. The doctor does not say that any one who slept out in the open on that night was likely to get pneumonia. He says merely that the man "developed pneumonia on account probably of exposure in the open maidan on 6th December, 1940". Thus it is not established that the pneumonia was in fact caused by the exposure. Moreover the doctor did not say that pneumonia was a probable consequence of sleeping out; and as a matter of fact it appears that the other two men who were poisoned, P. Ws. 1 and 2, although they also slept out in the open for the same length of time, did not develop pneumonia.

In these circumstances it is clear that the act of the accused in administering dhatura to Kunjan Nayar has not been shown to have caused his death. The conviction of the appellant for the offence of murder cannot therefore be sustained and it is set aside. The appellant must be convicted in the case of Kunjan Nayar also of an offence under S. 328, Indian Penal Code. I set aside the sentence of transportation for life and for the offence under S. 328, Indian Penal Code, I sentence the appellant to ten years' rigorous imprisonment, the sentence to run concurrently with the other two sentences of seven years' rigorous imprisonment.

K. S. *Sentence varied.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE SOMAYYA.

F.B.

Sundaresa Aiyar, *In re.*

In the matter of Sri V. M. Sundaresa Aiyar, *Pleader, Vellore.**

Legal practitioner—Filing certificate of receipt of fees which he has not n fact received—Whether misconduct.

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*R.C. No. 20 of 1941. 8th September, 1941.

F.B.

Sundaresa Aiyar, *In re.*

It is a very serious matter for a pleader or an advocate to file a false certificate with regard to fees which he has not in fact received and the Court will take strong disciplinary action in any such case coming to its notice.

The notice under Ss. 13 and 14 of the Legal Practitioners' Act issued by the High Court to Sri V. M. Sundaresa Aiyar, Pleader, Vellore, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court, in that he a pleader practising at Vellore filed into the Court of the District Munsif of Vellore, fees certificates dated 7th July, 1934, 19th August, 1937 and 18th February, 1938, in O. S. No. 300 of 1934, 31 of 1937 and I. A. No. 858 of 1937 in O. S. No. 31 of 1937 respectively on the file of the said Court of the District Munsif of Vellore, certifying that he had received Rs. 40, Rs. 60 and Rs. 20 respectively for his fees in the said proceedings, while in fact as per the entries in his statement of accounts, Ex. XIV of O. S. No. 297 of 1940 and his evidence as D.W. 2 in the said O. S. No. 297 of 1940 on the file of the Court of the District Munsif of Vellore, he did not receive these sums of Rs. 40, Rs. 60 and Rs. 20 or any other sum for his fees in the said proceedings and that he has thereby rendered himself liable to be dealt with under S. 13 of the Legal Practitioners' Act.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the notice.

T. M. Krishnaswami Aiyar for *V. Govindarajachari* for the Pleader.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The respondent is a pleader practising at Vellore. He has been charged with professional misconduct. He filed in Court three certificates to the effect that he had received from his client by way of fees Rs. 40, Rs. 60 and Rs. 20, respectively. He had not in fact received these fees and his certificates were false. The charge against him is in connection with the filing of these certificates.

There is no dispute with regard to the facts, but the respondent pleads that there are extenuating circumstances. He had acted for this client for many years and he had kept a running account in respect of the work done for him. He had always been paid his fees and he had no reason to suppose that these sums would not be paid. It is certainly a very serious matter for a pleader or an advocate to file a false certificate

F.B.

Sundaresa Aiyar, *In re.*

Leach, C.J.

with regard to fees. This Court had to draw attention to the seriousness of such conduct in a circular issued on the 13th April, 1939. In that circular the Court said that for a pleader or an advocate to file a fee certificate without having received the fee was most improper and the Court would take strong disciplinary action in any case coming to its notice. This appears to be the first case which has been brought to the notice of the Court. It will be inadequate to pass a mere censure on the respondent as his offence is a very serious one but as there is some thing to be said for him in extenuation we consider that adequate punishment will be to suspend him from practice for a period of one month, and there will be an order accordingly.

It must be clearly understood that the punishment which the Court has inflicted in this case is not to be taken as a guide with regard to the Court's action in the future. What is stated in the circular will be adhered to.

K. S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

T. S. Alagappa Mudaliar ... *Appellant* (Plaintiff)*

v.

A. L. V. R. S. T. Veerappan Chettiar and another. *Respondents (Defendants).*

Alagappa Mudaliar *v.* Veerappan Chettiar.

Workmen's Compensation Act (VIII of 1923), *Ss.* 3 (5), 10 (1) *and* 22—*Workman applying after six months time to Labour Commissioner—Application admitted—But later on dismissed on the ground of delay in applying—Legality of disposal—Meaning and nature of "claim" in S.* 10.

"Claim for compensation" in S. 10 (1) of the Workmen's Compensation Act refers to the claim made before the Commissioner. Such claim is of the nature of a plaint without which no proceedings for the recovery of compensation are maintainable, and even where a claim has been rejected *in limine* the claim would be one "instituted" before the Commissioner within the meaning of S. 3 (5) (*a*) so as to bar a suit for damages in a Court of law.

Rejection by the Commissioner of an application for compensation after condonation of delay in filing the same without giving any decision on the merits is illegal, and the remedy of the aggrieved party is only to carry the matter to the High Court under S. 30 of the Act.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 2 of 1937 pre-

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* S. A. No. 1068 of 1937. 27th September, 1940.

Alagappa Mudaliar v. Veerappan Chettiar.

ferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 543 of 1934.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

Srinivasaraghavan for Respondents.

The Court delivered the following

JUDGMENT.—On the 13th of August, 1933, the appellant met with a serious accident in the respondents' mill, his leg being fractured by the falling of a beam on it. The employers (the respondents) assured him that they would look after him, pay his expenses while he was in the hospital, maintain him, re-employ him when he was discharged from the hospital, and see that he was looked after for the rest of his life. On the strength of this assurance he was persuaded to file a leave application, in which he said falsely that he fell into a channel and so wanted some leave. After his discharge from the hospital some time in November, he was re-entertained. On 1st March, 1934, he was dismissed from service, apparently because he was not able on account of his injury to perform his duties properly. Lawyer's notices were sent to the employers, who denied that the mill was open on the day of the accident and asserted that the appellant had been on leave. As no satisfactory reply was forthcoming, an application was made before the Labour Commissioner on 27th March, 1934. Although this was beyond six months from the date of the accident, the application was entertained and treated as a claim for compensation, and some enquiry seems to have been made. On 23rd April, 1934, the Commissioner asked the appellant to furnish certain particulars and to furnish a medical certificate. Before that date, the Inspector of Factories, to whom the application for compensation was referred, received a letter from the respondents asserting that the day on which the accident was alleged to have taken place was a Sunday and that the mill was not open on that day. They also referred to the leave application of the appellant in support of their contention. On 12th May, 1934, the Commissioner passed an order which seems to me very discreditable. Instead of dealing with the application on its merits after having apparently condoned the delay in filing the application, he dismissed the application on the technical ground that it was barred by time

under S. 10 (1) of the Workmen's Compensation Act. Although the unfortunate appellant had engaged lawyers in connection with this matter with regard to sending notices and so on, he was not advised to take this matter to the High Court, under S. 30 of the Act. Instead, he filed the present suit on 1st August, 1934, before the District Munsif, Tinnevelly, for compensation and for damages for negligence. That suit has been dismissed on the ground that it is barred by S. 3 (5) of the Workmen's Compensation Act and that decision was confirmed on appeal by the Subordinate Judge.

It is first contended that if the letter to the Commissioner was an application for compensation, it was not barred by time under S. 10 (1). S. 10 (1) reads:

"No proceedings for the recovery of compensation shall be maintainable before a Commissioner unless notice of the accident has been given, in the manner hereinafter provided as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been instituted within six months of the occurrence of the accident..........."

There are certain provisos to this section which enable the Commissioner to dispense with some of these limitations. It is contended that the 'claim for compensation' referred to in S. 10 (1) means a claim made of the employers and not a formal claim made before the Commissioner. The section speaks of a claim being instituted. "Instituted" implies the formal making of a claim before some tribunal and is not the same as making a claim of the employer. Moreover, the words "claim" and "instituted" are referred to not only in S. 10 (1). Even the third proviso to S. 10 (1), gives a clear indication of the meaning of the word 'claim' for it runs:

"Provided further that the Commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given or the claim has not been instituted in due time as provided in this sub-section (1)........."

The word 'claim' must have the same meaning throughout and must be the claim made to the Commissioner. In S. 3 (5) (*a*) it is clear that the instituting of the claim for compensation is before the Commissioner, and it is difficult to believe that the instituting of the claim referred to in S. 3 (5) (*a*) is not the same instituting of the claim as is referred to in S. 10 (1). S. 22, which deals with the procedure to be adopted during the enquiry of the claim, refers to the "claim", and the

Alagappa Mudaliar *v.* Veerappan Chettiar.

"claim" there clearly relates to a claim made before the Commissioner. This was also the view of two learned Judges of the Patna High Court in *Abdul Matin* v. *Bidesi Rajwar*[1]. There is, however, a decision of the Calcutta High Court to the contrary in *Abdul Karim* v. *Eastern Bengal Railway*[2]. The reasons given by the learned Judges were: (1) the Indian Legislature intended to follow the English Act and (2) the wording of S. 22, to which I have referred. With regard to the first point, with great deference to the learned Judges, it seems to me very unsafe to presume that the Indian Legislature knew and intended to adopt the interpretation put by the English Courts upon the corresponding English Act. I should have thought that there was little reason to suppose that the Indian Legislature had studied the corresponding English Act and wished to adopt it. No doubt a drafter may closely follow an English original, but I do not think there is any reason for assuming that the Legislature had a similar desire. Moreover, the Indian Act departs in many respects from the English Act and the Legislature has substituted for the word 'make' in the English Act the word 'instituted', which has a very much more formal meaning and suggests the making of a claim before some tribunal. It has been pointed out by the learned Advocate for the respondents that the Legislature has now amended the wording of S. 22 (1) because the Calcutta High Court had given to the section a meaning not intended by the Legislature.

The second reason given by the Calcutta High Court, to use the words of the learned Chief Justice in *Abdul Karim* v. *Eastern Bengal Railway*[2] is this:

> " S. 22 relates to the initiation of proceedings before a Commissioner and refers to an 'application for the settlement of any matter by a Commissioner' and prescribes certain particulars which are to be contained in the application, and among them, 'in the case of a claim for compensation against an employer' certain details are to be given. I should find it difficult to hold that the words at the head of the section, 'an application for the settlement of any matter by a Commissioner' and the reference to a 'claim to compensation against an employer' both refer to exactly the same thing, namely, that by which proceedings are initiated before the Commissioner."

This is no doubt a weighty argument, but the learned Advocate for the respondents points out that S. 22 does not deal only with claims for compensation. This is indicated

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1. (1938) I.L.R. 17 Pat. 658.
2. (1934) I.L.R. 61 Cal. 508.

by the fact that in S. 22 (2) (*b*) special reference is made to the form of application where it amounts to a claim for compensation against an employer, certain particulars being required in addition to those to be furnished in other applications for the settlement of any matter by a Commissioner.

This question does not however directly arise for decision here because, unfortunately for the appellant, he did not carry the matter to the High Court and contend that the order of the Commissioner was wrong. Whether the decision of the Commissioner was right or not, that decision is now final, and the only question here is whether a claim has been filed at all. It is argued that Ex. L, which is the claim on which the Commissioner acted, is a very loosely worded document and does not contain by any means all the particulars that are required by S. 22: nor does it contain the certificate referred to in r. 19 (2) of the Rules framed under the Act. A form (form F) under r. 19 has been prescribed, but this form the Commissioner, if he thinks fit, may get the applicant to fill up and sign after the claim is made. It is no doubt true that several of the particulars required by S. 22 are not to be found in Ex. L, the claim; but there can be no doubt, reading Ex. L as a whole, that it was intended to be a claim for compensation. It could not have been the intention of the Legislature that a claim could not be entertained or enquired into, or that no compensation should be granted, unless the application were in strict form. If those particulars and that certificate were necessary, the Commissioner could have obtained them; but he did not in fact do so, presumably because he did not think them necessary. In paragraph 4 of Ex. L, the appellant says:

" The Mill agent has, the petitioner now understands, got such a letter (referring to the leave application) signed by the petitioner in order to avoid the penalties for negligence giving rise to injuries to the petitioner in the course of employment and to escape giving compensation to the petitioner."

The appellant at the end of his petition does not directly ask for compensation, but prays that the Commissioner will be pleased "to enquire into the matter and render justice". This is the conventional ending of a petition, but the petitioner added:

"*N.B.*—It is prayed that notice of the date of enquiry be given to the petitioner."

He seems to have had in view the enquiry that is to take place in an ordinary claim for compensation. The application

Alagappa Mudaliar *v.* Veerappan Chettiar.

was treated as a claim for compensation by the Commissioner. It was admitted and the Commissioner made enquiries, called for particulars from the appellant in connection with his claim for compensation; and the appellant furnished those particulars. It is impossible to construe Ex. L as anything but an application for a claim for compensation. If Ex. L was a claim for compensation before the Commissioner, then it is clear that the suit is barred by S. 3 (5) of the Act.

It has been contended that a claim that has been rejected *in limine* would not be a claim instituted before the Commissioner within the meaning of S. 3 (5) (*a*). The wording of S. 10 (1):

> "No proceedings for the recovery of compensation shall be maintainable before a Commissioner........unless the claim for compensation with respect to such accident has been instituted within six months of the occurrence of the accident.........."

is referred to in support of that argument. The whole of S. 10 (1) however indicates that the claim for compensation is of the nature of a plaint without which no proceedings for the recovery of compensation are maintainable: so that the words relied on only mean that unless there is a formal claim for compensation, the Commissioner cannot make any enquiries or conduct any proceedings. In the present case, proceedings did however take place and the claim for compensation was instituted and was admitted by the Commissioner. S. 3 (5) (*a*) therefore clearly applies, and the lower Courts were right in holding that the suit was barred.

The appellant has suffered very greatly at the hands of the Labour Commissioner, who should have dealt with his application in accordance with the spirit as well as the letter of the Act. Although this question has not been argued, it seems to me that the Commissioner acted illegally in rejecting the application after condoning the delay, without giving any decision on the merits of the application. The appellant was deceived by the respondents, who lulled him into a sense of security by promising to give him employment and to look after him, which security led him to prefer his claim before the Commissioner out of time. This behaviour of the respondents was disgraceful. Nothing can be done for the appellant in this appeal; but the respondents have represented through their learned advocate that they do not wish to take advantage of the dismissal

of this appeal by refusing relief to the appellant. They promise to give compensation to him and I hope, for the sake of their reputation as employers, that they will do so. The respondents do not press for their costs. The appeal is dismissed without any order as to costs. The appellant will have to pay the Court-fee due to Government.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Seemakurthi Manikyam ... *Petitioner** (*Respondent*)

v.

Jonnavithula Manikyamma ... *Respondent* (*Petitioner*).

Civil Procedure Code (V of 1908), S. 60 (b)—'Tools of an artisan' meaning of—Musical instruments whether such 'tools'.

A musician is not an artisan and musical instruments are not 'tools of an artisan' within the meaning of S. 60 (*b*), Civil Procedure Code and should not be released from attachment in spite of the person, in whose possession they are, having used them for earning a livelihood.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Rajahmundry dated 4th November, 1938 and made in E. A. No. 799 of 1938 in E. P. No. 234 of 1938 in S. C. No. 633 of 1937.

P. V. Vallabacharyulu for Petitioner.

T. Satyanarayana for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner in this civil revision petition in execution of the decree obtained by him in Small Cause Suit No. 633 of 1937 on the file of the District Munsif of Rajahmundry attached a sewing machine, a harmonium, a fiddle and a veena which belonged to his judgment-debtor, who was a Brahmin widow. The judgment-debtor filed an application for the release of the articles from attachment, and the order passed by the District Munsif of Rajahmundry on that application has given rise to this revision petition. The learned District Munsif finding that the judgment-debtor made her living by sewing and teaching music and that the sewing machine and musical instruments were consequently "tools of an artisan" within the meaning of S. 60, cl. (*b*) of the Civil Procedure

*C. R. P. No. 9 of 1939. 20th January, 1941.

Manikyam v. Manikyamma.

Code allowed the application and released the articles from attachment. It is conceded for the petitioner that the finding that the sewing machine was a "tool of an artisan" cannot be questioned. The only questions for determination are, therefore, whether a musician is an artisan within the meaning of S. 60 (*b*), C. P. Code and whether, if so, musical instruments are the tools of an artisan within the meaning of the same section.

It is urged by the learned advocate for the petitioner that the cases cited by the learned District Munsif do not support his conclusion. The District Munsif referred to the ruling of a single judge of the Upper Burma Judicial Commissioner's Court in *Maung Tha U* v. *Maung Hla*[1] and to decisions of the Allahabad and Bombay High Courts in *Bindeshari* v. *Banshi Lal*[2] and *Emperor* v. *Haji Shaik Mahomed Shustari*[3]. The first case is of no assistance as the learned judge, without deciding whether a musician was an artisan, held that his musical instruments were not tools within the meaning of S. 60, cl. (*b*), C. P. Code. With respect, if I was of opinion that a musician was an artisan, I should have no hesitation in holding that the musician's instruments were tools of an artisan within the meaning of S. 60. In the Allahabad case it was held that cooking vessels (utensils) and the "paraphernalia" of a soap-maker were tools of an artisan, and in the Bombay case, that a person engaged to drive an engine on board a steamer was an artisan within the meaning of the Indian Emigration Act. It does not seem to me that it necessarily follows from either of these decisions that a musician is an artisan. The learned District Munsif, however, was of opinion that these decisions justified a liberal interpretation of the terms "artisan" and "tools of an artisan" and relying on a definition of "artisan" in Dr. Anandale's dictionary as "one skilled in any art or trade, a handicraftsman, a mechanic" found that the musical instruments in question were "tools of an artisan" within the meaning of S. 60 (*b*), Civil Procedure Code.

In the Allahabad and Bombay cases referred to above the learned Judges who decided the cases based their decisions on the definitions of "artisan" given in standard dictionaries. In the Allahabad case, Niamatullah, J., referred to the definition

1. (1916) 38 I.C. 414. 2. (1931) I.L.R. 54 All. 399.
3. (1907) I.L.R. 32 Bom. 10.

Manikyam v. Manikyamma.

in Murray's Dictionary, namely, "one who practises or cultivates an art—an artist". A musician would no doubt fall within the scope of this definition, but I do not think that the definition is one which can be accepted. In *The Emperor* v. *Haji Shaik Mahomed Shustari*[1], the definition of an artisan given in Webster's Dictionary was accepted—"one who is engaged in a mechanical employment". The Oxford English Dictionary defines an artisan as (*i*) "an artist"—a meaning attached to the word which was stated to be obsolete and (*ii*) "one who is employed in any of the industrial arts, a mechanic, handicraftsman, artificer". I have no doubt that in common speech "artisan" does not mean "artist" now and has not meant it for a very long time.

For the petitioners I have been referred to a ruling of this High Court in an old case reported in *Poonen Ex parte*[2]. In that case it was ruled that a washerman was not an artisan within the meaning of Madras Act III of 1871. S. 3 of the Act sets out the classes of village officers to which the Act applies, and it is plain that under the ruling of this High Court the only village artisans among the classes mentioned in S. 33, cl. (4) would be the village carpenter, blacksmith and potter. Neither a village barber, washerman, astrologer, nor a priest is an artisan within the meaning of the Act. The ruling of course relates to an artisan within the meaning of the Madras Hereditary Village Officers' Act, but it is of interest as, in my opinion, it follows common usage, and it certainly would not permit the inclusion of musicians in the category of artisans. Moreover, the Bombay and Allahabad decisions referred to by the learned District Munsif, while they no doubt give a wider meaning to "artisan" than "handicraftsman" or "artificer" do not take the definition beyond the scope of "one who is employed in any of the industrial arts". A musician is not employed in an industrial art, and I think that the learned District Munsif was wrong in his conclusion that there was authority for attaching a sufficiently wide meaning to "artisan" to include a musician. This view is justified by a reference to S. 60 (*b*), Civil Procedure Code itself. In the same clause "tools of artisans" are freed with the "implements of husbandry" of an agriculturist from liability to attachment. It seems plain that, probably, the legislature intended to provide that the tools of

1. (1907) I.L.R. 32 Bom. 10. 2. (1876) I.L.R. 1 Mad. 174.

Manikyam v. Manikyamma.

certain types of working men should not be liable to attachment. If a musician's instruments are within the meaning of "tools of an artisan", it is clear that the implements required for his profession by any professional man must come within the definition, as, for instance, the instruments of a surgeon or a dentist. I have no doubt that if the legislature had intended that the implements required by any man in order to carry on his profession should be freed from liability to attachment it would have made its intention plain.

For the reasons given I am of opinion that the musical instruments in question in this case were not 'tools of an artisan" within the meaning of S. 60, cl. (*b*), Civil Procedure Code and should not have been released from attachment. The order of the lower Court is, therefore, reversed and the petition is allowed. The lower Court has found that the respondent used the musical instruments in order to earn her livelihood. In the circumstances of the case, I make no order as to costs.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Srimat Paruvastu Pattabhirama China Govindacharyulu. .. *Appellant** (*Defendant*)

v.

Punyamurthula Seshagiri Rao .. *Respondent* (*L. R. of Plaintiff*).

Govindacharyulu v. Seshagiri Rao.

Libel—Suit for damages—Earlier criminal complaint and proceedings—Unconditional apology—Whether operates as accord and satisfaction of civil action in tort.

Where a certain act might give rise to a cause of action in tort and at the same time furnish a ground for a criminal complaint, an unconditional apology given before the Criminal Court (in this case in proceedings in respect of an alleged libel) will not operate as an accord and satisfaction of a subsequent civil action for damages, unless at the time of tendering the apology it was specifically agreed between the parties that the apology was also to operate as an accord and satisfaction of the civil action.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 47 of 1936 (A.S.No. 136 of 1936 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 4 of 1934.

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* S. A. No. 854 of 1937. 8th August, 1940.

Govindacharyulu *v.* Seshagiri Rao.

K. Krishnaswami Aiyangar and *A. Seshachari* for Appellant.

K. Bhimasankaran for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of an action for damages for libel filed by the plaintiff against the defendant in respect of certain allegations made by the latter in writing to the Superintendent of Post Offices concerning an appointment to the branch post office at Vedapalli. This was in December, 1932. On the 8th February, 1933, the plaintiff sent a notice to the defendant requiring him to tender an unconditional apology within fifteen days of the date of receipt of this notice and threatening a civil or criminal action in case he failed to do so. On the 26th February, 1933, the defendant sent a reply stating that the allegations made by him in his petition were not false, that he never intended to harm his reputation and that he was sorry that the allegations which he had made should have given rise to any misapprehension in regard to his intention. Of course this was not an unconditional apology as required by the plaintiff. Thereupon the plaintiff filed a criminal complaint. The defendant justified his action and the criminal complaint was dismissed. A revision petition was preferred against the said order and after a lengthy argument addressed by both sides as observed by the Sessions Judge who disposed of the case, the defendant herein withdrew his allegations against the plaintiff and expressed regret. In view of the unconditional apology the plaintiff withdrew the criminal complaint, and made an endorsement to that effect on the complaint petition. Subsequent to this, some misunderstandings apparently arose and this suit had been filed for damages. In the written statement filed by the defendant he justified his action, pleaded qualified privilege and also alleged that he having tendered an apology in the Criminal Court, the suit ought not to have been filed. The learned District Munsif went elaborately into all the questions and found against the plea of qualified privilege and that the apology was no defence to a civil action in tort and in assessing damages he observed as follows:

"I do not think that damages to the extent of Rs. 100 should be granted to the plaintiff, because if the defendant acted meanly in sending the petition with a view to cause loss to his enemy and gain to his own relative, the

Govinda-charyulu v. Seshagiri Rao.

plaintiff acted at least equally meanly in filing the criminal case and more meanly in filing this suit".

He therefore thought that the plaintiff was entitled to nominal damages and gave him Rs. 5 for damages and also the costs of the suit. It would have been better if both the parties had contented themselves with this decision, but the defendant chose to file an appeal against that decision to the learned Subordinate Judge. The appeal was dismissed and against that dismissal this second appeal has been preferred.

Mr. Krishnaswami Aiyangar for the defendant has urged before me two points: (1) that his client was justified in sending the petition containing the allegations because he was a person interested as a villager in making the complaint to the Postal Superintendent and therefore his client was protected by qualified privilege and (2) that the unconditional apology given in the Sessions Court and accepted by the plaintiff who in consequence withdrew the criminal revision petition operates as an accord and satisfaction of the action for damages for libel. In regard to the first point I fail to see what interest the defendant had in a matter concerning an appointment by the Government. I think that the view taken by the learned Subordinate Judge is perfectly sound and no question of qualified privilege arises in this case. In regard to the second point raised by Mr. Krishnaswami Aiyangar there was undoubtedly some force in his argument that the defendant while giving an apology never contemplated that a civil action would again be brought against him. But the question is not what his client thought, but the question is, what is the effect of the unconditional apology given before the Criminal Court? A certain act might give rise to a cause of action in tort and at the same time furnish a ground for a criminal complaint. Ordinarily in English law where a certain act gives rise to an indictment for felony and also to a civil action in tort, it is usual to have recourse to criminal proceedings before an action in tort for damages is filed. One remedy is different from the other and any adjustment of the criminal complaint would not operate as an accord and satisfaction of the civil action for damages. In one case in the interests of the state the wrongdoer is punished whereas in the other compensation is awarded to the person who suffers by the injury. Therefore unless at the time of giving the unconditional apology it was specifically agreed between the parties that the accept-

Govindacharyulu v. Seshagiri Rao.

ance of the apology should also operate as an accord and satisfaction of the civil action, *prima facie* I must take it that the parties intended to terminate the criminal litigation by the unconditional apology. I am inclined to agree with the lower Court and hold that the endorsement in the criminal complaint made by the Sessions Judge terminates only the criminal complaint and cannot be construed as a release of the plaintiff's right of suit for damages. It appears that even after the termination of the criminal proceedings, this apology was published in the newspapers and the plaintiff may well have been content with that. But he has chosen to assert his legal right to get redress for the injury he has sustained and he cannot be deprived of his legal right, though discretion may be vested in the Court in assessing damages. That is what the first Court has done and I cannot say that the damages awarded is excessive nor does Mr. Krishnaswami Aiyangar complain that it is. I am also of opinion that the order for costs is not wrong, because the defendant did not content himself with pleading that the unconditional apology given by him in the criminal case operated as an accord and satisfaction but began to justify his action by pleading qualified privilege and the Court had to investigate into the matter. If he had not taken this other plea, I would probably have deprived the plaintiff of his costs of the litigation, but in the circumstances I cannot say that the exercise of discretion by the lower Court in awarding costs to the plaintiff is wrong.

The second appeal fails and is dismissed with costs. Leave to appeal refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

Madhava Rao v. Administrator-General of Madras.

Madhava Rao *alias* Chinnakannan minor by his mother and next friend Sironmani Ammal. *Plaintiff**

v.

The Administrator-General of Madras and others. *Defendants.*

Indian Succession Act (XXXIX of 1925), Ss. 142 and 150—Provision in will for purchase of house for plaintiff from a specific fund, a bank deposit

* C. S. No. 72 of 1940. 23rd August, 1940.

Madhava Rao v. Administrator-General of Madras.

for Rs. 14,000—Later provision for division in equal shares between plaintiff and his brothers of balance from outstandings realised after deduction of money spent for the purchase of the house—Testator drawing out bank deposit on maturity and buying property—Legacy to plaintiff, if adeemed—Nature of legacy, specific or demonstrative.

Where a will provided for the purchase of a house for the plaintiff for Rs. 12,000 out of a bank deposit for Rs. 14,000, and later on recited that the balance left over from the collections of outstandings after deduction of the amount needed for purchase of the house for the plaintiff should be divided between him and his brothers equally, and the testator had drawn out the bank deposit on maturity and bought property, on the question whether in the circumstances the legacy to the plaintiff was a specific legacy and stood adeemed,

Held, that construing the will as a whole, the intention of the testator was to give a demonstrative and not a specific legacy to the plaintiff and as such there was no ademption and the plaintiff was entitled to a provision for Rs. 12,000 out of the assets of the testator for the purchase of a house for him.

V. Sundararajan for Plaintiff.

The Administrator-General (S. Rangaswami Aiyangar) in person.

S. S. Rajagopalan and *T. K. Rajagopalan* for Defendants.

M. A. Rajagopalan guardian *ad litem* for 3rd Defendant in person.

The Court delivered the following

JUDGMENT.—The originating summons is taken out for the purpose of construing the will of the late C. Manicka Mudaliar who died on 19th January, 1936, having made his last will and testament on 22nd January, 1935. He left two widows, by the senior widow one son, who is the second defendant, and by the junior widow two sons, the third defendant and the plaintiff. The Administrator-General of Madras is now administering the estate and is the first defendant.

The matter for decision is whether a gift in favour of the plaintiff of a sum of Rs. 12,000 was specific or demonstrative and if specific, whether it has been adeemed. To help to answer the problems to be considered one must ascertain, as far as one can, what the intention of the testator was, as expressed in his will.

In regard to the second and third defendants, he gave to each of them a large and a small house in Madras and lands in

the mofussil. To the plaintiff he gave specifically a small house in Madras and lands in the mofussil. The will then provides as follows:

"Further there is a sum of Rs. 14,000 in fixed deposit in my name in the Indian Bank, Madras, out of that amount I have given Rs. 12,000 to this son. With that sum of Rs. 12,000, my executors shall as early as possible purchase a house of the value of about Rs. 12,000 in Madras."

The fixed deposit matured between the date of the will and the death of the testator and it is common ground that after the date of its maturity the testator purchased a house in Madras for the sum of Rs. 10,000.

On behalf of the second and third defendants, it is contended that the gift of Rs. 12,000 in favour of the plaintiff was specific and that it was to be paid out of the fixed deposit with the Indian Bank; as there was no such fund at the date of the deceased's death, the legacy has been adeemed and must fail. On the other hand, on behalf of the plaintiff it is contended the legacy was demonstrative and whilst the legacy was primarily to be paid out of the fund with the Indian Bank, as that did not exist at the death of the testator, his other estate is responsible for the payment of the legacy.

Later in the will, the testator provides that moneys advanced by him on promissory notes and on mortgages as well as the money in the Bank should be collected, and the amount spent for the purchase of a house for the plaintiff being deducted, the balance should be divided into three shares, each of his sons, the plaintiff and defendants 2 and 3 being entitled to a share. Later still, in this will, the testator says that he had appointed his three sons as residuary legatees of all his movable and immovable properties. It is clear that the testator intended that the money which he had directed should be spent upon the purchase of a house should not be divisible amongst the three sons as he expressly excludes this from the moneys to be divided between the plaintiff and second and third defendants. When considering the general residuary clause in the will, one must give a meaning to the earlier provision. There can be no doubt that the testator wished to make equal provision for all his sons. Having given to the second and third defendants a large and a small house in Madras, he gave only a small house to the plaintiff, and expressly provided for the purchase of a large house.

Madhava Rao v. Administrator-General of Madras.

Emphasis has been placed by learned counsel on behalf of the other two sons that the gift of Rs. 12,000 to the plaintiff was expressed to be out of a sum of Rs. 14,000 in fixed deposit and thus, there has not been a general gift of a legacy. It is conceded that if there had been first a gift and then a subsequent direction of the fund out of which it should be paid, it would have been demonstrative and would be payable out of the general estate, in the absence of the existence of the fixed deposit account in the Bank at the date of the death. I think it is laying too much emphasis on the position of words or sentences to make the wish of a testator to be dependent upon such position.

S. 142 of the Succession Act provides that where a testator bequeaths to any person a specified part of his property which is distinguished from all other parts of his property, the legacy is specific. S. 150 provides that where a testator bequeaths a certain sum of money and refers to a particular fund or stock so as to constitute the same, the primary fund or stock out of which payment is to be made, the legacy is to be deemed to be demonstrative. The latter part of the explanation provides that where the legacy is directed to be paid out of specified property, it is demonstrative. To these two sections, there are a large number of illustrations, I can find but little, if any, help in some of these illustrations, the wording of some of them in both sections being substantially identical. For instance, one of the illustrations to S. 142 provides that an annuity of Rs. 500 out of the rents of the zamindari of *W* is a specific legacy; whereas an illustration under S. 150 provides that Rs. 1,000 out of the sum of Rs. 2,000 due to the testator is a demonstrative legacy. I merely refer to these to show the conflicting nature of the illustrations which are given.

In considering its provisions, one must refer to the will as a whole in order to ascertain the intention of the testator. Seeing the provision made for two sons of gifts of a large and a small house to each, the gift of one small house to the plaintiff, and the provision for the purchase of a larger house indicates that the testator wished to provide for his three sons in the same way and to the same extent. The direction that out of the moneys at the time of the date of the will which were deposited with the Indian Bank, a sufficient sum is to be paid to

Madhava Rao v. Administrator-General of Madras.

purchase the other house together with the later provision in the will that the balance of the bank deposit was to be divided equally between the three sons after there had been deducted from the deposit the moneys to be spent upon the purchase of a house, to my mind, shows that the testator intended to make a gift of a sum of money in favour of the plaintiff, which sum was to be spent on the purchase of a house and that this gift is not a specific but a demonstrative gift and the direction that it was to be paid out of a specified fund does not make the gift a specific one.

There will therefore be a direction that the first defendant will provide out of the assets of the testator in his hands a sum of Rs. 12,000. Learned counsel on behalf of the plaintiff, who is a minor, states that the house which was purchased for Rs. 10,000, can be given to the plaintiff, subject to the approval of the Court, in respect of the legacy of Rs. 12,000. The learned Administrator-General for the first defendant tells me, and I accept it, that this house, although Rs. 10,000 was paid for it, in fact is worth Rs. 12,000 and indeed even more than that. The first defendant will therefore take the necessary steps to place this house in the name of the plaintiff and the income thereof will be paid to him or to his guardian as the case may be. No other order is necessary save that the costs of all parties will be paid out of the assets. I fix the plaintiff's costs at Rs. 350 including all out fees and expenses, second defendant's at Rs. 175 and for the third defendant, I fix the guardian's fee at Rs. 125 and Rs. 75 to the Administrator-General.

Prayer 4 of the Originating summons seeks for a direction from the Court regarding the disposal of some jewellery. This jewellery is now the subject-matter of a suit in the City Civil Court, and it is unnecessary to dispose of this matter now. The abandonment by the plaintiff of the relief in respect of this jewellery is in no way to prejudice his rights, if any, in regard to it.

K. C. *Directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Nataraja Pillai and another .. *Appellants** (*Petitioners-Defendants 1 and 2*).

v.

Rangaswami Karamundar .. *Respondent* (*Respondent-Plaintiff*).

Nataraja Pillai *v.* Rangaswami Karamundar.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Sale in execution of decree held prior to 1st October, 1937—Purchase by decree-holder with leave to bid and set off—If operates as immediate satisfaction of the decree by reason of O. 21, r. 72 C. P. Code—Liability of decree to be scaled down.

In the case of a sale in execution to a decree-holder who has been allowed to bid and set off, the decree is not satisfied until the sale has been confirmed. Therefore where confirmation of such a sale is held up owing to the pendency of an application under O. 21, r. 90 of the Code of Civil Procedure to set aside the sale held before 1st October, 1937, the decree subsists and the judgment-debtor is entitled to ask that the decree be scaled down under Act IV of 1938.

Appeal against the order of the Court of the Subordinate Judge of Tanjore dated 7th August, 1939 and made in I. A. No. 261 of 1938 in O.S. No. 39 of 1933 etc.

The Advocate-General (Sir A. Krishnaswami Aiyar), C.A. Seshagiri Sastri and *K.S. Desikan* for Appellants.

K. Rajah Aiyar and *K.S. Rajagopalachari* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These three matters all arise out of the same order which raises a question under S. 19 of Madras Act IV of 1938. C.M.A. No. 325 and C.R.P. No. 1346 are alternative proceedings brought by the first defendant. C.M.A. No. 428 is an appeal against the same decision by the other defendants in the case.

There was a decree passed on 31st January, 1934 for a sum of Rs. 10,000 and odd by the Tanjore Subordinate Judge's Court. In execution of that decree a sale was held under the orders of the Subordinate Judge of Kumbakonam on 26th August, 1937 and the property was purchased by the decree-holder for Rs. 11,328, which was a little more than the amount due under the execution petition. He was given leave to bid

*A.A.O. No. 325 and 428 of 1939 and C.R.P. No. 1346 of 1939. 21st October, 1940.

Nataraja Pillai v. Rangaswami Karamundar.

Wadsworth, J.

and set off, so that there was no actual payment of cash. Within one month of the sale an application was filed by the defendants under O. 21, r. 90 Civil Procedure Code to set aside the sale on the ground of irregularity etc. When that application was still pending, Madras Act IV of 1938 came into force and on 20th June, 1938 applications were filed by the judgment-debtors to scale down the decree. These applications were rejected by the Court below on the ground that there was no subsisting decree in view of the fact that the purchaser was the decree-holder and had been allowed to bid and set off.

After the proceedings in this Court began, there was a consent order whereby the application under O. 21, r. 90 was terminated on conditions providing for the cancellati n of the sale on payment of an amount which will depend on this Court's orders in the present proceedings. We have therefore to proceed with the matter as it stood when the applications under S. 19 were filed, at which time a sale had been held but its confirmation was held up owing to the application to set aside the sale.

It has been argued that by reason of O. 21, r. 72 Civil Procedure Code there is an immediate satisfaction of the decree in a case where the decree-holder has been given leave to set off the purchase money against his decree. This is a contention which it is difficult to maintain not only by reason of decisions to the contrary, but also in view of the provisions of r. 89 which enable the judgment-debtor to get such a sale set aside on payment of the amount due together with the solatium to the purchaser. It has not been contended that r. 89 does not apply to a sale to a decree-holder and in such a case it seems to follow that the decree cannot be regarded as satisfied so long as the judgment-debtor can proceed under r. 89. There are, moreover, decisions which to our minds show conclusively that the decree is not satisfied in such a case as this until the sale has been confirmed; for example *Ganesh* v. *Purshottam*[1] *Khalil-Ur-Rahman* v. *Gokul Prasad*[2] and the decision of the Privy Council in *Rajah Ragunandan Prasad Singh* v. *Commissioner of Income-Tax, Bihar and Orissa*[3] which, though it relates to an income-tax matter, decides quite clearly on the basis of the Code of Civil Procedure that the date on which the proceeds of

1. (1908) I.L.R. 33 Bom. 311. 2. (1919) I.L.R. 41 All. 526.
3. (1933) 64 M.L.J. 544: L.R. 60 I.A. 133: I.L.R. 12 Pat. 305 (P.C.).

Nataraja Pillai. v. Rangaswami Karamundar.

Wadsworth, J.

the sale are received in such a case by the decree-holder is the date of the confirmation and not the date of the sale. In the face of these authorities it is not very profitable to refer to cases of rateable distribution in which the Court is concerned merely with the date of the receipt of the assets by the Court and not the date of the satisfaction of the decree. We are of opinion that on the facts of the present case it must be held that at the time when the applications under S. 19 were filed, the decree was still unsatisfied and the applicants were entitled as judgment-debtors to ask that the decree be scaled down under the Act.

We therefore allow the appeals and the revision petition, set aside the lower Court's order and remand the application for disposal in the light of this judgment. There will be an order for costs in C.M.A. No. 325 of 1939.

K. S. *Appeals and petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Chidambaram Chettiar (died) and others. *Appellants** (*Plaintiffs*)

v.

Sellakumara Goundan and others. *Respondents* (*Defendants*).

F.B.

Chidambaram Chettiar v. Sellakumara Goundan.

Transfer of Property Act (IV of 1882), S. 53—Alienation by debtor before his adjudication —Suit by creditor to set aside alienation—Leave of Insolvency Court if necessary—Presidency Towns Insolvency Act (III of 1909), S. 17 and Provincial Insolvency Act (V of 1920), S. 28 (2).

Where property has been transferred by a deed which falls within the mischief of S. 53 of the Transfer of Property Act and the transferor becomes insolvent the property does not form part of his estate and come within the purview of S. 17 of the Presidency Towns Insolvency Act or S. 28 of the Provincial Insolvency Act except when the Official Assignee or the Official Receiver or a creditor obtains a declaration that the transaction offends against S. 53. Accordingly a suit by a creditor to set aside such alienation is maintainable without the leave of the Insolvency Court. If the creditor desires to make the Official Assignee or the Official Receiver a party to such a suit, the consent of the Insolvency Court is necessary.

Subramanyam v. *Narasimham*, (1928) 56 M.L.J. 489, approved.

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* Appeals Nos. 161 of 1938 and 251 of 1939. 1st September, 1941.

F.B.

Chidambaram Chettiar v. Sellakumara Goundan.

Vasudeva Kamath v. *Lakshminarayana Rao*, (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684, overruled.

Appeals against the decrees of the Court of the Subordinate Judge of Coimbatore in O.S. Nos. 214 of 1936 and 176 of 1937 respectively.

K. V. Ramachandra Aiyar and *T. N. Sundaresan* for Appellants.

R. Sundaralingam for *K. Periaswami Goundar* for Respondents.

(These appeals coming on for hearing on 15th January, 1941, the Court, *Pandrang Row and Somayya, JJ.*, made the following Order of Reference to a Full Bench).

The Order of Reference to the Full Bench was made by

Somayya, J.—The question that arises in these appeals is whether leave of the Insolvency Court is required for a suit under S. 53 of the Transfer of Property Act brought by a creditor to set aside an alienation made by the debtor before he was adjudged an insolvent.

On this question there is a direct decision of this Court in *Vasudeva Kamath* v. *Lahshminarayana Rao*[1]. The lower Court dismissed the suit relying on the above decision as indeed it was bound to do.

The plaintiff appeals and contends that the above decision needs re-consideration and that the entire reasoning of the learned Judges in that case has been dissented from by Wallace and Thiruvenkatachariar, JJ., in *Donepudi Subramanyam* v. *Nune Narasimham*[2].

In the latter case, a decree-holder attached certain property of his judgment-debtor which had been alienated to a third party. On a claim petition filed by the vendee the attachment was raised and the decree-holder filed a suit under O. 21, r. 63 of the Code of Civil Procedure to set aside the order on the claim petition and to have it declared that the alienation was in fraud of creditors. Before this suit was filed, the debtor was adjudged an insolvent and the suit was filed without the leave of the Insolvency Court. Objection was taken that the suit was bad for want of leave of the Insolvency Court and relying on the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], Phillips, J., held that the suit was bad for want of requisite leave. On appeal under S. 15 of the Letters Patent, it was held that no leave was required. Dealing with the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], both

1. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.
2. (1928) 56 M.L.J. 489.

F.B.

Chidambaram Chettiar v. Sellakumara Goundan

Wallace and Thiruvenkatachariar, JJ., in separate but concurrent judgments, pointed out that the reasoning of the Judges in that case cannot be accepted. Ultimately, they held that in any event an adverse order on a claim petition gave the individual creditor a special right of action personal to him and that this right could be exercised by him without any leave from the Insolvency Court. They therefore did not expressly dissent from the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1].

Though the decision is ultimately rested on this ground, we find that there is considerable force in the argument of Mr. K. V. Ramachandra Aiyar for the appellant that the reasoning of the decision in *Donepudi Subramanyam* v. *Nune Narasimham*[2], is a dissent on every point from the reasoning in the earlier case.

In fact, it is doubtful how far the distinction drawn by Wallace and Thiruvenkatachariar, JJ., is supportable and whether the two decisions can stand alongside of each other.

We therefore think that it is desirable that the question must be considered by a Full Bench.

Even apart from the dissent expressed in the later case, we think that the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], should be re-considered.

In a case where a debtor alienates his property under circumstances which render it voidable by the creditors under S. 53 of the Transfer of Property Act, the alienation is binding on the debtor. If avoided by the creditors who alone can do so, and there is a surplus, it goes to the vendee. The title to the property continues to be in the vendee subject only to the rights of the creditors. When after such an alienation, the debtor is adjudged an insolvent, it is clear that the property itself does not vest in the Official Receiver.

In a case where the property had ceased to be that of the insolvent and a creditor desires to fight the alienee and have it cleared that the alienation is bad against him and other creditors, it is difficult to see how such a suit requires the leave of the Insolvency Court. The right of the creditors to file suits against strangers can be taken away only by express language. Further, the decision in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], is based mainly on the reasoning contained on page 686:

> "A suit by a judgment-creditor such as I have mentioned without the leave of the Court would, I think, be in contravention of this section and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent".

1. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.
2. (1928) 56 M.L.J. 489.

F.B.

Chidambaram Chettiar v. Sellakumara-Goundan.

This reasoning appears to us to be erroneous. At any rate after the Transfer of Property Act was amended, the benefit of success goes to all the creditors. Once the creditor's suit succeeds, the right to realise the property and to distribute the proceeds will be that of the Official Receiver.

On the other side it may be suggested that the Official Receiver can file the suit under S. 53 of the Transfer of Property Act in the ordinary Civil Court as the statutory representative of all the creditors, and that where there is a representative of the creditors who can and ought ordinarily to take whatever steps are necessary in their interests, an individual creditor ought not to exercise that right at any rate without the leave of the Insolvency Court which will ordinarily give the leave only if the Official Receiver declines to act. Would a suit by an individual creditor be an interference with the administration of the estate by the Official Receiver?

If an individual creditor files the suit which has to be a representative one, is the Official Receiver a necessary party to it and would the decision in such a suit bind the Official Receiver even if he is not a party? In reason, it ought to, for he represents all the creditors and the suit is now at any rate, one on behalf of all the creditors.

We are not impressed by the distinction sought to be drawn by the appellant's advocate that in a case where the alienation is beyond two years before the insolvency, the Official Receiver cannot move the Insolvency Court under S. 53 of the Provincial Insolvency Act (55 of the Presidency Act) and that in such a case the prohibition under S. 28 of the Provincial Insolvency Act does not apply. In fact, in *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], the alienation was beyond two years before the insolvency but this was evidently not thought to be material:

We therefore refer the following question to a Full Bench:

"Is a suit by a creditor under S. 53 of the Transfer of Property Act to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?"

(These appeals coming on for hearing in pursuance of the aforesaid Order of Reference, the Court expressed the following Opinion).

The Opinion of the Court was expressed by

Leach, C.J.

The Chief Justice.—The question which has been referred is this:

" Is a suit by a creditor under S. 53 of the Transfer of Property Act to

1. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.

F.B.

Chidambaram Chettiar v. Sellakumara Goundan,

Leach, C.J.

set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?"

In *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], a Bench of this Court (Wallis, C.J., and Ayling, J.,) held that such a suit could not be instituted without the leave of the Insolvency Court and this decision was accepted as being correct by the Rangoon High Court in *Mohamed Adjim Nacoda* v. *E. M. Chettyar Firm*[2], and by the Lahore High Court in *Din Mohammad* v. *Mt. Walait Begum*[3]. The decision was, however, strongly criticised by another Bench of this Court (Wallace and Thiruvenkatachariar, JJ.,) in *Subramanyam* v. *Narasimham*[4]. We consider that there is full justification for the criticism.

S. 53 of the Transfer of Property Act states that every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of a creditor defeated or delayed. Before 1929 a creditor could bring a suit under this section in his individual capacity, but in that year the section was amended and there is now a specific direction that the suit shall be instituted on behalf of, or for the benefit of, all the creditors. S. 17 of the Presidency Towns Insolvency Act and S. 28 of the Provincial Insolvency Act vest the property of the insolvent in the Official Assignee or the Official Receiver as the case may be and these sections prohibit, without the leave of the Insolvency Court a creditor of the insolvent filing a suit against the insolvent during the pendency of the insolvency proceedings. All matters regarding the insolvent's estate have to be decided by the Insolvency Court in proceedings contemplated by the Act.

Property which the insolvent has transferred in fraud of his creditors is not his property. The transaction is voidable, but until it has been set aside the transferee has a valid title. Therefore, where property has been transferred by a deed which falls within the mischief of S. 53 and the transferor becomes insolvent, the property does not form part of his estate and come within the purview of S. 17 of the Presidency Towns Insolvency Act or S. 28 of the Provincial Insolvency Act. Of course, it comes within the purview of these sections when the Official Assignee or the Official Receiver or a creditor, obtains a declaration that the transaction offends against S. 53.

1. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.
2. (1930) I.L.R. 9 Rang. 7.
3. A.I.R. 1938 Lah. 856.
4. (1928) 56 M.L.J. 489.

F.B.

Chidambaram Chettiar *v.* Sella Kumara Goundan.

Leach, C.J.

In *Vasudeva Kamath* v. *Lakshminarayana Rao*[1], certain creditors filed a suit for a declaration that an alienation of immoveable property by an insolvent was void under S. 53 of the Transfer of Property Act. They did not ask for the leave of the Insolvency Court, notwithstanding that the Official Receiver was made a party to the suit. The Court held that the effect of an adjudication under S. 16 (1) of the Provincial Insolvency Act, Act III of 1907 (which corresponds to S. 28 (2) of the present Provincial Insolvency Act) was to prohibit a creditor bringing a suit under S. 53 of the Transfer of Property Act without the consent of the Insolvency Court. The learned Judges who decided that case overlooked the fact that a suit under S. 53 of the Transfer of Property Act is not a suit in respect of the property of the insolvent, but is a suit in respect of property which had been the property of the insolvent and which he had transferred in fraud of his creditors. Such a suit does not fall within the prohibition of the Insolvency Act. Moreover, the very definite right given by S. 53 of the Transfer of Property Act to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency Towns Insolvency Act or the Provincial Insolvency Act which can be read as taking away his right. This was pointed out in *Subramaniam* v. *Narasimham*[2]. The learned Judges who decided that case also pointed out that a suit to set aside a transfer because it offends against the provisions of S. 53 of the Transfer of Property Act is not a suit respecting the property of the insolvent. As already indicated once a declaration has been obtained, the property does become the property of the insolvent and automatically vests in the Official Assignee or Official Receiver as the case may be. A creditor can get no personal advantage out of it, as the section now stands.

A creditor who brings a suit under S. 53 of the Transfer of Property Act may desire to make the Official Assignee or the Official Receiver a party, but he can only do so with the consent of the Insolvency Court. This is quite a different matter from saying that the Insolvency Court must give its consent before a suit can be instituted under S. 53 of the Transfer of Property Act when the representative of the insolvent's estate is not made a party.

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1. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.
2. (1928) 56 M.L.J. 489.

F.B.

Chidambaram Chettiar *v.* Sella Kumara Goundan.

Leach, C.J.

It follows from what we have said that we are in full agreement with the decision in *Subramaniam* v. *Narasimham*[1], and that *Vasudeva Kamath* v. *Lakshminarayana Rao*[2], was wrongly decided. Consequently the answer to the question referred will be in the affirmative.

The costs of this reference will be costs in the appeals.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Athiappa Chettiar ... *Appellant* (Petitioner-Plaintiff)*

v.

Ibramsa Pulavar ... *Respondent (Respondent 2nd Defendant).*

Athiappa Chettiar *v.* Ibramsa Pulavar.

Provincial Insolvency Act (V of 1920), Ss. 28 (6), 34, 44 and 47—Mortgagee's right to personal decree under O. 34, r. 6 of Civil Procedure Code (V of 1908)—Whether lost by order of absolute discharge in mortgagor's insolvency.

The mortgagor's liability to a personal decree in respect of a mortgage debt is a debt provable in his insolvency and the mortgagee is not entitled to apply under O. 34, r. 6 of the Civil Procedure Code for a personal decree against the mortgagor for any deficiency left after the sale of the mortgaged property, after an order of absolute discharge has been made in the mortgagor's insolvency.

Kupchand Nathmal Marwadi v. *Rajeswar Shankar Deshpande*, I.L.R. (1940) Nag. 512 and *Haveli Shah* v. *Mt. Hussaina Jan*, A.I.R. 1938 Lah. 217 followed.

Niaz Ahmad v. *Phul Kunwar*, (1931) I.L.R. 54 All. 428 and *Sunder Lal* v. *Benarsi Das*, I.L.R. (1939) All. 492 dissented from.

Appeal against the decree of the District Court of Madura dated 31st August, 1938 and made in A. S. No. 37 of 1938 preferred against the order of the Court of the District Munsif of Melur dated 8th January, 1938 and made in E. A. No. 735 of 1937 in O. S. No. 82 of 1929.

T. L. Venkatarama Aiyar and *M. V. Ganapathi* for Appellant.

R. Ramasubbu Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of an application made by a mortgage-decree-holder for a personal decree

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1. (1928) 56 M.L.J. 489.

2. (1918) 36 M.L.J. 453: I.L.R. 42 Mad. 684.

*S. A. No. 257 of 1939. 21st August, 1941.

Athiappa Chettiar *v.* Ibramsa Pulavar.

under O. 34, r. 6, Civil Procedure Code against the second defendant. The relevant facts are these. The appellant who is the mortgagee obtained a preliminary decree for sale of the property mortgaged to him on 16th August, 1929. A final decree was also passed on 10th December, 1930. The mortgaged property was brought to sale on 27th August, 1934 and the sale was confirmed on 29th September, 1934. But the second defendant who was adjudicated insolvent on 21st July, 1933 after the final decree was passed obtained an order of absolute discharge on 10th August, 1934. This application for a personal decree against the second defendant was made on 28th September, 1937. Both the lower Courts have taken the view that the order of absolute discharge precludes any relief being granted to the appellant. The question is whether this view is sound.

On this point there is a conflict between Lahore and Nagpur High Courts on the one hand and the Allahabad High Court on the other. In *Haveli Shah* v. *Mt. Hussaina Jan*[1], it was held that the personal liability under a mortgage is a debt provable in insolvency within the meaning of S. 44 (2) of the Provincial Insolvency Act and therefore by the order of absolute discharge this liability has been discharged. This view has been followed by the Nagpur High Court in *Kupchand Nathmal Marwadi* v. *Rajeswar Shankar Deshpande*[2]. But the Allahabad High Court has taken a different view. In *Niaz Ahmad* v. *Phul Kunwar*[3], the reason for the view is thus stated:

"The order of discharge has no more effect upon the right of the secured creditor than the order of adjudication. Under S. 45 (2) (of the Presidency Towns Insolvency Act III of 1909 corresponding to S. 44 (2) of the Provincial Insolvency Act) "an order of discharge shall release the insolvent from all debts provable in insolvency". The debt due to a secured creditor is not a debt provable in insolvency. The order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract."

This view has been again followed in *Sunder Lal* v. *Benarsi Das*[4]. With due respect to the learned Judges I am not able to agree with this view. Under S. 34 (2) of the Provincial Insolvency Act all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become

1. A.I.R. 1938 Lah. 217.
2. I.L.R. (1940) Nag. 512.
3. (1931) I.L.R. 54 All. 428.
4. I.L.R. (1939) All. 492.

Athiappa Chettiar v. Ibramsa Pulavar.

subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act. Therefore the liability to pay the deficit arising after the sale of the property mortgaged in virtue of the personal covenant or obligation which the mortgagor enters into under the deed of mortgage will be a debt provable within the meaning of S. 34 (2). It was a liability to which the second defendant will become subject by reason of the obligation incurred before the date of his adjudication. That such a liability is a debt provable in insolvency is clear from S. 47 of the Act. Under that section it is open to a secured creditor to adopt any of the three courses specified therein, namely, (1) he can realise the security and prove for the balance due to him; (2) he can relinquish the security and prove for the whole debt; and (3) he can value the security at a particular amount and then prove for the balance. This therefore clearly indicates that the liability of a mortgagor under a deed of mortgage is a debt which the mortgagee can prove in insolvency. It is open to him, as S. 47 (1) provides, to wait until the security is realised and prove for the balance when it is ascertained, but he takes the risk of not getting any dividend if the insolvent obtains an order of discharge by that date, by reason of the liability being extinguished under S. 44 (2). If he wants to avoid this risk he ought to take advantage of Cls. 2 and 3. I am therefore inclined to follow the view of the Lahore and Nagpur High Courts in preference to that of the Allahabad High Court.

Mr. Venkatarama Aiyar contends that by virtue of S. 28 (6) the rights of the secured creditor are not affected by the order of adjudication and one of such rights is to get a personal decree for the balance due under a personal covenant in the deed of security and therefore his right to get such a decree remains unaffected by the order of discharge. All that S. 28 (6) says is that the right of a secured creditor to realise the moneys due to him from and out of the security is not affected. But the liability due under the deed of mortgage is nevertheless a debt in respect whereof the secured creditor has to adopt the procedure in insolvency before he can get any dividend and in respect whereof he is subject to the other provisions of the Insolvency Act. Stone, C.J., in *Khupchand Nathmal Marwadi*

Athiappa Chettiar *v.* Ibramsa Pulavar.

v. *Rajeswar Shankar Deshpande*[1], after mentioning the three courses open to secured creditors under S. 47 observed thus:

"If instead of taking one or the other of these courses, he simply ignores the insolvency, then, as above observed he is limited to his security, the reason being that a mortgagee with a mortgage containing a personal covenant is a secured creditor so far as the mortgage transaction is concerned and an ordinary creditor so far as the personal covenant is concerned."

I respectfully agree with this observation.

In the result the appeal fails and is dismissed with costs. Leave to appeal refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Mrs. Raji Bai Ammal, guardian and mother of Minor Dickson Chandrahasan and another. *Petitioners** (*Petitioners*)

v.

Md. Nathar Sahib ... *Respondent* (*Respondent*).

Raji Bai Ammal *v.* Nathar Sahib.

Evidence Act (I of 1872), S. 112—Claim by a married woman for maintenance of her children against stranger under S. 488, Criminal Procedure Code, alleging him to be their putative father—No proof of non-access with husband—Admission as to paternity by alleged putative father—Relevancy.

Admissions of paternity of illegitimate children by the alleged putative father are irrelevant if the mother, a married woman fails to prove that she and her husband had no access at the time when the children could have been begotten.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Chidambaram dated 7th January, 1941 and passed in M. C. No. 38 of 1940.

A Christian married woman who was living away from her husband filed a petition under S. 488, Criminal Procedure Code, on behalf of her two children against the respondent who, she alleged was the putative father of the children and relied on admissions of paternity by the respondent.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioners.

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1. I.L.R. (1940) Nag. 512 at 516.

* Crl. R. C. No. 393 of 1941
(Crl. R. P. No. 372 of 1941). 27th August, 1941.

Raji Bai Ammal v. Nathar Sahib.

C. Padmanabha Aiyangar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In view of the clear wording of S. 112 of the Evidence Act, all admissions of paternity are irrelevant if the complainant fails to prove that she and her husband had no access at the time when the child could have been begotten.

The Magistrate has held that there may have been access. The petition for maintenance had necessarily therefore to be dismissed, however convincing the evidence adduced by the complainant might have been.

This petition is dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Kora Vathan and another ... *Accused*.*

Kora Vathan, *In re.*

Criminal Procedure Code (V of 1898), S. 123—Substantive sentence of imprisonment—If can be made to take effect on expiry of imprisonment imposed under S. 123, Criminal Procedure Code.

An order directing a substantive sentence of imprisonment to take effect on the expiry of a period of imprisonment imposed under S. 123, Criminal Procedure Code, is illegal. The substantive sentence must take effect from the date on which it is pronounced.

Cases referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the District Magistrate of South Arcot in his letter R. O. C. No. 1355-41 dated 30th June, 1941.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In these cases the order directing the substantive sentences of imprisonment to take effect on the expiry of the periods of imprisonment imposed under S. 123, Criminal Procedure Code, is illegal. *Vide* the second proviso to S. 397, Criminal Procedure Code. The order in each of these cases is accordingly set aside. The sentence in each case must take effect from the date on which it was pronounced.

K. S. *Ordered.*

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* Crl. R. C. Nos. 547, 548 and 549 of 1941 (Case Referred Nos. 33, 34 and 35 of 1941). 28th August, 1941.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Muttapukuntla Chinnapareddi .. *Appellant** (*1st Defendant*)

v.

Masineni Venkataramanappa and others. *Respondents* (*Plaintiff and Defendants 2 and 3*).

Chinnapareddi *v.* Venkataramanappa.

Transfer Property of Act (*IV of* 1882), *Ss.* 6 (e) *and* 130—*Sale of land set aside as vendor had no title—Right of vendee to recover purchase money —Whether 'actionable claim', which is assignable or a mere 'right to sue.'*

A sale of immmovable property having been set aside at the instance of the real owners who established that the vendor had no title thereto the vendees assigned to the plaintiff their right to get a refund of the purchase money from the vendor. In a suit by such assignee it was contended that what was assigned was a mere right to sue which was not assignable according to S. 6 (*e*) of the Transfer of Property Act.

Held, that the claim for the recovery of the purchase money was one for a precise sum which the vendees were entitled to get either on the view that the sale was void *ab initio* (the vendor having had no title from the very beginning) or on the ground of an existing consideration which afterwards failed. The right to repayment of the purchase money must be taken to be an implied term of the contract between the vendor and the vendees. A right to claim enforcement of this contract would be an actionable claim to which S. 130 of the Transfer of Property Act applies. The right is clearly assignable and the suit is competent.

Manmatha Nath Mullick v. *Hedait Ali* (1931) 62 M.L.J. 287: I.L.R. 11 Pat. 266: L.R. 59 I.A. 41 (P.C.) applied.

Appeal against the decree of the District Court of Anantapur in A. S. No. 38 of 1938 preferred againt the decree of the Court of the District Munsif of Anantapur in C. S. No. 222 of 1937.

A. Lakshmayya for the Appellant.

K. Krishnaswami Aiyangar and *N. Koteswara Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant sold some properties to respondents 2 and 3. The sale was, however, set aside at the instance of two persons who claimed to be the real owners thereof. Their claim was upheld and the sale by the appellant in favour of respondents 2 and 3 was declared invalid. Thereafter respondents 2 and 3 assigned their right to get the purchase money from the appellant to the first respondent (plaintiff) under Ex. A dated the 9th of February, 1937. The first respondent then filed this suit for recovery of the purchase money from the

* S. A. No. 803 of 1939. 9th September, 1941.

Chinnapa-reddi v. Venkata-ramanappa.

appellant on the strength of Ex. A the deed of assignment in his favour. The sole question in the second appeal is whether Ex. A is a valid assignment.

It was urged for the appellant who was the first and the contesting defendant that the right of respondents 2 and 3 which accrued to them as a result of the sale in their favour being set aside, was a right to sue for damages and that being a bare right to sue, it was not assignable at law being opposed to S. 6 (*e*) of the Transfer of Property Act. Both the lower Courts held that the right which respondents 2 and 3 assigned in favour of the plaintiff 1st respondent was one to recover an ascertained amount and an actionable claim, and not a mere right to sue for damages. The suit was accordingly decreed by both the Courts.

In second appeal Mr. Lakshmayya, the learned advocate for the appellant, urges that the view taken by the lower Courts as to the nature of the right which accrued to respondents 2 and 3 by the sale to them being declared invalid has not been properly understood by both the Courts.

If it is a bare right to sue that the respondents 2 and 3 got on the sale in their favour being set aside, then, it is obvious that a transfer of the same would be prohibited by S. 6 (*e*) of the Transfer of Property Act and that the first respondent would have no right to sue. The question is not free from difficulty but I think it is covered by the decision of the Judicial Committee in *Manmatha Nath Mullick* v. *Hedait Ali*[1]. A lease contained an agreement by the lessee to pay the Government revenue and there was a provision that if he committed a breach of the covenant, he should be liable to pay damages to the lessor. The lessee failed to pay certain instalments of revenue. Then the lessor sold the property to a third person who paid those instalments from out of the purchase money. Later, the lessor executed a document by which he assigned to the purchaser his right to recover the instalments from the lessee. The question was whether the right which the lessor obtained on the lessee committing default in the payment of the revenue to the Government which the lessor ultimately paid, was a bare right to sue, in which case the assignment of that right would not be a valid one. The suit was filed by the assignee

1. (1931) 62 M.L.J. 287: I.L.R. 11 Pat. 266: L,R. 59 I,A. 41 (P.C.).

Chinnapa-reddi v. Venkata-ramanappa.

to recover the instalments of revenue which remained unpaid by the lessee which as stated above he himself paid on behalf of the lessor. The suit was filed on the strength of the assignment which the lessor executed conveying his rights to recover the same from the lessee. The lessee committed default in payment of a further instalment which accrued due after the purchase of the property by the plaintiff. In so far as that instalment was concerned he was the owner by that time and under the terms of the document having stepped into the lessor's shoes, he was held entitled to recover that instalment which accrued due after his purchase. As regards the right to recover the instalments which the lessee had failed to pay before the purchase by the plaintiff, the High Court held that it was a mere right to sue and that such a right was not transferable under the law. As extracted on page 271 of the report, the High Court said this:

> "What was assigned by the defendant No. 2 to the plaintiff was his right to recover damages from the defendant No. 1 on account of the latter's default in payment of the Government revenue and cesses. The right to recover damages is a mere right to sue and such a right cannot be transferred under the law."

After setting out the above extract, the Judicial Committee referred to a relevant provision in the Transfer of Property Act, S. 6 (*e*) which is in these terms:

> "A mere right to sue cannot be transferred".

The Judicial Committee held that what was assigned was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This is what they say:

> "Their Lordships are clearly of opinion that this clause [Transfer of Property Act, S. 6 (*e*)] has no application to the facts of the present case. In their Lordships' opinion what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This would, their Lordships think, be an actionable claim to which S. 130 of the Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages within the meaning of the clause in the lease on which the High Court found, but to a claim for reimbursement of the precise sum which the landlord has disbursed to meet the obligation".

In the present case, respondents 2 and 3 the purchasers from the appellant had a claim for reimbursement of the precise sum which they had paid as purchase money. This was a precise sum which they were entitled to get either on the view that the sale was void *ab initio* (the vendors having had

Chinnapareddi v. Venkataramanappa.

no title from the very beginning) or on the ground of an existing consideration which afterwards failed. In either case, it is the purchase money that respondents 2 and 3 had a right to recover. It may be that they had a right to recover some other amount under some other head of claim but certainly they had the right to recover the purchase money which is a definite sum of money and the vendor the appellant was bound to repay this sum to his vendees-respondents 2 and 3. As in the case before the Judicial Committee it must be taken that this was an implied term of the contract of sale. In the case before the Judicial Committee, the lease deed did not contain an express covenant to repay to the lessor the sum which he paid to the Government by way of Government revenue which the lessee had defaulted to pay. But evidently the Judicial Committee implied such a contract and that is what is referred to on page 271 as a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. The contract which is here referred to is obviously an implied term of the contract, namely, the lease deed. On the same reasoning it must be held that there was in this case a contract to repay the purchase money between the vendor and the vendees. A right to claim enforcement of this contract would be in the words of the above decision an actionable claim to which S. 130 of the Transfer of Property Act applies. This being so, the right was clearly assignable. Having regard to the above decision of the Judicial Committee, I think it is not profitable to refer to the other cases cited by either party.

The second appeal fails and is therefore dismissed with costs.

(Leave to appeal refused.)

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Krishna Rao v. Official Receiver, East Godavari.

Manyam Krishna Rao ... *Petitioner** (*2nd Respondent*)

v.

The Official Receiver, East Godavari and another. *Respondents* (*1st Respondent and Insolvent*).

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 7, 20 *and* 21—*Application by insolvent to Insolvency Court for declaration that he was insolvent*

* C. R. P. No. 2258 of 1939. 8th September, 1941.

Krishna Rao *v.* Official Receiver, East Godāvāri.

and that his debts should be scaled down—Official receiver not impleaded—Refusal of stay by the Official Receiver and sale by public auction—Validity of sale—Provincial Insolvency Act (V of 1920), Ss. 68 and 75.

The equity of redemption in certain properties belonging to an insolvent was advertised for sale by the Official Receiver. The insolvent filed an application in the Insolvency Court on 14th September, 1938, without impleading the Official Receiver, for a declaration that he was an agriculturist and that his debts should be scaled down. The insolvent applied to the Official Receiver for stay of sale under S. 20 of the Madras Act IV of 1938. The Official Receiver did not stay the sale which was held on 27th September, 1938. Thereupon the insolvent filed an application under S. 68 of the Provincial Insolvency Act to set aside the sale. The Insolvency Court held that the application was not maintainable in law as the insolvent cannot be a "person aggrieved" within the meaning of S. 68. The lower appellate Court held that by virtue of Ss. 20 and 21 of Madras Act IV of 1938 the insolvent was competent to apply and have the sale set aside. On revision,

Held, that the application for scaling down the debt without impleading the Official Receiver was irregular and the application to the Official Receiver under S. 20 of the Agriculturists' Relief Act by the insolvent for stay was incompetent and though the sale was held by the Official Receiver with knowledge that the insolvent had already made a move in the matter of an application under S. 21 of Act IV it cannot be said that the Official Receiver acted illegally or irregularly in going on with the sale notwithstanding that knowledge.

Appropriate procedure in such cases indicated.

Petition under S. 75 (1) proviso of Act V of 1920 praying that the High Court will be pleased to revise the order of the District Court of East Godavari at Rajahmundry dated 5th August, 1939 and made in C. M. A. No. 25 of 1939 (I.A. No. 127 of 1938 in I.P. No. 14 of 1932, Sub-Court, Rajahmundry).

A. Lakshmayya for Petitioner.

V. Viyyanna for Respondents.

The Court delivered the following

JUDGMENT.—This civil revision petition is preferred under S. 75 of the Provincial Insolvency Act against the order of the District Judge reversing the decision of the Insolvency Court which declined to interfere under S. 68 of the Provincial Insolvency Act with a sale held by the Official Receiver. The petitioner here was the purchaser from the Official Receiver of the equity of redemption of certain properties of the insolvent which were bound by three mortgages, one of which had been the subject of a decree for sale. The other two had not been sued on. The insolvency sale was held on the 27th September, 1938 and was subject to these mortgages. On the 14th September, 1938, the insolvent filed the petition in the Insolvency Court. According to an unofficial copy of the petition which has been placed before me, the insolvent impleaded therein a

Krishna Rao v. Official Receiver, East Godavari.

large number of creditors, but did not implead the Official Receiver and he asked under Ss. 21 and 7 of Act IV of 1938 that he should be declared an agriculturist, that the debts due to the creditors should be scaled down or that the Official Receiver should be asked to prepare schedules according to the Act after scaling down the debts; and the petition recites that the Official Receiver has advertised the properties for sale on the 27th September, 1938, and that loss will be suffered by the insolvent if the properties were sold before the debts are scaled down. On the 27th September, the actual date of the sale, the insolvent filed an application before the Official Receiver in which he alleged that he was an agriculturist entitled to relief, no dividend having yet been declared, and also recited the fact of the petition already filed in the Insolvency Court; and under S. 20 of Act IV of 1938 he prayed the Official Receiver to stay the sale. The Official Receiver did not stay the sale. The properties were knocked down to the present petitioner. Thereupon the insolvent filed the petition under S. 68 of the Provincial Insolvency Act to set aside the sale. This petition was rejected by the Insolvency Court on the ground that the insolvent was not a person aggrieved by the sale in the light of the decisions and that he was not therefore entitled under S. 68 to question the act of the Official Receiver whereby the sale was completed. There was an appeal to the District Judge against this order and the District Judge reversed the decision of the trial Court holding that, although in an ordinary case the insolvent was according to the authorities not aggrieved by the sale held in the course of administration of his estate, the enactment of Act IV of 1938 has made a substantial difference, seeing that it confers the right upon the insolvent to apply for the scaling down of his debt, and the learned Judge goes further and says that the insolvent is entitled under S. 20 of the Act to get the proceedings stayed.

It seems to me quite clear that S. 20 of Act IV of 1938 has no application to sales by Official Receivers and cannot be invoked in favour of a person who is not a judgment-debtor seeking to stay the execution of a decree. It seems to me also clear that though S. 21 of Act IV of 1938 lays down no procedure for scaling down debts due by the insolvent, the procedure should, as far as may be, be analogous to that prescribed for the reduction of other debts. It is apparent, therefore, that,

if there was a debt embodied in a decree, the Court which passed the decree would have to be moved under S. 19 to reduce the decree and the Court which executes the decree must be moved under S. 20 to stay execution of the decree in so far as the debts of the insolvent are covered by the decrees of a Court.

Krishna Rao v. Official Receiver, East Godavari.

There was at the time of this sale no procedure prescribed by the rules. Subsequently rules have been enacted giving to the Court having jurisdiction a power to entertain applications for declaration of the amount due on any debt as scaled down under the Act, even though no suit has been filed therein. But as things stood when this sale was held, I have little doubt that it would be within the power of the Insolvency Court to entertain an application under S. 21 for the scaling down of those debts not covered by the decrees or suits in other Courts, and that with reference to those debts the Insolvency Court would be empowered to apply the principles of the Act and direct the Official Receiver to revise or frame the schedule in accordance with the result. One thing seems to be abundantly clear and that is that any proceedings under S. 21 of Act IV of 1938 should not be taken behind the back of the Official Receiver by the insolvent himself. As the status of the insolvent has necessarily to be established before any relief can be obtained, it seems to me desirable that both the Official Receiver and the insolvent should be made parties to any application under this section. If an application is properly presented to the Insolvency Court it would no doubt be within the competence of the Insolvency Court to give directions to the Official Receiver regarding the staying of realisation of assets where such realisation is legally to be effected by the scaling down process. Thus if the Official Receiver was about to sell properties subject to mortgages which mortgages were liable to be scaled down, an application might be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed; and if the Official Receiver held the sale in disobedience to such directions, then presumably it would be a ground under S. 68 for setting aside the sale. I doubt whether the decision of the Full Bench in *Hari Rao* v. *Official Assignee of Madras*[1], would necessarily stand in the way of a petition by the insolvent in such special

1. (1926) 50 M.L.J. 358 I.L.R. 49 Mad. 461 (F.B.)

Krishna Rao v. Official Receiver, East Godavari.

circumstances. It would not be a case of the insolvent being aggrieved by the mere sale of the properties, but the insolvent being aggrieved by the act of the Official Receiver disregarding the directions of the Court obtained at the instance of the insolvent who is seeking the benefit of a special statutory procedure.

In the present case the procedure of the insolvent seems to have been wrong throughout. The mortgages to which the properties were subject were not all in the same position. The first mortgage was decreed. The Court which passed that decree might properly be moved under S. 19 to scale down the debt on proof that the insolvent, had he not been an insolvent, would have been entitled to the benefits of the Act. The other two mortgages had not been decreed. It is doubtful whether the Insolvency Court would have jurisdiction to scale down those secured debts and it might be argued that r. 2 of the rules framed under the Act cannot override the general law of mortgages, a matter on which I express no opinion. As to the rest of the debts, the question whether the Insolvency Court could or could not deal with them depends upon the nature of each debt, whether it was decreed or was the subject of a pending suit and if so, in what Court. It seems to me clear that the petition filed by the insolvent before the Insolvency Court to scale down all the debts, apparently including these mortgage debts, could not be maintained.

Moreover the application to the Official Receiver under S. 20 praying for the stay of sale was clearly incompetent. An application might possibly have been made to the Official Receiver to move on behalf of the insolvent in the proper Court for the scaling down of those debts which could not be scaled down in the Insolvency Court and to move the Insolvency Court for the reduction of those debts which were within the competence of the Insolvency Court and in that application the Official Receiver might have been asked to obtain the directions of the Insolvency Court to suspend the sale pending the decision of the amount due. But it certainly does not follow from the mere fact that an insolvent's estate may claim the benefit of S. 21, that all administration of the estate must stop until there has been an adjudication on the claims nor does it necessarily follow because there is a sale being held subject to mortgages and the insolvent estate may have a right to get those mortgage

debts scaled down, that the sale must necessarily await the scaling down process. It might be desirable to sell the properties subject to the mortgages, the purchaser taking a chance of the burden being reduced as a result of the scaling down process.

Krishna Rao v. Official Receiver, East Godavari.

However that may be, it seems to me clear that on the procedure adopted by the insolvent in this case there was nothing to prevent the Official Receiver from going on with the sale and that, though the sale was held by the Official Receiver with the knowledge that the insolvent had made a move in the matter of an application under S. 21 of Act IV of 1938, it cannot be said that the Official Receiver acted illegally or irregularly in going on with the sale notwithstanding that knowledge.

In this view I allow the civil revision petition with costs throughout and restore the order of the Insolvency Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sri Chitturi Narayanamma ... *Appellant* (Plaintiff)*

v.

Vankina Venkatachalam and another ... *Respondents (Defendants).*

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (v)—"Creditor"—If includes person beneficially entitled to the amount due—S. 8 explanation—Question of benami *for creditor not open to debtor—Mortgage by son in renewal of pre-partition debt on promissory notes by father—Debtors if same.*

Narayanamma v. Venkatachalam.

The definition of the word 'creditor', in S. 3 (*v*) of Act IV of 1938, though it expressly includes the creditor's heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. Accordingly where there is a debt in favour of *A* discharged by a mortgage debt in favour of *B* it will not be open to the debtor to let in evidence to show that the money which he owes to *B* is really the money of *A* so as to bring into force the explanation to S. 8.

Where a mortgage is executed by a son in discharge of pre-partition debts evidenced by a promissory note executed by his father, the debtors in respect of the two debts are not the same.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 13 of 1937, dated 31st August, 1938.

A. Lakshmayya for Appellant.

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* Appeal No. 71 of 1939. 2nd September, 1941.

Narayanamma v. Venkatachalam.

Wadsworth, J.

V. Govindarajachari for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The plaintiff appeals against the reduction of her claim on the basis of a defence under Madras Act IV of 1938. The suit was on a mortgage (Ex. A) dated 10th January, 1931, executed by the first defendant in favour of the plaintiff for the sum of Rs. 20,000. The mortgage deed recites four previous debts, the discharge of which provided the consideration for the document. They are as follows: (1) Ex. B, a promissory note for Rs. 3,000 dated 18th August, 1928, executed by the first defendant's father in favour of P. W. 4, the husband of the plaintiff; (2) Ex. D, a promissory note for Rs. 2,025 dated 30th September, 1929, between the same parties that is, the first defendant's father and the plaintiff's husband; (3) Ex. C, a promissory note for Rs. 5,429-5-0 executed on 11th February, 1930, by the first defendant himself in favour of the plaintiff's husband. This promissory note recites the discharge of an earlier promissory note debt incurred by the first defendant's father, which debt had been allotted to the first defendant in the division effected between him and his father, and (4) Ex. E, a promissory note for Rs. 6,000 executed on 18th August, 1928, by the first defendant's father in favour of the plaintiff herself. The learned Subordinate Judge went at some length into the evidence whether the plaintiff was really a benamidar for her husband and whether the monies advanced to the first defendant's father, which debts became consolidated in the suit mortgage, were the monies of the plaintiff herself or those of her husband. At the time when this case was decided, the Courts had not the benefit of the decisions which have helped to elucidate Act IV of 1938 and it was not realised that in order to claim the benefit of the explanation to S. 8, there must be a substantial identity of both parties to the debt, with the parties to the prior debts of which it is alleged to be a renewal. We held in *Varadarajam* v. *Krishnamurthi*[1], that when there was a mortgage debt which was claimed to be a renewal of an antecedent promissory note debt in favour of a different person, it was not open to the petitioner to contend that the creditor under the promissory note was some one other than the promisee whose name appears in the note. That conclusion

1. (1940) 2 M.L.J. 664: I.L.R. (1941) Mad. 248.

Narayanamma *v.* Venkatachalam — Wadsworth, J.

was based upon the provisions of the Negotiable Instruments Act, but we point out incidentally that the definition of the word 'creditor' in S. 3 (*v*) of Act IV of 1938, though it expressly includes the creditor's heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. In *Karuppanna Goundan* v. *Marutha Pillai*[1], we had to deal with the position where a joint family owed a debt and at the partition of the family this debt was allotted to one of the former co-parceners who executed a fresh document in favour of the creditor. We held that the contract executed by the individual debtor in substitution for the earlier debt owed by the joint family was not a debt renewed or included in a fresh document in favour of the same creditor, holding the view that there must be a substantial identity of the debtor as well as the creditor. We have, of course, held that where there is a joint family debt for which one co-parcener has signed, which is renewed by another joint family debt for which a different co-parcener signs, there is a substantial identity of the debtor sufficient to satisfy the criterion which we have laid down. In one case *Ramasubbier* v. *Rama Aiyar*[2], we had to deal with the rather peculiar circumstances of a debt due by a joint family consisting of four brothers, one of whom executed a release deed and went out of the family whereafter the other three brothers, who continued to form the joint family, renewed the debt in their own names. We held in the special circumstances of the case that there continued to be a debt due by the same family as that which had originally incurred the debt.

Now, applying these decisions to the facts of the present case, the four debts superseded by Ex. A may be classified as follows: Those evidenced by Exs. B and D are debts in which neither of the parties is a party to the suit debt, the debtor being the father of the 1st defendant and the creditor being the husband of the plaintiff. In each of the two transactions evidenced by Exs. C and E there is one party common to Ex. A though the other party is different. In Ex. C the debtor is the 1st defendant himself but the creditor is the plaintiff's husband, while in Ex. E the debtor is the first defendant's father and the creditor is the plaintiff herself. It seems clear from the recitals in Ex. C that there was a regular partition between the

1. (1941) 1 M.L.J. 773. 2. (1941) 1 M.L.J. 39.

Narayan-amma. *v.* Venkata-chalam. — Wadsworth, J.

first defendant and his father, the date of which must have been sometime between September, 1929 and February, 1930 judging from the recitals in Exs. D and C. It follows that there is a different debtor in each of the antecedent debts evidenced by Exs. B, D and E, and on the strength of our decisions the first defendant cannot claim to scale down the suit debt with reference to the antecedent debts of the joint family allotted to him at the partition in respect of which he has executed fresh documents.

With reference to Ex. C the debtor is the same. The promisee under Ex. C is the plaintiff's husband, whereas under the later mortgage the creditor in the document is the plaintiff herself. But it was found by the lower Court that the plaintiff took this mortgage as a benamidar for her husband. In the view we take of the law it is unnecessary for us to decide whether the lower Court's decision on the facts is correct or not. We are unable to accept the view that the debtor can scale down the debt under Ex. A on the basis that the real creditor under Ex. A is the promisee under the earlier note Ex. C. Our decisions have already gone so far as to make it impossible for the debtor to contend that the promisee under Ex. C is a benamidar for the later mortgagee. But we have not so far held in a case where the debt is neither due under a negotiable instrument nor under a decree, that the plea of benami cannot be called in aid in order to establish the identity of the creditor under the later debt with the creditor under the earlier debt. The observation already referred to at page 254 in *Varadarjam* v. *Krishnamurthi*[1], does contain an indication of the view which we are now setting forth. When we have to decide whether one creditor is the same person as another creditor, we are entitled to look to the definition in the Act and when that definition expressly includes heirs, legal representatives and assigns, there is much to be said for the view that the non-mention of beneficiaries must justify an inference that they are not included in the definition of 'creditor'. Ordinarily speaking, when we speak of a creditor, we mean the person with whom the debtor has contracted and to whom he looks for his discharge; we do not mean the person to whom the money will eventually go after it has been collected. In order to justify the interpretation of the term 'creditor' as including a

1. (1940) 2 M.L.J. 664: I.L.R. (1941) Mad. 248.

Narayanamma v. Venkatachalam. — Wadsworth, J.

beneficiary who will eventually be entitled to the proceeds of the debt, there ought to be some express indication in the enactment which we do not find. On the other hand, the Explanation to S. 8 seems clearly to indicate that we must look to the document ordinarily to find out who is the creditor. The words "where a debt has been renewed or included in a fresh document in favour of the same creditor," do seem to indicate that in order to ascertain whether the later creditor is the same as the earlier creditor, we must look to the writing. No doubt in the special case of one creditor who can be shown to be an assign or a legal representative or a heir of the previous creditor, the Act comes to the debtor's aid and provided he can prove that this relationship exists between the two, the identity of the creditors will be established. But ordinarily speaking, when we have a debt in favour of *A* discharged by a debt in favour of *B*, it will not in our opinion be open to the debtor to let in evidence to show that the money which he owes to *B* is really the money of *A* so as to bring into force the Explanation to S. 8.

It follows therefore that the lower Court was wrong in scaling down the debt under Ex. A on the basis that it was a renewal of previous debts between the same parties. The debt under Ex. A was contracted in January, 1931. It therefore falls under Cl. (1) of S. 8 and the plaintiff will be entitled to a decree for the principal sum of Rs. 20,000 with interest at 6¼ per cent. per annum from 1st October, 1937, till the date fixed for redemption, which will be three months hence, and subsequent interest at 6 per cent. The plaintiff will have full costs in the trial Court and also the costs in the appeal.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Vedangi Veera Raghava Rao ... *Appellant* (Defendant Appellant)*

v.

Vedangi Gopalarao ... *Respondent (Plaintiff Respondent).*

Veera Raghava Rao v. Gopalarao.

Registration Act (XVI of 1908), S. 17—Hindu Law—Partition deed unregistered and inadmissible in evidence—Effect on status and rights of parties.

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* S.A. No. 925 of 1938. 9th September, 1941.

Veera Raghava Rao v. Gopalarao.

The mere fact that the parties contemplated the execution of a more comprehensive partition deed later on does not make a deed purporting to effect a division of the properties any the less operative to create interests in the immovable properties comprised therein and it cannot be said that such a document does not require registration. Where such a deed of partition is inadmissible in evidence being unregistered, even if one co-sharer happened to be in sole enjoyment of a particular property, he could not, sue in ejectment basing his title on the partition deed if another co-owner disturbed such enjoyment. He could only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners. Mere previous possession cannot be made the basis of a decree in ejectment against co-owners. The doctrine of part performance is not applicable either, as it only entitles a person in possession to invoke it as a shield to protect such possession and does not enable one who has lost possession to sue for recovery of it.

Appeal against the decree of the Court of the Subordinate Judge of Narasapur in A. S. No. 161 of 1936 preferred against the decree of the Court of the District Munsif of Narasapur in O. S. No. 257 of 1934.

P. Satyanarayana Rao for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the defendant against a decree directing his ejectment from the suit property and the delivery thereof to the respondent. The appellant and the respondent are two out of five brothers who originally formed a joint Hindu family. Two of the brothers separated in June, 1930, and the appellant and the respondent and one Subba Rao continued joint till 20th May, 1932, on which date the properties held by them jointly till then were divided between them under the document marked as Ex. A. The respondent's case was that the property in suit was among the properties allotted to his share under this document and that the appellant unlawfully trespassed upon it shortly before the suit.

The document which is described as 'list of shares of immovable property equally divided on 20th May, 1932, among these three individuals, namely, etc.', recites:

"We, namely, our five brothers effected partition previously, that is, on 16th June, 1930, and we were keeping our three shares jointly up till now and managing the same. We have now mixed the property pertaining to our three shares together and have again effected division of the same with reference to good and bad qualities through mediators as follows."

Then follow the lists of properties allotted to each sharer who has signed at the end of his list. A "remark" at the end provides:

"That each of us should with full rights, enjoy the trees and fruit trees

Veera Raghava Rao v. Gopalarao.

which are in his lands, that each should pay circar taxes for the lands pertaining to (his) respective share and that each should enjoy his respective share with rights of alienation by way of gift and sale."

And the document as a whole is signed by all the three brothers and attested by two witnesses and the writer. It is thus clear that the document purports to effect a partition of the properties comprised therein between the three brothers and it is admitted by the appellant's own witnesses that the allotment under it was intended to be final.

It was argued for the appellant that this document (Ex. A) not having been registered, was inadmissible to prove the allotment of the suit property to the respondent, and that as the latter based his title only on Ex. A, his suit was bound to fail. The Court below has repelled this contention on two grounds. First, it has held relying upon the oral evidence in the case that it was intended that there should be another comprehensive partition deed executed subsequently when the movables and outstandings belonging to the family were to be divided, incorporating therein the allotment of the immovable properties made under Ex. A, and that therefore the partition under Ex. A could not be treated as a final partition and did not require registration. This view cannot be accepted, for, as already observed, it is not disputed that the allotment of the immovable properties under Ex. A was intended to be final. The mere fact that the parties contemplated the execution of a more comprehensive partition deed later on does not make Ex. A any the less operative to create interests in the immovable properties comprised therein. It cannot therefore be said that Ex. A does not require registration. It clearly falls within S. 17 of the Registration Act and being unregistered, it must be held to be inadmissible in evidence.

It is, however, argued by Mr. Somasundaram for the respondent that even if this partition deed is put aside as inadmissible in evidence, it is still open to the Court to take into consideration the subsequent conduct of the parties, and as both the Courts have found that the respondent was in exclusive possession for about two years after the partition till the appellant trespassed upon the suit property in 1934, the decision of the Court below can be supported on the ground of the respondent's possessory title. Mr. Somasundaram placed reliance upon a decision of Ramesam, J., in *Ahobilachariar* v.

Veera Raghava Rao v. Gopalarao.

Thulasi Ammal[1], which to some extent appears to support his contention. That was a case where the plaintiff sued to recover certain properties alleging that her deceased husband and his brothers divided certain properties in 1910, that in such division the properties claimed fell to her husband's share and were enjoyed by him till 1918 when he died and that her husband's brothers thereupon trespassed upon those properties. The learned Judge held that the partition of 1910 being unregistered was not admissible in evidence and could not therefore be relied on to show what properties fell to the share of the plaintiff's husband. The learned Judge, however, proceeded to hold that this did not prevent the Court from finding that the properties there in question were enjoyed by the plaintiff's deceased husband as his separate properties at the time of his death, and passing a decree in favour of the plaintiff on the strength of such possessory title which had devolved on her. With due respect I find it difficult to follow this reasoning. If the partition deed could be used as evidence of only a division in status and could not be relied on to show that the properties there in question were allotted to the share of the plaintiff's husband as held by the learned Judge, the position would be that the plaintiff's husband and his brothers were tenants in common of the family properties. As pointed out in *Subba Rao* v. *Mahalakshmamma*[2], the finding that the partition deed was inadmissible to show what property fell to each co-sharer must result in the conclusion that each co-sharer enjoyed an undivided share in each item of the properties. In such circumstances, even if one co-sharer happened to be in sole enjoyment of a particular piece of property, he could not, as it seems to me, sue in ejectment if another co-owner disturbed such enjoyment. He could only bring a suit for partition of all the properties owned in common or, according to some decisions, for joint possession with his co-owners. Mr. Somasundaram was unable to cite any authority binding on me holding that a possessory title, that is to say, mere previous possession can be made the basis of a decree in ejectment against co-owners. I have to hold therefore that the appellant being unable to establish his exclusive title to the property in suit on the basis of its allotment to his share at a valid partition, is not entitled to the relief claimed by him in the suit.

1. A.I.R. 1927 Mad. 830.
2. (1930) 59 M.L.J. 558: I.L.R. 54 Mad. 27 at 53.

Veera Raghava Rao v. Gopalarao.

The next ground relied on by the lower Court in support of the conclusion that the plaintiff was entitled to a decree for possession is that the doctrine of part performance is applicable to the circumstances of the case, as the appellant was found to have been in possession of the property in pursuance of the partition till the respondent disturbed such possession in 1934, and reliance was placed on certain decisions which were, however, cases decided before the Transfer of Property Amendment Act of 1929. The limits of the application of the doctrine of part performance have now been defined in S. 53-A of the Act and it is plain that that provision only entitles a person in possession to invoke the doctrine as a shield to protect such possession if the conditions therein referred to are satisfied and does not enable a person who has lost possession to sue for recovery of it. Mr. Somasundaram frankly admitted that he could not invoke that doctrine in the circumstances of this case.

In the result, the second appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

Leave to appeal is granted.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

M. Ethirajulu Naidu .. *Appellant* (Plaintiff)*

v.

A. Ranganatham Chetty and others .. *Respondents (Defendants).*

Ethirajul Naidu v. Ranganatham Chetty.

Lease—Stipulation that the lessee was to be paid the value of the building put up by him according to the market rate when lessor resumed possession—Computation of value—Mesne profits—Right to.

Where a lease of a site provided that the lessee was to be paid the market value of the building put up by him on resumption of the site by the lessor on the termination of the lease, the value should be ascertained only after allowing for due depreciation. The fact that the lessor will take some time to construct the building and would during that period be deprived of the present user and the income derived therefrom, is no valid reason for refusing to allow for depreciation. The market value is only the constructional value of the building and its special letting value cannot be taken into consideration in fixing the value in the absence of a stipulation to the contrary.

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* O. S. A. No. 57 of 1938. 18th September, 1940.

Ethirajulu Naidu v. Ranganatham Chetty.

Where the value is ultimately found to be Rs. 18,000 and the lessor tendered only Rs. 3,000, the possession of the lessee after such tender cannot be held to be wrongful so as to entitle the lessor to claim mesne profits from such date.

Appeal from the judgment and decree of the Hon'ble Mr. Justice Venkataramana Rao dated 11th May, 1938 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 41 of 1933.

A. Viswanatha Aiyar and *T. S. Muthuswami* for Appellant.

K. Rajah Aiyar and *A. Subramanyam* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the owner of a plot of land in Thatha Muthiappan Street, George Town, Madras. On the 18th October, 1912 the appellant leased this land to the respondents for a period of ten years. The respondents acquired the lease for the purpose of building thereon a hall which was intended to be used for dramatic performances. At the time the lease was entered into there was a building on the land, but this the respondents demolished and erected in its stead a new building, which was used for dramatic performances and for cinematograph entertainments. On the expiration of this lease the appellant granted to the respondents a new lease for another period of ten years from the 1st of October, 1922. Cl. 4 of the second lease reads as follows:

"The lessee shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment".

Therefore, when the respondents' right to occupy the land expired, the appellant was to be entitled to the building on it, provided he paid to the respondents the market value. This had to be paid before the respondents surrendered possession. This factor has an important bearing on one of the questions raised in this appeal.

The second lease was not renewed and the appellant became entitled to the possession of the property on payment to the respondents of the value of the building which now stands upon the land. He tendered to the respondents the sum of Rs. 3,000 as representing its market value. This was not accepted and on the 25th January, 1933, the appellant filed on

Ethirajulu Naidu v. Ranganatham Chetty.

Leach, C.J.

the Original Side of this Court the suit out of which this appeal arises. He prayed for a decree for possession, for payment to him of Rs. 2,900 (the amount which he claimed to be due as mesne profits up to the date of the filing of the suit); and for payment of future mesne profits at the rate of Rs. 725 per mensem. The respondents contested the appellant's right to possession of the land. They contended that by virtue of the Madras City Tenants Protection Act of 1921, which came into force on the 21st of February, 1922, they were entitled to a conveyance of the land on payment to the appellant of a sum representing the value of the building. The respondents also contended that the appellant could not in any event obtain a decree for possession until he had paid Rs. 100,000, which the respondents alleged was the true value of the building. The suit was tried by Wadsworth, J., who held that the Madras City Tenants Protection Act did not apply and that the appellant was entitled to a decree for possession. Having decided this question, the learned Judge directed the Official Referee to hold an inquiry into the value of the superstructure. A preliminary decree was passed in accordance with this judgment and an appeal was then filed. The appellate Court concurred in the opinion expressed by Wadsworth, J., that the Madras City Tenants Protection Act did not apply. The respondents then appealed to the Privy Council, but there also failed. The judgment of the Judicial Committee was delivered on the 10th October, 1939.

With regard to the appellant's contention that he was entitled to recover mesne profits from the respondents Wadsworth, J., said that this question depended on whether the respondents were in wrongful possession of the property and he considered that they could not be held to be in wrongful possession if the amount of compensation offered by the appellant, namely, Rs. 3,000, was "ridiculously inadequate". If, on the other hand, the amount offered approximated to the true value of the superstructure the respondents would be wrong in refusing to deliver possession to the appellant, and consequently they would render themselves liable for mesne profits. With these observations the learned Judge left the question of liability to mesne profits to be decided after the property had been valued.

The inquiry conducted by the Official Referee proved to be a lengthy one and his order was not passed until the 4th March,

Ethirajulu Naidu v. Ranga-natham Chetty.

Leach, C.J.

1938. The Official Referee found that the value of the superstructure was Rs. 18,000. This finding was challenged by both sides. The appellant said it was far too much and the respondents said it was far too little. The objections to the Official Referee's report were heard by Venkataramana Rao, J., who, on the 11th May, 1938, held that the value was Rs. 20,400. The learned Judge directed the appellant within three months to deposit the amount into Court or to pay it to the respondents. In default of payment the amount was to carry interest at six per cent. per annum from the date of default. The learned Judge also held that the appellant was entitled to set-off against this sum, Rs. 100 per mensem from the 1st October, 1932 up to the date of payment as "the rent due and payable" for the occupation of the premises. On the 10th October, 1938 the appellant paid into Court Rs. 20,400, but pending the decision of the Privy Council the respondents obtained a stay of that part of the decree requiring them to give possession to the appellant. It was made a condition of the stay that the respondents should pay into Court a sum of Rs. 900 every month as security for the mesne profits which the appellant might be entitled to. The appellant obtained possession of the property on the 1st August, 1940.

The present appeal is from the decision of Venkataramana Rao, J. In the first place the appellant says that the learned Judge should not have valued the building at more than Rs. 14,000. In the second place, he says that he is entitled to mesne profits from the date of the expiry of the lease, namely, the 1st October, 1932, to the 1st of August, 1940, when the possession was obtained. He also advances the contention that the learned Judge should not have awarded any interest on the Rs. 20,400. The respondents have filed a memorandum of cross-objections. They contend that the learned Judge should have valued the building at the sum of Rs. 50,000.

In holding that the value of the building was Rs. 20,400 that is, Rs. 2,400 more than the value placed upon it by the Official Referee, Venkataramana Rao, J., said that if the landlord were to erect a pucca building on the site, some time would be taken to construct it and he would during the interval be deprived of the present user and the income derived therefrom. Therefore the learned Judge was not inclined to allow any sum for depreciation. We find ourselves unable to agree

Ethirajulu Naidu v. Ranganatham Chetty.

Leach, C.J.

that this is a valid reason for refusing to allow for depreciation. The contract between the parties stipulated that the price to be paid should be according to the market value of the building at the time the landlord resumed possession. In valuing the building at Rs. 18,000 the Official Referee had regard to the cost of reproducing the building and then allowed for depreciation and cost of repairs, a method of which the Privy Council approved in *Hari Chand* v. *Secretary of State*[1]. No authority has been cited which lends support to the decision of the learned judge that there ought to be no deduction for depreciation.

While accepting the applicability of the principle referred to in *Hari Chand* v. *Secretary of State*[1], Mr. Rajah Aiyar on behalf of the respondents, has contended that regard should also be had to the fact that this building can be let out as a cinema hall at a monthly rent of Rs. 800. In our opinion that was never in the contemplation of the parties and is not a factor which should be taken into consideration in a case where a person is allowed to build on another's land on the understanding that when his right of occupation to that land has expired the building shall become the property of the land owner on payment of its value as a building. Unless there is some stipulation to the contrary, it seems to us that value must be the constructional value of the building. Any figure in excess of that value must be attributable to the site, not to the building. A building which is favourably situated will fetch more in rent than a similar building which is not well situated. Mr. Rajah Aiyar has conceded that if a special value is not to be placed on the building by reason of its being a cinema hall he cannot object to the finding of the Official Referee that its value is Rs. 18,000.

With regard to the value of the building it only remains to consider whether the Official Referee was right in his conclusion that Rs. 18,000 was the fair price to be paid. After a careful examination of the evidence the Official Referee considered that the cost of the erection would be Rs. 20,000, but it would be proper to allow a deduction of ten per cent. for depreciation. Mr. Viswanatha Aiyar does not object to the finding that the constructional value was Rs. 20,000 but he says that there should be a greater amount allowed for depreciation. He asks that a

1. (1939) 2 M.L.J. 722: L.R. 66 I.A. 258: I.L.R. (1939) Kar. 363 (P.C.).

Ethirajulu Naidu *v.* Ranganatham Chetty.

Leach, C.J.

third of the amount should be deducted on this ground. We consider that this is far too much and that the Official Referee was right in allowing a deduction of ten per cent.

The next point to be considered is whether the learned Judge was right in allowing the appellant a sum of Rs. 100 per mensem by way of rent instead of an amount for mesne profits. If the appellant is entitled to mesne profits he would certainly be entitled to more than Rs. 100 per mensem, because for many years the building was let at a rent of Rs. 700 per mensem and later at Rs. 800 per mensem. The appellant can only claim mesne profits if the respondents are to be regarded as trespassers. As did Venkataramana Rao, J., we agree with Wadsworth, J., that the respondents could only be treated as being in wrongful possession if they had refused a reasonable offer for the building at the expiration of the lease. No reasonable offer was made. The offer of Rs. 3,000 was "ridiculously inadequate". The appellant should have made an offer in the neighbourhood of Rs. 18,000. As I have already pointed out the contract contemplated that the respondents should remain in possession until the market value of the building had been paid. It was not paid until the 10th October, 1938 and as no reasonable offer was made in the meantime the respondents cannot be regarded as trespassers and in the circumstances the respondents' occupation must be deemed to have continued on the basis fixed by the contract, namely, on payment of a Rs. 100 per mensem. This, of course, does not apply after the stay was granted. The position since then will be governed by the conditions of the stay.

The only other question for consideration is whether Venkataramana Rao, J., was right in holding that the sum of Rs. 20,400, which he regarded as the value of the building, should carry interest at 6 per cent. in the event of default in payment within three months of his order. Inasmuch as the learned Judge directed the respondents to pay Rs. 100 a month for their occupation of the land he was not entitled to direct that the Rs. 20,400 should carry interest. This objection must be upheld.

The decree on the Original Side will be modified to the extent indicated. As the appellant has failed in the main and as the respondents have failed entirely, we make no order as to costs in this Court.

K. S. —— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Muthukumaru Maniakarar and another. *Appellants** (*Plaintiffs*)

v.

Pethia Maniakarar ... *Respondent* (*4th Defendant*).

Muthukumaru Maniakarar *v.* Pethia Maniakarar.

Madras Estates Land Act (I of 1908)—Sale by revenue Court in execution of rent decree—Suit for declaration that purchase was benami—If barred by S. 66 of the Civil Procedure Code.

S. 66 of the Code of Civil Procedure is not applicable to sales in execution of a decree for arrears of rent by a revenue Court under the provisions of the Madras Estates Land Act and will not prevent a person from suing for a declaration that the purchase was for his benefit though standing in the name of another person.

Jagannatha Pillai v. *Kathaperumal Pillai*, (1927) 53 M.L.J. 688: I.L.R 51 Mad. 76, relied on.

Balaram v. *Naktu*, (1928) 54 M.L.J. 462 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 113 of 1937, preferred against the decree of the Court of the District Munsif of Koilpatti in O. S. No. 169 of 1936.

A. Swaminatha Aiyar and *S. Thiagarajan* for Appellants.

C. S. Rajappa for Respondent.

The Court delivered the following

JUDGMENT.—The question for decision in this appeal is whether the plaintiffs are precluded by S. 66, Civil Procedure Code, from praying for a declaration that the fourth defendant has no right to item 1 of the property in the schedule to the plaint in the suit out of which this appeal arises. The relevant facts are few and may be briefly stated. The defendants 1 and 2 executed a deed of mortgage dated the 18th July, 1924, in favour of the plaintiffs' undivided father, one Ramasami Maniagarar. Five items of property were mortgaged thereunder and they are items 1 to 5 of the schedule to the plaint. Item 1 was brought to sale in execution of a decree for arrears of rent by the revenue Court and purchased by the fourth defendant on the 4th July, 1934. The present suit has been filed by the plaintiffs, sons of the said Ramasami Maniagarar, to recover a sum of Rs. 150 as being the balance due under

* S. A. No. 167 of 1939. 19th September, 1941.

Muthukumaru Maniakarar v. Pethia Maniakarar.

the said mortgage. In the plaint they allege that item 1 though purchased by the fourth defendant, was really for their (plaintiffs') benefit, that at the time of the purchase the fourth defendant was acting as kariasthan or manager of their property, that the property was purchased with their funds for a sum of Rs. 300, that ever since the date of the purchase they have been in possession of the property and enjoying the profits thereof and paying kist on the same, that they have given credit in the suit for the value of the said item and only prayed for a decree for the balance and that since the fourth defendant is setting up title thereto they have impleaded him and prayed for a declaration in regard to that item and for a sale of the remaining items of the hypotheca, namely, items 2 to 5 of the plaint schedule. The fourth defendant denied that the purchase was on their behalf but asserted it was only for his benefit and that in any event under S. 66, Civil Procedure Code, the plaintiffs are not entitled to the declaration prayed for. So far as the mortgage was concerned, there is no defence by defendants 1 to 3 and there was a decree as prayed for. But the learned District Munsif dismissed the suit against the fourth defendant on the ground that S. 66 precludes the plaintiffs from asking for a declaration of right in respect of item 1. On appeal, the learned Subordinate Judge confirmed his judgment taking the same view. The question therefore is whether this view is tenable.

Two contentions were raised by Mr. Thiagaraja Aiyar on behalf of the plaintiffs: (1) The property having been purchased in a sale in execution of a rent decree, S. 66 Civil Procedure Code, is not applicable and it would not prevent the plaintiffs from pleading that the purchase was for their benefit. (2) Assuming that S. 66 applied, the fourth defendant having been the kariasthan for the plaintiffs who were on the date of the purchase, and are still minors, with their funds, under the second clause of that section, the purchase must be deemed to have been made fraudulently or without their consent and therefore they are entitled to the declaration prayed for.

I shall now deal with the first contention, namely, the applicability of S. 66 to sales in execution of decrees for rent by a revenue Court. S. 66 (1) runs thus:

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

Muthukumaru Maniakarar v. Pethia Maniakarar.

The section deals with a purchase certified by the Court in such manner as may be prescribed. "Prescribed" has been defined in the Civil Procedure Code, as "prescribed by the rules". "Rules" are defined as meaning "rules and forms contained in the first schedule or made under S. 122 or S. 125, Civil Procedure Code". *Prima facie*, therefore, the section only applies to purchases made and sale certificates issued under the rules contained in the first schedule of the Civil Procedure Code, which make provision for sales in execution of decrees and issue of sale certificates for purchases made at those sales. As pointed out by Sulaiman, C.J., in *Bishan Dayal* v. *Kesho Prasad*[1]:

> " A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code would not be protected under S. 66 of the Civil Procedure Code."

The section has been construed strictly and their Lordships of the Judicial Committee very early indicated the policy underlying the said section in construing a corresponding provision (S. 260) in Act VIII of 1859 (*M. Buhuns Kowur* v. *L. B. Lall*)[2]:

> " It is well known that *benamee* purchases are common in *India*, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and, therefore, they must still be recognised, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.
>
> The enactments relied on by the plaintiffs are found in a Code professing to deal, not with rights, but with remedies and procedure to enforce rights.
>
> The only express enactment on the subject occurs in S. 260.
>
> * * * *
>
> This enactment is clear and definite; *there is nothing from which it can be inferred, that more is meant than is expressed.*" (The italics are mine).

The question therefore is whether the purchase by the fourth defendant can be said to be one certified by the Court under any of the rules framed under the Civil Procedure Code. If it is not, the section will not apply.

The provisions which are applicable to sale of property in execution of decrees passed by a revenue Court for rent are to be found in Chapter VI of the Madras Estates Land Act because it is admitted that the decree was passed by a revenue Court under the provisions of that Act. S. 132 of the Act provides that the provisions of the said Chapter shall be applicable as far as may be, to the execution by a revenue Court of any decree for arrears of rent and Ss. 111 to 131 deal with the procedure for sale of holdings. S. 124 provides for the issue of a sale certificate. S. 124 (2) provides that on the

1. I.L.R. (1937) All. 113 at 121. 2. (1872) 14 M.I.A. 496 at 522.

Muthukumaru Maniakarar *v.* Pethia Maniakarar.

expiration of 45 days from the date of sale as specified in the notification under sub-S. 3 of S. 123, the Collector shall grant a certificate of sale to the purchaser if no application has been made to set aside the sale under S. 131 of the Act. Therefore, the sale certificate in the present case must be deemed to have been issued under the provisions of that section. Thus it is clear that the procedure followed in a sale in execution of a decree for arrears of rent is that provided by the said Act and the sale certificate is issued under that Act and *prima facie*, therefore in this case neither the sale was made nor the certificate issued under the rules in the first schedule of the Civil Procedure Code. Therefore S. 66 would have no application to the sale in question.

But the view taken by both the lower Courts and which is pressed before me by the learned counsel for the respondent is that under S. 192 of the Madras Estates Land Act S. 66 must be deemed to have been made applicable to such sales and therefore that section operates as a bar to the plaintiffs getting the relief they claim. The material portions in S. 192 are as follows:

"(1) the (Provincial Government) may from time to time make rules consistent with this Act declaring that any provisions of the Code of Civil Procedure, 1908, shall not apply to suits, applications, appeals, or other proceedings under this Act in any Civil or Revenue Court or to any specified classes of such suits, applications, appeals or proceedings . . . . or shall apply to them subject to modifications, and additions specified in the rules.

(2) Subject to any rules so made and subject also to the other provisions of this Act and the following modifications and additions, the provisions of the Civil Procedure Code, 1908, shall apply to all such suits".

The contention is that the local Government has not made any rules declaring that S. 66 does not apply and therefore, under Cl. (2) of that Section, it must be taken that S. 66 is made applicable to a sale in execution of a decree of a revenue Court. But the contention omits to take notice of the fact that the provisions of the Civil Procedure Code are only made applicable subject to the provisions of the Act and so far as the provisions of the Code are not inconsistent therewith. Where the Act itself provides the procedure for the sale of immoveable property in execution of decrees for rent that procedure has to be followed and not the procedure prescribed in the Civil Procedure Code. Therefore, the provisions of the Civil Procedure Code so far as they relate to the sale of immoveable property and the issue of sale certificate to a purchaser at such a sale

Muthukumaru Maniakarar v. Pethia Maniakarar.

must be deemed to be inconsistent with the provisions of the Act. This is the view taken by a division bench of this Court in *Jagannatha Pillai* v. *Kathaperumal Pillai*[1]. (Vide the observations of Jackson, J., at page 82). Reliance is placed on the decision of the Privy Council reported in *Balaram* v. *Naktu*[2], where S. 66 was held, by their Lordships of the Judicial Committee, to be applicable to a sale held in execution of a decree for arrears of revenue by a Collector. The sale was held under the provisions of the Central Provinces Land Revenue Act (XVIII of 1881). On a reference to the provisions of that Act, it will be seen that S. 109 distinctly provides that where immoveable property is sold under that Act, the rules prescribed in Ss. 287, 288, 293 and 306 to 316 of Civil Procedure Code, 1882 corresponding to O. 21, rr. 66, 71, 84 to 94 in the First Schedule of the Civil Procedure Code of 1908 should be followed. Therefore as the sale was held and certificate issued in pursuance of the provisions of the Code of Civil Procedure their Lordships applied S. 66 of that Code.

It seems to me therefore that S. 66 is not applicable to sales in execution of a decree for arrears of rent by a revenue Court under the provisions of the Madras Estates Land Act. In regard to the second contention both the Courts hold that as there was no allegation in the plaint that the name of the 4th defendant was inserted in the certificate fraudulently or without the consent of the real purchaser the application of S. 66 (2) does not arise. On a reference to the plaint I find the only allegation is that the property was purchased by the 4th defendant for the benefit of the plaintiffs. In the view I have taken in regard to the first contention relating to the applicability of S. 66 Civil Procedure Code, I think it unnecessary to deal with this point.

In the result I set aside the decrees of both the lower Courts so far as item 1 is concerned and remand the suit for hearing to the District Munsif of Koilpatti on the fourth issue. In the circumstances of this case I direct each party to bear his own costs throughout. The appellants will be entitled to the refund of court-fee paid on the memorandum of appeal both here and in the lower appellate Court.

Leave to appeal is refused.

K. S. *Appeal allowed.*

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1. (1927) 53 M.L.J. 688: I.L.R. 51 Mad. 76.
2. (1928) 54 M.L.J. 462 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Athinarayana Konar and another .. *Appellants** (*Defendants 1 and 2*)

v.

V. Subramania Aiyar .. *Respondent* (*Plaintiff*).

Athinarayana Konar *v.* Subramania Aiyar.

Execution—Attachment of property subject to a contract to sell—Rights—Civil Procedure Code, S. 64.

Though a contract to sell land does not create any interest in or charge on the property, it does give rise to an obligation which limits the right of its owner and any attachment of the right, title and interest of the owner is subject to any such limitation by which he was bound.

Diravyam Pillai v. *Veeranan Ambalam,* (1939) 2 M.L.J. 822 relied on.

There is no legal basis for the theory that an attachment of land will prevail against a pre-existing contract binding the owner of the land if the attaching decree-holder had no notice of the contract. Where therefore in pursuance of the contract, a registered sale deed is executed subsequent to the attachment, the sale will not be one contrary to the attachment.

If however the attachment is followed by a Court sale and the purchaser thereat had no notice of the pre-existing contract, the position will be different and the purchaser will get a good title and the promisee under the private contract would be left to seek his remedy against his promisor.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 165 of 1938, preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 101 of 1937.

G. N. Thirumalachariar and *G. Thiruvenkatachariar* for Appellants.

T. S. Venkatesa Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit by a Court-auction purchaser for possession of the land which he had purchased, from the appellants who are alleged to have trespassed upon that land after delivery through Court, claiming title to it under a private sale made at the time when the attachment was pending. The essential facts are that the appellants, who, were defendants 1 and 2 in the trial Court, held certain mortgages over the land in question and they allege that on 10th March, 1932 the mortgagor who was not a party in these proceedings entered into an agreement with them to sell to them the mortgaged land. The written statement does not describe this agreement, but it is said in the course of argu-

*S. A. No. 231 of 1939. 14th February, 1941.

Athinarayana Konar *v.* Subramania Aiyar.

ments that it was an unregistered written agreement. Nearly a month later, on 3rd April, 1932 the present respondent in execution of a money decree against the mortgagor attached that land. It is not in evidence whether this attachment was with or without notice of the contract to sell. On 8th June, 1932, that is to say, two months after the attachment the mortgagor executed a registered sale deed in favour of the appellants conveying to them the land which was under attachment. Some eight months later on 15th February, 1933, the respondent in execution of his decree brought the same land to sale in Court-auction and purchased it himself and two years later he got delivery through Court. Thereafter the appellants are alleged to have entered upon the land and hence this suit.

Ths trial Court disposed of the suit in a very short judgment without giving any finding on the issue relating to the alleged agreement to sell dated 10th March, 1932. The learned District Munsif expressed the opinion that after the attachment the agreement could not have been carried out by the debtors to the detriment of the plaintiff. In appeal the attention of the learned District Judge was drawn to the decision in *Paparaju Veeraraghavayya* v. *Kamaladevi*[1], and other cases and he found himself unable to agree with the District Munsif that the truth of the agreement of March, 1932, was not a matter to be considered in the suit, but he supported the trial Court's decision on the ground that there was nothing in the written statement to show that the plaintiff had notice of this agreement, apparently holding the view that, though a person who has rights under a contract to sell at the time of an attachment can enforce these rights as against the attaching decree-holder, the enforcement depends on the question whether the attaching decree-holder had at the time of the attachment notice of the existence of the contract and he also seems to think that it is the duty of the persons claiming under the contract to prove that the attaching decree-holder had notice.

Now, there is a line of decisions of this Court which make it quite clear that though a contract to sell does not, having regard to the terms of S. 54 of the Transfer of Property Act, create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and that the attachment of the right, title and

1. (1934) 68 M.L.J. 67.

Athinarayana Konar v. Subramania Aiyar.

interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. The cases which have been quoted before me on this point are *Bapineedu* v. *Venkayya*[1], *Rebala Venkata Reddi* v. *Mangadu Yellappa Chetty*[2], *Paparaju Veeraraghavayya* v. *Kamaladevi*[3], *Veerappa Thevar* v. *Venkatarama Aiyar*[4], *Diravyam Pillai* v. *Veeranan Ambalam*[5], and there is a decision of the Privy Council which throws light on the same subject reported in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[6]. An attempt has been made to distinguish these decisions on the ground that they are cases in which the prospective purchaser has under his contract either paid money or got possession, but it does not seem to me that this is the basis of any of these decisions. The matter has been well put by Varadachariar, J., at page 831 of the decision in *Diravyam Pillai* v. *Veeranan Ambalam*[5]. The learned Judge says that:

> "The question is not whether any *interest* has passed under the contract to sell. An attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property. As explained in the decisions and recognised in S. 40 of the Transfer of Property Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor."

It seems to follow therefore that a finding as to the truth and validity of this agreement dated 10th March, 1932, is an essential preliminary to the disposal of the present suit.

It is however contended that even assuming the truth of this agreement, the attachment will prevail against the agreement unless the attaching creditor had notice thereof. If this is the law, it seems to me obvious that the plaintiff who seeks to escape from the effects of the pre-existing contract by reason of his ignorance of the contract must himself allege and prove that he had no knowledge of it, vide *Bhup Narain Singh* v. *Gokul Chand Mahton*[7], and *Attorney-General* v. *Biphosphated Guano Company*[8]. But I cannot myself see any legal basis for the theory that an attachment will prevail against a pre-existing

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1. (1910) 21 M.L.J. 82.
2. (1916) 5 L.W. 234.
3. (1934) 68 M.L.J. 67.
4. (1935) 69 M.L.J. 678: I.L.R. 59 Mad. 1.
5. (1939) 2 M.L.J. 822.
6. (1922) 45 M.L.J. 770 (P.C.).
7. (1933) 66 M.L.J. 255: L.R. 61 I.A. 115: I.L.R. 13 Pat. 242 (P.C.).
8. (1879) 11 Ch. D. 327 at 337.

Athinarayana Konar *v.* Subramania Aiyar.

contract binding the owner of the land, if the attaching decree-holder has no notice of the contract. No doubt if the attachment is followed by a Court-sale and the purchaser at the Court-sale has no notice of this obligation, he will get a good title and the promisee under the private contract would be left to seek his remedy against his promisor. So much can be deduced from the decision of the Privy Council in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[1]. But we are not concerned here with a purchaser for good consideration without notice of a contract to sell binding the vendor or judgment-debtor whose land is being sold. At the time of the Court-sale there was already a registered sale deed in favour of the appellants which had been in existence for some eight months. How the Court-sale could have been held without knowledge of that registered sale-deed is a matter for conjecture. But if the registered sale deed is good, no amount of ignorance on the part of the Court-auction purchaser will give him a good title. The sale in favour of the appellants can only be attacked on the basis of S. 64, Civil Procedure Code and in order to make this section applicable it must be shown that this sale was a private transfer contrary to the attachment. If the attachment was subject to the obligation under the previous contract, the sale in pursuance of the contract will not be a transfer contrary to the attachment. It is therefore incumbent upon the respondent to show that an attachment will prevail against a pre-existing contract to sell binding a judgment-debtor, if the attaching creditor had at the time of the attachment no notice of the existence of this contract. I have not been referred to any authority for this position and it seems to me to be a position which it would be difficult to support in logic. That which the creditor attaches is the right, title and interest of his judgment-debtor. When once it is conceded, as I think it must be in the light of the decisions quoted above, that the right, title and interest of the judgment-debtor is limited by any obligations with reference to the land binding upon the judgment-debtor, it is difficult to see how the attachment of that right, title and interest without knowledge of those limitations can enlarge the right, title and interest which the decree-holder attaches. The protection given to a *bona fide* purchaser for value without notice is based upon the fact that

1. (1922) 45 M.L.J. 770 (P.C.).

Athinarayana Konar *v.* Subramania Aiyar.

the purchaser has paid cash in all innocence for an apparently good title, but there is no logical reason why a similar protection should be given to an attaching creditor who has not paid cash at all. Surely it is the duty of the attaching creditor to ascertain the extent of the rights of the judgment-debtor and it is only over such rights as they actually exist that the attachment will operate. Moreover, I am of opinon in the present case, there being no assertion by the plaintiff that he was ignorant of the defendants' rights and no proof that he had no notice thereof, the lower appellate Court was wrong in assuming that he had no notice merely because the written statement had failed to aver notice and the defendant had failed to prove notice.

The appeal therefore succeeds and the suit will be remanded to the trial Court for fresh disposal after taking evidence and recording a finding on issue No. 4. Costs throughout will abide the result. The court-fee on the memorandum of appeal will be refunded.

Leave to appeal is granted.

K.S. *Appeal allowed.*

PRIVY COUNCIL.

[On Appeal from the High Court at Fort William in Bengal.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER AND SIR GEORGE RANKIN.

Bhowanipur Banking Corporation Limited .. *Appellants* (Plaintiffs)*

v.

Sreemati Durgesh Nandini Dasi.. *Respondent (Defendant).*

P.C.

Bhowanipur Banking Corporation Ltd. *v.* Durgesh Nandini Dasi.

Contract Act (IX of 1872), S. 23—Mortgage by wife—Part of the consideration withdrawal of criminal prosecution for non-compoundable offence against her husband—Opposed to public policy and illegal—Debt really due from husband—Relevancy—Mortgagor's ignorance of criminal proceedings—If can validate the mortgage.

An agreement to stifle prosecution is in essence a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. Proof that there has actually been a crime committed is unnecessary. Such agreements are from their very nature seldom set out on paper but will have to be inferred from the conduct of the parties after a survey of the whole circumstances.

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* P.C. Appeal No. 79 of 1939. 23rd June, 1941.

P.C.

Bhowanipur Banking Corporation Ltd. *v.* Durgesh Nandini Dasi.

Where an agreement to abandon a prosecution against her husband is part of the consideration for a promise of payment of a debt by a wife there is an infringement of public policy and the agreement is illegal. The fact that there was a debt really due from the husband is irrelevant. Indeed if no debt was due, the demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently itself be a criminal offence. Even if it is found that the mortgagor (the wife) did not know of the criminal proceedings against her husband and would have come to his relief merely to discharge his civil debt, it cannot be acceded that the wife's security obtained by the husband to effectuate his unlawful agreement would not be invalidated.

Appeal from a judgment of the High Court at Fort William in Bengal dated 6th June, 1938, (*Nasim Ali and Henderson, JJ.*,) reversing the decree of the Subordinate Judge of Twenty-four Parganas.

The necessary facts appear from their Lordships' judgment.

Sir Herbert Cunliffe and *W. Wallach* for Appellants.

W. W. K. Page for Respondent.

23rd June, 1941. Their Lordships' Judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from a decree of the High Court of Judicature in Bengal which reversed a decreee of the Subordinate Judge in favour of the present appellants, the plaintiffs in the suit. The suit was to recover a sum due upon a mortgage bond executed by the respondent and for the usual relief in a mortgage suit in default of payment. The bond reciting that the husband of the mortgagor was indebted to the Bank in the sum of Rs. 1,78,965 and that the mortgagor desired to reduce his debt by borrowing money by the mortgage of her own property, provided that the mortgagor borrowed from the Bank Rs. 30,000 and mortgaged to them the immoveable property there stated. The plaint alleged that no part of the principal or interest had been paid. The defendant by her written statement set up a number of defences such as that she was a purdanashin lady and was not fully advised of the nature of the bond, that she was coerced into executing it, that it was not duly executed or attested and that she did not receive the consideration money. All these defences were negatived by the trial Judge and nothing further has been heard of them. But the defence remained which was also rejected by the trial Judge but accepted by the High Court and is the question in issue in he present appeal. It was that the mortgage bond in question

P.C.

Bhowanipur Banking Corporation Ltd. *v.* Durgesh Nandini Dasi.

Lord Atkin.

was given as part of the consideration for a promise by the Bank to withdraw criminal proceedings against one Kalidas the mortgagor's husband. If established this would plainly afford a defence under S. 23 of the Indian Contract Act. The law in regard to agreements to stifle prosecutions is reasonably clear. The Board were referred to the various considerations set out at length in the well-known judgment of Vaughan Williams, J., in *Jones* v. *Merionethshire Permanent Benefit Building Society*[1]. The learned Judge is in fact doing nothing more than considering the elements that go to the making of a simple contract, for it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. It is of course impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Vaughan Williams, J., inadvertently says "must be cognisant of the crime". Proof that there has actually been a crime committed is obviously unnecessary. But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

It is not difficult to apply these principles to the facts of the present case. Kalidas the defendant's husband was a vakil of the High Court. He had been employed as legal advi-

1. (1891) 2 Ch. 587.

P.C.

Bhowanipur Banking Corporation Ltd. v. Durgesh Nandini Dasi

Lord Atkin.

25th the draft mortgage prepared by the bank was sent to the defendant and on June, 27th it was executed, and registered; 30,000 rupees was handed to the defendant 25,000 was paid by her husband to the bank in respect of his debt on the same day: and as found by the judge Rs. 5,000 was retained by the defendant until July, 25th, when it was paid into the bank on her behalf by Jitendra. Of this sum Rs. 2,338 was retained by the bank for the costs of the mortgage and another mortgage of the same date by her husband; and the balance was drawn in different sums by the defendant over the next 2 or 3 months. As has been said the mortgage was completed on June, 27th, the criminal case having been adjourned to June, 29th for the last time. On that date a petition was presented to the Court on behalf of the bank as follows:

In the Court of Honorary Magistrate, Alipore. *Prokash Chandra Bose* v. *Kalidas Rai Chowdhury and others.*

Section 420/120-B Indian Penal Code.

The humble petition of Prokash Chandra Bose complainant abovenamed,

Most respectfully sheweth :—

That in the above case Babu Kalidas Roy Chaudhury and his son Babu Jitendra Kumar Roy Chaudhury have made up their differences with the Bank and have voluntarily made arrangements for the payment of the monies due from them.

That the other three accused persons are undergoing trial in the Court of the Police Magistrate, Alipore and a charge under S. 420/120-B Indian Penal Code, had been framed against them along with other charges and there is no necessity for another trial.

That your petitioner therefore does not desire to further proceed with the case or adduce any evidence.

Your petitioner therefore prays that your honour will be pleased to discharge the accused.

And your petitioner, as in duty bound, shall ever pray. Allipore, 29th June, 1925.

13035.

It is difficult to see what more cogent proof there could be of an agreement to stifle a prosecution. "The accused have made arrangements for the payment of the moneys due from them"........."Your petititioner therefore does not desire to proceed further with the case". The reason why this petition is in this ingenious form, and was acceded to by the Magistrate is probably that suggested by the Chief Justice in his judgment in the similar case against Kalidas which is also under appeal. The accused were charged under Ss. 120-B, 420, 408, and 406

P.C.

Bhowanipur Banking Corporation Ltd. *v.* Durgesh Nandini Dasi.

Lord Atkin.

of the Indian Penal Code. As the Chief Justice said:

"Section 120-B is the offence of conspiracy to commit a criminal offence and is not compoundable. S. 406 is an offence to commit a criminal breach of trust and is not compoundable. S. 408 is the offence of criminal breach of trust by a clerk or servant and is not compoundable. S. 420 is the offence of cheating by dishonestly inducing the delivery of property and is with the permission of the Court before whom the prosecution for such offence is pending, compoundable by the person cheated (S. 345, Criminal Procedure Code.). It may be due to inadvertence, or it may not be, that the petition for the discharge of the accused mentioned S. 420 but not Ss. 406 and 408. In any event the accused were discharged in respect of all the offences not merely S. 420 but also Ss. 120-B, 406 and 408 which are non-compoundable".

The case therefore seems to be one in which the prosecutors have plainly stated that they have compounded a non-compoundable offence: and it cannot be disputed that part of the terms of composition was the mortgage given by the defendant. But the evidence does not rest there. The defendent and her son Satyendra both give evidence that the defendant was told by her husband that there were criminal proceedings pending and that the mortgage was for the purpose of having them withdrawn. It is true that they are both unreliable witnesses in that some of their evidence as to the payment of the consideration, the facts of the execution and other matters are untrue. But this only means that a statement made by such a witness cannot be relied on unless supported by independent evidence. When the Bank state before the Magistrate that there is talk of compromise, take adjournments obviously to arrange the compromise, make a compromise which includes taking the mortgage in question and then ask to withdraw the case because of the compromise there seems little doubt that the lady and her son were in this respect telling the truth. It was contended that even if the illegal agreement with Kalidas were proved, yet there was no reliable evidence that the wife knew of the criminal proceedings, and that she would have come to the relief of the husband merely to discharge the civil debt. Their Lordships must not be taken to accede to the view that even on this state of facts the wife's security obtained by the husband to effectuate his unlawful agreement would not be invalidated. But from the facts of this case the knowledge of the wife seems an irresistible inference. Their Lordships therefore agree with the decision of the High Court, though they do not follow the reasoning of one of the learned judges that the money consideration to the wife was illusory. It was real enough: but it was not the only consideration. They

P.C.

Bhowanipur Banking Corporation Ltd. *v.* Durgesh Nandini Dasi.

Lord Atkin.

desire also to point out that the learned Subordinate Judge has attached undue weight to the fact that here there was a debt really due from Kalidas. In this class of cases that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence.

Their Lordships will humbly advise His Majesty that this appeal be dismissed.

The respondent having relied on an infringement of public policy has successfully maintained on appeal her contention: and is entitled to her costs of this appeal.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Stanley Johnson and Allen.*

K.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

Appa Trimbak Deshpande and another. ... *Appellants* * *(Plaintiff and 4th Defendant)*

v.

Waman Govind Deshpande and others. ... *Respondents (Other defendants).*

P.C.

Appa Trimbak Deshpande *v.* Waman Govind Deshpande.

Practice—Decision of Privy Council declaring true principle of law, changing complexion of the case under appeal—New question not raised in pleadings or issues arising—Necessity to give parties opportunity to make good such new case.

The parties were governed by the Mayukha school of Hindu law. In 1865 one *R* was given in adoption by his father *M* to the widow of one *V*. *M* had two other sons *A* and *G*, and by a deed of 1868 to which *M* and his three sons were parties the terms upon which the adoption had been made were expressed. The deed provided that on *M's* death the total income of the ancestral immovables should be divided as follows: To *R* notwithstanding his adoption 4 annas 8 pies and to each of his brothers 5 annas 8 pies share respectively and as regards the property expected to come to *R* from his new family, the income from immovables should be divided so that *R* should get 6 annas 8 pies share and the share of each of his brothers should be 4 annas 8

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* P. C. Appeal No. 42 of 1939. 23rd June, 1941.

P.C.

Appa Trimbak Deshpande *v.* Waman Govind Deshpande.

pies each. The shares were to go to the descendants of the branches. *R* did not succeed in obtaining possession of any of the properties of *V* and was equally unsuccessful in obtaining recognition as heir when in 1890 *V's* brother died. *R* died in 1894 and *M* and *G* also died in that year leaving *A* as the senior member of that family. In 1894, *A* as next friend of *R's* only son *T*, filed a suit claiming the properties of *V* and his brother on the footing that they had all been joint. The suit and appeals thereon were dismissed in 1897, 1898 and 1899 respectively on the ground that *V's* widow could not validly adopt a son in the absence of authority from *V* or consent of *V*'s brother. *T* died in 1910 leaving two sons born in 1908 and 1910 respectively. *A* continued in management of the family property till his death in 1928 when *G's* son *W* took over the management. During *A's* lifetime the sons of *T* had been receiving a share of income, corresponding to 4 annas 8 pies share. From 1928 *W* refused to pay anything to *T's* sons and he and *A's* son each claimed a half share to the exclusion of *R's* descendants. On 26th August, 1930 *T's* sons filed the present suit claiming to be entitled to a third share in *R's* natural family, which was decreed by the trial Judge with mesne profits. An appeal was filed to the High Court on 29th March, 1932 against this decree and it was stated that the deed became void in 1899 and subsequent payments to plaintiffs and his father were made purely out of love and sympathy. While the appeal was pending, on 4th November, 1932, in *Bhimabai* v. *Gurunathgouda*, (1932) 64 M.L.J. 34: I.L.R. 57 Bom. 157: L.R. 60 I.A. 25 (P.C.) the true rule of law under the Mayukha had been declared by the Privy Coucil to be that unless the widow had been expressly forbidden by her husband, she can adopt notwithstanding that he died undivided and that she had not obtained the consent of his surviving co-parceners. This alteration of the law changed the entire complexion of the appeal in the case pending before the High Court, inasmuch as the earlier decision in *T's* suit of 1894 was not a judgment *in rem* and therefore not conclusive against the defendants in the present suit. On this footing two questions arose; namely, (*i*) Whether plaintiffs though mere strangers to the family of *M* had in fact for 12 years before 1928 been in possession of a third or other share in the suit property adversely to the branches of *A* and *G*, the other sons of *M*. If so, does not S. 28 of the Limitation Act entitle them to bring a suit to recover possession of such share and obtain partition with mesne profits? (*ii*) Whether the deed of 1868 was still operative and if so where not the plaintiffs entitled to enforce the rights given thereunder to *R* and his descendants? If so, upon a true construction of the deed, did it give them a 4 annas 8 pies share in the properties or only in the income, and to what relief are they entitled? Neither question had been raised in the pleadings nor issues framed in the trial court.

Held, that the change in the case-law having placed the plaintiffs in an embarrassing position the dismissal of the suit in the circumstances would entail risk of injustice unless the plaintiffs were allowed the fullest opportunity to make good such case as they may have upon either of the two questions, and such an opportunity must therefore be given.

Appeal from the judgment and decree of the High Court of Judicature at Bombay dated 20th August, 1935.

J. M. Parikh for Appellants.

Respondents not represented at the hearing.

P.C.

Appa Trimbak Deshpande v. Waman Govind Deshpande.

Sir George Rankin.

23rd June, 1941. Their Lordships' Judgment was delivered by

SIR GEORGE RANKIN.—This appeal has been brought in *forma pauperis* by the plaintiff and the fourth defendant, who are brothers. No one has appeared at the hearing to represent the respondents but Mr. Parikh has presented the case for the appellants with great care and fairness. In the result their Lordships are of opinion that the case should be remanded upon two points and they will say only what seems necessary to explain the scope and purpose of the remand.

In 1865 the appellants' grandfather Rangrao was given by his father Madhavrao to the widow of one Vishnu in adoption to her deceased husband. Madhavrao had two other sons, Anandrao and Govinda and by a deed dated 18th May, 1868 to which the father and all three sons were parties the terms upon which the adoption had been made were expressed. A main term was to the effect that upon Madhavrao's death the total income from his ancestral immoveables should be divided —not into thirds or shares of 5 annas 4 pies—but in proportion as follows:—to Rangrao notwithstanding his adoption 4 annas 8 pies and to each of his brothers 5 annas 8 pies; and that as regards certain property expected to come to Rangrao from his new family, the income from the immoveables should be divided so that Rangrao should get a 6 annas 8 pies share, and the share of each of his brothers should be 4 annas 8 pies. Rangrao was during his father's lifetime to live with him. By the eighth clause of the deed his share of the income from his father's property was to continue to his descendants save that it should not go to any adopted son unless he had been taken from among the issue of Anandrao or Govind. This clause is here mentioned because it has some bearing upon the question whether upon a true view of the effect of the deed Rangrao's interest in his father's property was an interest in income only or whether it extended to the capital corpus of the property—a question which may become important.

Rangrao did not succeed in obtaining possession of any of the properties of Vishnu and he was equally unsuccessful when in 1890 Vishnu's brother Keshavrao died, in obtaining recognition as his heir. Rangrao died in 1894 without having brought the validity of his adoption to the test of a civil suit. His father Madhavrao and his brother Govind died in the

P.C.

Appa Trimbak Deshpande *v.* Waman Govind Deshpande.

Sir George Rankin.

same year, leaving Anandrao as the senior member of that branch of the family.

In 1894, also, Anandrao as next friend brought a suit (No. 97 of 1894) in the Court at Wai, on behalf of Trimbak (only son of Rangrao and father of the present appellants) laying claim to the properties of Vishnu and his brothers Keshavrao and Ganpat on the footing that they had all been joint and that the two latter had died without leaving issue. This suit was dismissed by the trial Court (19th June, 1897) and on first appeal (3rd August, 1898) and by the High Court on second appeal (1st March, 1899). The ground upon which these decisions proceeded was that as Vishnu was joint with his brother Keshavrao, his widow could not validly adopt a son to him unless she had either his permission or the consent of Keshavrao. This was at the time and had been since 1879 at least the rule of Hindu Law accepted as prevailing in the Mahratta country of the Bombay Presidency and thus applicable to the parties. Upon the questions of fact, whether Vishnu had given permission and whether Keshavrao had consented there is no reason to doubt the correctness of the concurrent decisions in the negative.

Trimbak died in 1910 leaving two sons, the second appellant born in 1908 and the first appellant (plaintiff) born in 1910. Anandrao continued in the management of the family property till his death in 1928, when the first defendant Waman took over the management. From the findings of both the Courts in India in the present case it appears that the appellants had in Anandrao's time been receiving from him a share of the income, corresponding in fact to 4 annas 8 pies and not to a one-third (5 annas 4 pies) share. The learned Subordinate Judge was of opinion, that what they got was paid to them in virtue of their right to a one third share—that is, in recognition, that Rangrao's adoption having proved invalid he had reverted to his original rights as a member of his natural family and not upon the view that he was relegated to the right given to him by the deed of 1868.

However that may be, from 1928 when the first defendant Waman succeeded Anandrao in the management of the family properties he refused to pay anything to the appellants. In the present suit, brought on the 26th August, 1930, the appellants claim to be entitled between them to a one-third share. The

P.C.

Appa Trimbak Deshpande. v. Waman Govind Deshpande.

Sir George Rankin.

decree which they ask for, and which was given to them by the trial judge on 21st December, 1931, is a decree for possession with mesne profits and for partition. The decree was made against the first three defendants who are the respondents upon this appeal, but the second defendant is the widow of Anandrao's son and does not now appear to have any interest in the matter. The relief claimed by the appellants is as against Waman, the first defendant (son of Rangrao's brother Govind) and Govind, the third defendant, who was the son of Waman but has been given in adoption to the son of Anandrao. These two defendants represent respectively the branches of Rangrao's brothers Govind and Anandrao and claim to be entitled each to a half share in the suit properties, excluding Rangrao's descendants altogether.

The learned Subordinate Judge had no occasion to doubt the invalidity of Rangrao's adoption and had little difficulty in holding that his rights in his natural family remained to him and that the deed of 1868 became void when the adoption was declared in 1899 to be invalid. From this decree the defendants appealed to the High Court and their memorandum of appeal dated 29th March, 1932, set out that Rangrao and his heirs were paid an amount corresponding to 4 annas 8 pies under the deed, that the deed became void in 1899 and that the subsequent payments were made purely out of love and sympathy.

The appeal did not come on for hearing till 1935. Meanwhile, on 4th November, 1932, the rule of law as to the power of a widow to adopt which had in 1899 been applied to Rangrao's adoption had been declared by this Board to be erroneous and the true rule under the Mayukha had been declared to be that unless the widow has been expressly forbidden by her husband to adopt she can do so notwithstanding that he died undivided and that she has not obtained the consent of his surviving co-parceners (*Bhimabai's case*[1]). This reversed a long-standing decision of a Full Bench of the Bombay High Court *Ramji* v. *Ghamau*[2], as to which another Full Bench in 1926 (*Ishwar Dadu* v. *Gajabai*[3],) had decided that it had not been overruled by the Board in *Yadao* v. *Namdeo*[4]. In *Bhimabai's case*[1]

1. (1932) 64 M.L.J. 34: L.R. 60 I.A. 25: I.L.R. 57 Bom. 157 (P.C.).
2. (1879) I.L.R. 6 Bom. 498 (F.B.) 3. (1925) I.L.R. 50 Bom. 468.
4. (1921) 42 M.L.J. 219: L.R. 48 I.A. 513: I.L.R. 49 Cal. 1 (P.C.)

P.C.

Appa Trimbak Deshpande.
v.
Waman Govind Deshpande.

Sir George Rankin.

the Board held that *Ramji's case*[1] had been overruled by *Yadao's case*[2] and they restored as law the interpretation which had been put upon the Mayukha in 1868 in the case of *Rakhmabai* v. *Radhabai*[3], a Full Bench decision in the time of Sir Richard Couch.

This alteration in the case-law had changed the entire complexion of the present case pending the appeal to the High Court. S. 41 of the Indian Evidence Act does not give to such decisions as those arrived at in Trimbak's suit of 1894 the character of judgments *in rem*: indeed it is based upon a judgment of Sir Barnes Peacock *Kanhyalal* v. *Radha Charan*[4], in the course of which it was said:

> "If a judgment in a suit between *A* and *B* that certain property for which the suit was brought belonged to *A* as the adopted son of *C* were a judgment *in rem* and conclusive against strangers as to the fact and the validity of the adoption the greatest injustice might be caused."

In the High Court learned counsel for the present appellants had to admit the validity of Rangrao's adoption subject to a contention as to *res judicata* which the High Court rightly rejected. On this footing two questions or sets of questions arose. *First*, whether the appellants though mere strangers to the family of Madhavrao had been in fact for twelve years before 1928 in possession of a one-third or other share in the suit property adversely to the branches of Anandrao and Govind. If so, does not S. 28 of the Indian Limitation Act entitle them to bring a suit to recover possession of such share against the defendants as trespassers and to obtain a partition thereof as also a decree for mesne profits? *Secondly*, whether the deed of 1868 was still operative and if so were not the present appellants entitled to enforce the rights given thereunder to Rangrao and his descendants: if so upon a true construction of the deed did it give them a 4 annas 8 pies share in the properties or only in the income, and to what relief are they entitled?

Though these were the material questions arising upon the footing that the adoption of 1865 was valid neither question had been raised by the pleadings or by the issues framed in the trial Court. The only question of limitation had been whether the defendants had been in possession adversely to the plaintiff.

1. (1879) I.L.R. 6 Bom. 498 (F.B.)
2. (1921) 42 M.L.J. 219: L.R. 48 I.A. 513: I.L.R. 49 Cal. 1 (P.C.).
3. (1868) 5 Bom.H.C. (A.C.J.) 181.
4. (1867) 7 W.R. 338 at 344.

P.C.

Appa Trimbak Deshpande. v. Waman Govind Deshpande.

Sir George Rankin.

The deed of 1868 had not been mentioned in the plaint and the plaintiff in a counter written statement had refused to admit it and had contended that in any case it became inoperative when the adoption was held to be invalid. The learned judges of the High Court while saying that the agreement of 1868 was undoubtedly acted upon did not decide whether the appellants could recover on the strength of it since the suit was not based on the agreement and indeed the plaintiff had repudiated it.

On the assumption that Rangrao's adoption was invalid, the defendants had contended that he had not reverted to his natural family; hence the plaintiff might have set up any case he desired to make under S. 28 of the Limitation Act. On the other hand there were more direct answers to this contention of the defendants. The validity of the adoption made an end of the reason given in the plaintiff's pleading for regarding the deed of 1868 as inoperative. It is true that no application to amend the pleading or to frame new issues was made on behalf of the present appellants in the High Court whose action in disposing of the issues as they stood is hardly open to criticism. But their Lordships finding that a change in the case-law had put the present appellants in a most embarrassing position are concerned to scrutinise somewhat narrowly a decision which deprives the appellants of an income which for many years had been enjoyed by them, their father and their grandfather. Though not impossible, it is difficult in almost any circumstances to suppose that such an income was received by them without any claim of right. Hence their Lordships think that the dismissal of the suit would entail risk of injustice unless the appellants be allowed the fullest opportunity to make good such case as they may have upon either of the two lines of argument which have been indicated, that is, under S. 28 of the Limitation Act and upon the deed of 1868. As the respondents have not appeared at the hearing of this appeal their Lordships do not think it right to determine any matter which is not strictly within the pleadings and issues as they now stand, even though materials for the decision may be on the record.

They consider that the appeal should be allowed and the decree of the High Court dated 20th August, 1935 set aside save as regards the directions as to costs therein contained, that the case should go back to the High Court with directions to frame issues in respect of the two questions hereinbefore

P.C.

Appa Trimbak Deshpande. v. Waman Govind Deshpande.

Sir George Rankin.

set forth and to dispose of the appeal to the High Court after determining the same. The High Court is to be at liberty if it should see fit to exercise its power under O. 41, r. 25 to refer such issues to the trial Court and to give all such directions as it may think necessary in respect of the amendment of pleadings and the taking of further evidence provided always that should either party desire to adduce further evidence upon the said issues an opportunity to do so shall be afforded. Their Lordships will humbly advise His Majesty accordingly. There will be no order as regards the costs of this appeal.

Solicitors for Appellants: *Harold Shephard.*

Solicitors for Respondents: *Douglas Grant & Dold.*

K. S. *Appeal allowed. Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

S. M. Enayatullah Saheb .. *Appellant** (*4th Defendant*)

v.

S. A. K. Jeelani Saheb and another. *Respondents* (*Plaintiff and 1st Defendant*).

Enayatullah Saheb. v. Jeelani Saheb.

Married Women's Property Act (III *of* 1874), *S.* 6—*Applicability to policy of insurance effected in* 1905 *by a Mahomedan on his life for the benefit of his children—Trust—Release of their interest by the beneficiaries—Revokes the trust.*

S. 6 of the Married Women's Property Act is applicable to a policy of insurance effected in 1905 by a Mahomedan male on his own life for the benefit of his wife and children. *Balamba* v. *Krishnayya,* (1913) 25 M.L.J. 65: I.L.R. 37 Mad. 483 (F.B.), relied on.

If S. 6 of the Act were to apply, a trust is created in favour of the several persons for whose benefit the policies were effected though the interest taken by them was contingent. Such interest can be transferred and therefore also be released by the beneficiaries because it is not in the nature of a mere right to sue. The effect of such release will be to revoke the trust.

Appeal against the decree of the City Civil Court, Madras dated 25th October, 1939, and made in O. S. No. 370 of 1937.

Raffiudin Ahmad for Appellant.

O. K. Nambiar and *Short Bewes & Co.*, for Respondents.

The Court delivered the following

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* C. C. C. A. No. 4 of 1940. 5th August, 1941.

Enayatullah Saheb. *v.* Jeelani Saheb.

JUDGMENT.—This appeal raises a question of some importance touching the applicability of S. 6 of the Married Women's Property Act to policies of life insurance effected in 1905 by a Mohammadan on his own life for the benefit of his children. The subject-matter of the suit out of which this appeal arises relates to five policies being Nos. 65284 to 65288. The plaintiff is the father, defendants 2 and 4 to 9 are his sons and defendants 10 and 11 are his daughters. Policy No. 65284 was effected for the benefit of the second defendant, No. 65285 for the benefit of the fourth defendant, No. 65286 for the benefit of the eighth defendant, No. 65287 for the benefit of one of his daughters who is not a party to the suit and No. 65288 for the benefit of the tenth defendant. The first defendant is the Oriental Life Assurance Company with whom the policies were effected. The third defendant is the Official Assignee of Madras representing the estate of the second defendant. The suit is for a declaration that the plaintiff is the owner of the said policies and that none of the several defendants for whose benefit the policies were effected are entitled to claim any rights thereunder. The basis of the claim is that the Married Women's Property Act does not apply to Mohammadans and therefore under S. 6 of the Act none of the children for whose benefit the plaintiff effected the policies will obtain any benefit thereunder; that even assuming they obtained such benefit, it was released or transferred in favour of the plaintiff in pursuance of a family arrangement by a release deed dated 31st July, 1935. The first defendant company has contended that the policies were effected in Bombay and that the Married Women's Property Act is not applicable to the policies in question as they were effected long before 1923. The contention on behalf of defendants 3 and 4 was that under S. 6 of the Married Women's Property Act a trust was created in favour of the several beneficiaries for whose benefit the policies were effected, that there was no family arrangement, that the deed of release on which reliance was placed by the plaintiff could not put an end to the trust in their favour and therefore the plaintiff is not entitled to any declaration. The parties did not adduce any oral evidence and contented themselves with filing certain documents. The learned City Civil Judge came to the conclusion that the Married Women's Property Act applied to the policies in question, that there was a family arrangement by which the

Enayatullah Saheb. *v.* Jeelani Saheb.

parties surrendered their rights in favour of the plaintiff and the trust was therefore put an end to. On these findings he gave a declaration in favour of the plaintiff. The fourth defendant has preferred this appeal. The first defendant has filed a memorandum of objections raising a contention that the Married Women's Property Act would not apply to these policies and that in any event the second defendant not being a party to the deed of release it would not bind him.

The first question which arises for decision is whether S. 6 of the Married Women's Property Act governs the policies in question. In *Balamba* v. *Krishnayya*[1], the applicability of S. 6 of the Married Women's Property Act to a policy of insurance effected by a Hindu male on his own life for the benefit of his wife and children came for decision and it was held that S. 6 of the Act applied to the policy in question. This decision would govern a similar policy effected by a Mohammadan male. The Bombay High Court in *Shankar Vishwanath* v. *Umabhai*[2], took a different view on a claim made by a widow in respect of a policy effected by her husband for her benefit and it was held that as the Act of 1874 did not apply to Hindus, she could not claim the benefit of its provisions. This view was followed in *Ishani Dasi* v. *Gopal Chandra Dey*[3], and the learned Judges were of the opinion that:

> ". . . . although S. 2 of the Act expressly provides that nothing in the Act applies to any married woman who at the time of her marriage professed the Hindu amongst other religions, or whose husband at the time of such marriage professed that religion and does not expressly exempt their children from the operation of the Act, the intention of the Legislature taking the Act as a whole, is to exclude the children also from the benefits of S. 6 of the Act."

They dissented from the decision in *Balamba* v. *Krishnayya*[1]. Apparently in consequence of this conflict of view the Married Women's Property Act was amended in 1923 by an amending Act and the following proviso was introduced to S. 6:

> "Notwithstanding anything contained in S. 2 the provisions of Subsection (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Mohammadan, Sikh or Jain in Madras, after the 31st day of December, 1913 or in any other part of British India after the 1st day of April, 1923".

1. (1913) 25 M.L.J. 65 : I.L.R. 37 Mad. 483 (F.B.).
2. (1913) I.L.R. 37 Bom. 471. 3. (1914) 18 C.W.N. 1335.

Enayatullah Saheb. v. Jeelani Saheb.

After this Amending Act came into force, the question of the applicability of the Act to life polices effected before 1913 came up for consideration in our High Court and it was contended before Venkatasubba Rao and Madhavan Nair, JJ., who were dealing with the matter that the amendment of S. 6 introduced by the Amending Act of 1923 clearly implied that the Full Bench decision was wrong. The contention was that as the proviso says:

"the provisions of Sub-section (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Mohammadan, Sikh or Jain in Madras after the 31st December, 1913",

it indicates that the Act would not apply to a policy effected before that date. This contention was repelled and the learned Judges held that the Full Bench decision governed the case and that all the policies effected before 1923 would be governed by the Act of 1874 as it stood before the amendment. Subsequent to this decision a question arose with reference to a claim made by a widow of a Hindu male on a policy effected in Calcutta by her husband for her benefit and the learned Judges, the Chief Justice and Bardswell, J., in *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*[1], made the following observations:

" The point to be considered by us here is, where was this policy of insurance effected? If it was effected in Madras, then a trust has been created in favour of the assured's wife and the policy money has to be paid to the Official Trustee of Madras; and that is by reason of S. 6 of the Married Women's Property Act. If, on the other hand, the policy was effected in Calcutta, it having been effected in 1919, that is to say, before 1923, there is no trust and letters of administration will have to be taken out by the widow of the assured for the purpose of obtaining the policy money".

Neither the Full Bench decision in *Balamba* v. *Krishnayya*[2], nor the decision in *Rama Rao* v. *Kristnamma*[3], was noticed and considered. So far as this High Court is concerned, the Full Bench decision in *Balamba* v. *Krishnayya*[2] is a clear authority for the position that S. 6 of the Married Women's Property Act would govern a policy effected by a Mohammadan male for the benefit of his children. No doubt it may be contended, at it was contended in *Rama Rao* v. *Kristnamma*[3], that the mention of date "December, 1913" in the proviso introduced by the Amending Act was made with reference to the Full Bench decision in *Balamba* v. *Krishnayya*[2], and it was the intention of

1. (1933) 65 M.L.J. 455.
2. (1913) 25 M.L.J. 65 : I.L.R. 37 Mad. 483 (F.B.).
3. (1929) 57 M.L.J. 793 : I.L.R. 52 Mad. 936.

Enayatullah Saheb. v. Jeelani Saheb.

the Legislature to make it plain that having regard to the interpretation placed on S. 6 in *Balamba* v. *Krishnayya*[1], all policies effected after 1913 should be governed by the Act though the Act was passed in April, 1923. But the proviso cannot be construed as a declaratory enactment declaring what the previous law was and therefore from the positive nature of the enactment that from a particular date the Act should apply, it does not arise by necessary implication that the Act would not apply to a policy effected before that date. Whatever it is, so long as the Full Bench decision in *Balamba* v. *Krishnayya*[1], stands it must be treated as the governing law so far as our Court is concerned.

If S. 6 of the Act were to apply there can be no doubt that a trust was created in favour of the several defendants for whose benefit the suit policies were effected though the interest taken by them was contingent. Justice Tomlin in dealing with a similar policy in *Fleetwood's Policy,* In re[2], observed thus:

> "It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think therefore that the policy creates a trust in favour of the wife, but only in the terms of the trust".

The next question is what is the effect of the family arrangement and the consequent execution of the release deed by the defendants who executed it? It is contended before me that such a release is invalid and inoperative having regard to the express language of S. 6 of the Act which says that so long as the object of the trust remains it can never become the property of the plaintiff. It is contended that the expression "object" in the section means the beneficiary and so long as the beneficiary is alive, it must be taken that the object of the trust. remains. This section is borrowed from the provisions of the English Act (S. 10, Married Women's Property Act, 1870) and there is a conflict in English law as to what the expression 'object' means. According to one view the expression 'object' means beneficiary; according to another view, it means purpose (vide In re *Collier*[3], and *Cousins* v. *Sun Life Assurance Society*[4], It seems to me that it is not necessary to deal with this conflict in the view I am taking of the effect of the deed of release.

1. (1913) 25 M.L.J. 65: I.L.R. 37 Mad. 483 (F.B.).
2. (1926) Ch. 48 at 53.
3. (1930) 2 Ch. 37.
4. (1933) Ch. 126 at page 139.

Enayatullah Saheb v. Jeelani Saheb.

S. 6 of the Married Women's Property Act provides that the policy money should not form part of the estate of the insured only so long as the object of the trust remains. But if the performance of the trust becomes impossible or the trust fails or is otherwise satisfied or comes to an end, the policy money will form part of the estate of the insured. In *Cousins* v. *Sun Life Assurance Society*[1], Romer, L.J., in construing S. 11 of the Married Women's Property Act, 1882—corresponding to S. 6 of the Indian Act—observed that the proviso meant that:

> "The policy moneys shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end".

Therefore the trust can come to an end by revocation of it. S. 78 (*a*) of the Trusts Act provides that a trust can be revoked where all the beneficiaries are competent to contract by their consent. It was therefore perfectly competent to the several defendants to revoke the trust created by the policies in their favour. Under S. 58 of the Trusts Act it is also clear that it is competent for a beneficiary to transfer his interest. The interest taken by the several defendants under the policies though contingent can be transferred because the right created under the policies is not in the nature of a mere right to sue. Vide *Ma Yait* v. *The Official Assignee*[2]. If the beneficiary is capable of transferring his interest, he can also release it. The effect of the deed of release therefore is to put an end to the trust. Once the trust is put an end to, the plaintiff becomes the owner of the policies and the moneys payable thereunder. The fourth defendant was a party to the deed of release and he was competent to contract on that date. On his own admission the deed of release was executed on account of the family arrangement by which the plaintiff settled his own property on his children. I would therefore dismiss the appeal of the fourth defendant with costs, one set to be shared between the first and second respondents.

In regard to the memorandum of objections it must be noticed that the second defendant was not a party to the release deed. The finding of the learned City Civil Judge as to the existence of the family arrangement was based on the admission made in the deed of release and as the second defendant was not a party to it, it will not be open to the Court to bind him by

1. (1933) Ch. 126 at p. 139.
2. (1929) 58 M.L.J. 83: L.R. 57 I.A. 10: I.L.R. 8 Rang. 8(P.C.).

Enayatullah Saheb v. Jeelani Saheb.

the said document. Therefore the declaration so far as the second defendant is concerned must be set aside. The memorandum of objection is allowed only so far as the second defendant is concerned. I may point out that the first defendant company stated before the learned City Civil Judge that they did not dispute the jurisdiction of the Court to deal with the case and before me too, the question of jurisdiction was not raised. As the first defendant company have partly failed and partly succeeded, I direct the company to bear their own costs in the memorandum of objections.

Appeal dismissed and memorandum of objections allowed in part.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

P. Rama Naidu ... *Appellant* (5th Accused—Prisoner).*

Rama Naidu, *In re.*

Indian Penal Code (XLV of 1860), *S. 193—Fabricating false evidence—Abetting the making of document—Document falsely evidencing discharge of a decree debt—Attestor punishable in the circumstances.*

Where the accused had attested a forged document and admitted his signature and the evidence showed that he was interested in bringing such a document into existence in the interests of certain persons,

Held, that he was guilty of abetting the making of a false document and of fabricating false evidence under S 193, Indian Penal Code.

Appeal against the order of the Court of Session of the Chittoor Division in C. C. No. 7 of 1941.

K. S. Jayarama Aiyar and *V. V. Chowdhury* for Appellant.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT.—The appellant was admittedly an attestor to a forged document. There had been litigation between P. W. 9 and the 9th accused and P. W. 9 had obtained a decree against the 9th accused for maintenance. The forged document purported to be a discharge of that decree debt.

The appellant admits that he was an attestor, and the evidence shows that he knew of the litigation between the parties. The writer of the document turned approver and was examined

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*Cr. Appeal No. 287 of 1941. 27th August, 1941.

Rama Naidu, *In re.*

as P. W. 3. He states that at the time when the document was forged, a blank space was left for the attestation of some other person and that when he saw the document again, that space was filled by the signature of the appellant. The appellant did not deny this but explained:

"I was in my field in Nalagampalle. I did not see the payment of any money. I said 'How can I sign when I have not witnessed the payment?' He (Lingama Naidu, the 1st accused) said, 'She has affixed her thumb impression. The witnesses have all signed. Can you not trust me?' I then believed him and signed."

This statement itself suggests that the appellant was somewhat suspicious of the document. It is clear from the evidence that he knew of the suit that had been brought and that he was sufficiently nearly related to the parties to be interested in bringing such a document into existence in the interests of the first and the ninth accused in support of whom he had already deposed in the maintenance proceedings. On these facts, I think that the learned Judge was justified in coming to the conclusion that the appellant was guilty of forgery and of fabricating a false document.

The judgment of Pandrang Row, J., in *Chinna Veera Reddi and others* v. *Emperor*[1], has been referred to as providing an instance where a learned Judge of this Court thought that the bare fact of an attestation was not sufficient to justify an inference that the attestor knew that he was attesting a forged document. The learned Judge had however other facts before him besides the mere fact of attestation, and he quoted the judgment of the trial Judge to show that it was improbable that the attestor had the knowledge imputed to him.

Mr. Jayarama Aiyar has also argued that as a receipt does not need attestors, the receipt was complete before the appellant signed it, and that he therefore could not be said to have abetted the making of a false document. The fallacy of this argument is that although attestation was not necessary, the persons who brought this document into existence intended that it should be attested and that the appellant should be one of the attestors. The document was therefore not complete until the appellant had signed. He therefore abetted the making of a false document, and as he must have known that the document was intended to prove the discharge of the decree debt, he was also guilty

1. 1939 M W.N. Crl. 86.

Rama Naidu, *In re.*

under S. 193 of fabricating false evidence. The conviction is right and the sentence extremely light. They are therefore affirmed and the appeal is dismissed.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Baron Von Dincklage, *In re.*

Baron Von Dincklage ... *Appellant**

Penal Code (XLV of 1860), *S.* 407—*Scope—Act done in anticipation of statute which will make such act offence—Not an offence.*

A German director in India of a German company on the eve of the declaration of war between Britain and Germany, realised some cash by sale of his stock and handed over the money to his wife. In a prosecution for criminal breach of trust, it was found that the acts of the accused were done merely to screen the money from the Government of India or the Custodian of Enemy Property and that he had no intention to cause wrongful loss or wrongful gain to any other person or persons.

Held: It is not an offence to do an act in anticipation of a statute or enactment which would make that act an offence. As there was no evidence of any dishonest intention of defrauding his company the accused is entitled to the benefit of the doubt in the matter. As there was no proof that the accused had attempted to save money for his firm at the expense of his creditors the accused is not liable for an offence under S. 407, Indian Penal Code.

Appeal against the conviction and sentence passed by the Second Presidency Magistrate of the Court of the Presidency Magistrates, G. T. Madras, in C.C. No. 4157 of 1940.

V. V. Srinivasa Aiyangar and *B. T. Sundararajan* for Appellant.

The Crown Prosecutor for the Crown.

The Court passed the following

ORDER.—The appellant has been convicted by the Second Presidency Magistrate, Madras under S. 409 of the Indian Penal Code of committing criminal breach of trust with respect to a sum of Rs. 7,643, the sale proceeds of certain enamels sold to one Dwarakadoss Narayanadoss; and he has been sentenced to nine months' rigorous imprisonment.

The facts of the case are fairly simple. The appellant, a German Director of a German Company, on the eve of the declaration of war between Britain and Germany, attempted to realise as much money as he could; and so asked his clerk to try to

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*Cr. Appeal No. 307 of 1941. 23rd September, 1941.

Baron Von Dincklage, *In re.*

find a purchaser for the enamels that he had in stock. He was brought into touch with Dwarakadoss Narayanadoss, who agreed to pay Rs. 7,643 for the enamels. He came with a cheque for that amount on the morning of the 2nd of September 1939, the day before the war was declared; but the accused refused to take a cheque and said that he must be paid in cash. The cash was paid in the afternoon of the 2nd September and the accused handed over the money to his wife. The question is whether in doing so he committed a breach of trust.

Mr. V. V. Srinivasa Aiyangar was inclined to argue at first that no breach of trust was committed, even if there had been a dishonest intention; but I think that the wording of S. 407 is wide enough to be attracted by a series of acts of this kind. The argument was not pressed because, as Mr.V.V. Srinivasa Aiyangar points out, it matters very little to the accused whether he is sentenced to nine months' rigorous imprisonment for criminal breach of trust or to some slightly lesser period for an offence under some other section of the Code.

The real question is whether the accused acted dishonestly, that is to say, whether he intended to cause wrongful loss or wrongful gain to any person. The accused's explanation was that he received the money after the banks had closed on the second, which was a Saturday, that as he had no safe, he kept the money with him intending to remit it to the bank on the Monday, and that in the meantime he was arrested and interned. This statement is not consistent with the remainder of the accused's statement, from which it seems pretty clear that he was desirous of preventing this money from falling into the hands of the Government of India or whomsoever they might appoint to take charge of the assets of enemy firms. Moreover, the fact that he refused a cheque shows that he was anxious to avoid having the money in the bank. It is not however an offence to do an act in anticipation of a statute or enactment which would make that act an offence. At the time when the accused took this money and handed it over to his wife intending to withhold it from the Government of India, there was nothing in law prohibiting the accused from screening the money from the Government of India or the Custodian of Enemy Property. If therefore the acts of the accused were done merely to screen the money from the Government of India or the Custodian of Enemy Property and he had no intention to cause

Baron Von Dincklage, *In re.*

wrongful loss or wrongful gain to any other person or persons, he did not commit an offence.

There are two interpretations of the acts of the accused which would make him guilty of an offence punishable under S. 407, of the Indian Penal Code. One is that he intended to profit himself at the expense of his firm, of which he was a partner. Others have shares in the assets of the Company and if he had appropriated money belonging to a number of persons, he would have been guilty of a criminal breach of trust, even though he was entitled to a share of the money. The prosecution has not examined any other partner of the firm; nor is there any evidence, except the fact that he withdrew money from the partnership and kept it in his own custody, to show that he had any intention of defrauding the Company. The explanation of the accused that he merely intended to protect the money so that in due course it might reach the hands of the shareholders is not unreasonable. That being so, we must give him the benefit of the doubt in this matter.

The other interpretation of the appellant's act which would make him guilty of the offence with which he was convicted is that even assuming that he acted from patriotic motives and with the intention of helping his firm, he nevertheless intended to defraud the creditors of the firm, *i.e.*, he did these acts with the intention of causing wrongful loss to the creditors of the firm. If he had attempted to save money for his firm at the expense of his creditors, I think he would have been criminally liable under S. 407 of the Indian Penal Code. There is however no evidence to show that the assets available in India were not sufficient to meet the demands of Indian creditors. The evidence with regard to the amounts due to Indian creditors and the realisable outstandings of the firm is very vague, and it cannot therefore be presumed that the accused acted with an intention to cause wrongful loss to Indian creditors.

Whatever way one may view the case, therefore, one is forced to the conclusion that the prosecution has not proved that the accused acted with any dishonest intention. The appeal is therefore allowed and the conviction and sentence set aside.

K.S. *Appeal allowed and conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Al. Sp. S. Rm. Subramanian Chettiar ... *Petitioner** (*Plaintiff*)

v.

Chinnamuthu Batcha Rowther and another ... *Respondents* (*Defendants 1 and 2*).

Subramanian Chettiar *v.* Batcha Rowther.

Madras Agriculturists' Relief Act (IV of 1938)—Non-agriculturist surety—If entitled to claim discharge pro tanto *with agriculturist principal debtor.*

Where the discharge of a principal debtor is brought about not by any voluntary act of the creditor but by the operation of a statute subsequently passed, the surety cannot claim discharge, *pro tanto* with the principal debtor S. 128 of the Contract Act defines the obligation of the surety on the date of the contract of guarantee. Accordingly a non-agriculturist surety is liable for the whole amount of the debt even though the agriculturist principal debtor is only liable for the debt as scaled down in accordance with Act IV of 1938.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Periyakulam dated 17th September, 1940, and passed in S. C. S. No. 305 of 1940.

T. P. Gopalakrishna Aiyar for Petitioner.

C. A. Mahomed Ibrahim and *T. S. Santhanam* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This Civil Revision Petition arises out of a Small Cause Suit on a promissory note executed by the first defendant, an agriculturist and guaranteed by the second defendant, a non-agriculturist. The letter of guarantee is in the following terms: (Wadsworth, J.)

> "Please get a pronote from S. Chinnamuthu Batcha Rowther the bearer of this letter and give Rs. 300. In the event of his not discharging it by paying principal and interest, I also shall be liable and pay the amount."

The debt of the first defendant was only partially discharged and the suit was filed. Against the first defendant, the plaintiff gave effect to the defences open to him as an agriculturist and claimed only Rs. 95-9-0. Against the second defendant the plaintiff claimed Rs. 157-14-4, the full amount due under the contract. In the lower Court the second

* C. R. P. No. 199 of 1941. 28th August, 1941.

Subramanian Chettiar v. Batcha Rowther.

Wadsworth, J.

defendant successfully claimed that he was entitled to the benefit of the reduction of the principal debtor's liability by reason of the terms of S. 128 of the Contract Act. It is contended in the revision petition that this decision is wrong. S. 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. It cannot be contended that there is any special provision in the present contract making the liability of the guarantor different from the liability of the principal debtor. It is, however, argued that S. 128 of the Contract Act lays down only the general principle governing the interpretation of contracts of guarantee and does not purport to govern the relations between the parties as a result of subsequent events after the contract has been entered into. Those, it is contended, are governed by the later sections such as Ss. 133, 134, 135 and so on. It is also contended that though the release of the principal debtor by the act or omission of the creditor has the legal consequences of discharging the surety under S. 134 of the Contract Act, no such result follows when the discharge of the principal debtor is by operation of law. In support of this proposition reliance is placed on the leading case of Ex parte *Jacobs*[1], where it was held that where the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. The rule enunciated in this decision has been set forth very clearly in another case, In re *Fitzgeorge*[2], where Bigham, J., says:

"I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion the obligation of the debtor to pay the interest under his guarantee remains".

The same principle is laid down in Rowlatt *On Principal and Surety* at page 272. That the rule enunciated in Ex parte *Jacobs*[1], applies to India has been recognised by a Bench

1. (1875) 10 Ch. App. C. 211. 2. (1905) 1 K.B.D. 462.

Subramanian Chettiar v. Batcha Rowther.

Wadsworth, J.

of this Court in *Bombay Company Limited* v. *Official Assignee of Madras*[1], and it may be said that the principle underlying that rule is recognised in the two insolvency Acts. S. 44 of the Provincial Insolvency Act which is similar in its terms on this point to S. 45 of the Presidency Towns Insolvency Act enacts that:

> "An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him".

This provision seems to involve the assumption that notwithstanding the disappearance of the debt of the principal debtor, the liability of the surety continues and consequently it seems in effect to recognise the principle that a discharge of the principal debtor by operation of law does not discharge the surety. It is unnecessary to quote cases relating to guarantors of minors' debts and cases relating to debts barred as against the principal debtor but alive as against the surety. Though these cases may serve as indications that S. 128 of the Contract Act is not intended to govern all future changes in the liabilities of the parties, yet the continuance of the guarantor's liability in such cases may be justified on special grounds. It is sufficient for the purpose of this case to hold that, when a new statutory provision has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected.

It follows that the lower Court was wrong in restricting the relief as against the second defendant to the amount of the debt as scaled down in the Act. The lower Court has also found that even if the view taken on the effect of S. 128 of the Contract Act is wrong, the second defendant can be made liable only for interest at 15 per cent. by reason of the terms of the Madras Debtors Protection Act. This finding is not questioned before us.

In the result the revision petition is allowed with costs and the plaintiff will get a decree as against the second defendant for the principal sum due with interest at 15 per cent. up to the date of the plaint and proportionate costs, with subsequent interest at 6 per cent. till realisation. The decree as against the first defendant stands.

K.S. *Petition allowed.*

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1. (1920) 40 M.L.J. 404: I.L.R. 44 Mad. 381.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Surisetti Rama Subbayya ... *Appellant** (*Nil*).

v.

Palur Thimmiah and others ... *Respondents (Petitioners and Respondents 1 and 2.)*

Rama Subbayya *v.* Thimmiah.

Limitation Act (IX of 1908), Art. 185 (2)—*Claim of third party to attached property allowed and execution petition dismissed—Unsuccessful suit under O. 21, r. 63 by decree-holder and appeal thereon—If continuation of the execution or 'step in aid' of execution to save subsequent application for execution from bar of limitation.*

In execution of a decree an application was made on the 17th October, 1930 for attachment and sale of an immovable property. The property was attached but on objection by a third party that it had been sold to him on the 2nd June, 1928 and that the judgment-debtor was not in possession thereof the claim was allowed on the 8th September, 1931 and the application for execution was dismissed. The decree-holder brought a suit to set aside the order passed by the executing Court. The suit was dismissed on 14th December, 1934 by the trial Court and the decree-holder's appeal also was dismissed. A fresh application for execution was presented by the decree-holder on the 16th March, 1936, that is, after the expiry of almost four years and a half after his first execution petition had been disposed of. On the question of limitation,

Held: The order dismissing the first execution petition in 1931 was conclusive and in view of the fact that the decision of the civil Court was not in any way different, it continued to be so and the execution application cannot be deemed to remain pending till the final disposal of the claim suit under O. 21, r. 63 of the Code of Civil Procedure.

The plaint in the claim suit cannot be construed to be "an application" within the meaning of that term as used in Art. 182 (5) of the Limitation Act. Applications, to constitute a step in aid of execution, have to be filed in the execution proceedings themselves and not in any other suit or proceeding however intimately connected the latter might be with the proceedings of the former.

Accordingly the second execution petition in 1936 is barred by limitation.

S. Hasan Shah v. *Mohammad Amir Mirza*, (1930) I.L.R. 6 Luck. 234 dissented from.

Appeal against the order of the Court of the Subordinate Judge of Kurnool, dated 24th September, 1938 and passed in Appeal Suit No. 21 of 1938 preferred against the order of the Court of the District Munsif, Kurnool in E. P. No. 338 of 1936 in O. S. No. 825 of 1929, D.M.C. Nandyal.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

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*C.M.S.A. No. 9 of 1939. 14th February, 1941.

A. C. Sampath Aiyangar for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J. The only question to decide in this appeal is whether an application for execution presented by the decree-holder more than three years after the dismissal of his first petition can be, in view of the pendency of a subsequent declaratory suit which he had brought to get rid of an order made by the executing Court accepting a third party's claim petition, held to be within time in spite of the fact that the suit instituted by the decree-holder challenging the validity of the order of the executing Court had failed. This would depend on the decision as to the character and effect of the order of dismissal passed by the executing Court on accepting the objections raised by the third party to the attachment and on the question whether the declaratory suit can be regarded to be a step in aid of execution of the decree within the meaning of that expression as used in Art. 182, sub-clause 5 of the Limitation Act. If the order accepting the claim petition and cancelling the attachment is to become final only on the dismissal of the suit brought against the third party claimant and the execution application in which the order had been passed in his favour is to be deemed to remain pending in spite of its dismissal by the executing Court or if the steps, consisting of the institution of a declaratory suit questioning the correctness of the order passed in execution and on its failure of carrying the matter in appeal, taken by the decree-holder to remove the obstructions caused to him by the third party in raising objections to the attachment successfully, despite their failure to achieve the desired result, can be regarded to have been taken in continuation of the execution proceedings in such a manner as to keep the execution petition pending and alive, the execution petition filed by the decree-holder subsequently must be held to be within time. If, on the other hand, the order passed by the executing Court accepting the objections is to be held as final and remains, in view of the dismissal of the declaratory suit, unaffected and if the steps taken by the decree-holder in instituting such a suit cannot be considered to be passed in execution of the decree or in continuance of the execution proceedings, the subsequent application for execution must be held to be barred and the time spent in carrying on the declaratory suit cannot be calculated in counting the three years within

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

which the second application should have been made after the disposal of the first one and or disregarded as being irrelevant altogether.

The facts out of which the above question of limitation has emerged for decision are that a decree was passed on the 25th September, 1929 in O. S. No. 825 of 1929. The decree-holder made an application for execution (E. P. No. 610 of 1930) on the 17th October, 1930 for attachment and sale of an immoveable property. It was attached but the third party objected to the attachment, on the ground that the property had been sold to him on the 2nd June, 1928 and that the judgment-debtor was not in possession of the attached property. This claim was allowed on the 8th September, 1931 and the application for execution dismissed. The decree-holder brought a suit (O. S. No. 774 of 1931) to set aside the order passed by the executing Court and for a declaration that the property attached by him belonged to his judgment-debtors and was liable to attachment in execution of his decree. The suit was dismissed on the 14th December, 1934 by the trial Court. An appeal was taken against that decree by the decree-holder to the Subordinate Judge of Kurnool (A. S. No. 70 of 1935). This was also dismissed but the learned Subordinate Judge in his judgment observed that a sum of Rs. 600 towards the unpaid balance of the price of the property purchased by him was still in the hands of the respondent who had put forward the sale in his favour and that the decree-holder might take out execution of that amount by appropriate proceedings. As the Subordinate Judge, in spite of this observation, considered that the only questions to decide in that appeal were whether the property belonged to the judgment-debtor and was liable to attachment in execution of the decree and on those two points he found himself against the decree-holder, he dismissed the appeal. In paragraphs 9, 10 and 11 of his judgment, he observed as follows:

"9. The further question that was argued and has to be considered is whether in the circumstances it is open to the plaintiff, in the present suit to proceed against the said sum of Rs. 600, as being the unpaid purchase money in the hands of the vendee. I should agree with the lower Court (vide *Moti Lal* v. *Bhagwan Das*)[1], 'that when on a sale part of the sale consideration remains unpaid, the vendor has a lien on the property sold for the unpaid purchase money. But this does not entitle any decree-holder of the vendor to bring the property to sale in execution of his decree as property of his

1. (1909) I.L.R. 31 All. 443.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

judgment-debtor. He may attach the unpaid portion of the purchase money which is due to his judgment-debtor and enforce his lien on the property but he cannot cause the property purchased by a third party to be sold for the recovery of the unpaid purchase money to which he, as decree-holder, is not entitled' vide also *Veerappa Thevar* v. *Venkatarama Aiyar*[1].

10. For plaintiff, reliance is placed on the ruling reported in *Basivi Reddi* v. *Ramayya*[2]. It cannot however be said, on the facts of this case, that the plaintiff's right to proceed against the unpaid purchase money is a consequential relief. As observed, all that has to be considered in this case is whether the property, which plaintiff now seeks to proceed against, still belongs to his judgment-debtor, or it has ceased to be his property. The sale, it should be found, is a true and *bona fide* transaction and was not a fraudulent one brought about with a view to cheat the creditors; on the other hand, it was brought about with a view to help the creditors, and to see that the best advantage is secured to them.

11. Thus the suit having been brought to vacate the claim order and mainly to establish the right of the plaintiff to proceed against the properties conveyed to the first defendant, in execution of his decree in O. S. No. 825 of 1929 and since it has been found that the properties have by virtue of the sale ceased to be the properties of defendants 2 and 3, plaintiff can be held entitled to no relief in the present suit as brought."

After the suit was dismissed, a fresh application for execution (E. P. No. 338 of 1936) was presented by the decree-holder on the 16th March, 1936, that is, after the expiry of almost four years and a half after his petition E. P. No. 610 of 1930 had been disposed of. This was made with the object of attaching the sum of Rs. 600 alleged to have been in the hands of the respondent as observed by the learned Subordinate Judge, Kurnool, towards the balance of the price which had remained unpaid. The application having been presented more than three years after the last petition was dismissed, it would be apparently barred by time. But limitation was attempted to be saved

(*a*) as the second application of 1936 was alleged to be in continuation or revival of the first application (E.P. No. 610 of 1930), and

(*b*) as the suit to set aside the order of the executing Court allowing the claim was claimed to be a continuation of the execution proceedings and regarded to be a step-in-aid of the execution under Art. 182, sub-cl. 5.

These contentions did not find favour with the District Munsif of Kurnool who dismissed the application as being barred by limitation. On appeal against that order, (A. S.

1. (1935) 69 M.L.J. 678: I.L.R. 59 Mad. 1.
2. (1916) 31 M.L.J. 394: I.L.R. 40 Mad. 733.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

No. 21 of 1938) the Subordinate Judge of Kurnool found the decree-holder to have been taking all necessary steps diligently for the execution of his decree and to have filed the present execution application within a few days after the appellate Court's decision in A. S. No. 70 of 1935, clarifying the rights of the parties, was pronounced and since he held that the acceptance of the claim petition and the consequent dismissal of the execution application were only subject to the result of the suit instituted for challenging the order passed by the executing Court on the claim petition, E. P. No. 338 of 1936 was declared by him to have been presented in time. The order of the first Court was thus reversed. The garnishee appeals and the short question for decision, indicated in the beginning of this judgment turns on the character of the orders passed by the executing Court on the 8th September, 1931 allowing the appellant's claim and dismissing the execution petition and on the effect of the suit brought under O. 21, r. 63, Civil Procedure Code.

Rule 60 of the same order provides that where upon an investigation, the Court is satisfied that the property, when attached, was not in the possession of the judgment-debtor or of some person on his behalf or under him or that even being in the possession of the judgment-debtor was not in his possession on his own account or as his own property, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit from attachment. Since the only application before the Court was in respect of the property claimed by the respondent and the executing Court found that the whole of the property had been sold to him and did not belong to the judgment-debtor, the property had to be released from attachment. There was no other prayer in the application for execution presented on behalf of the decree-holder and the Court was, in view of the order passed by it in favour of the claimant, unable to proceed further and unless it was prepared to adjourn the proceedings to a further date for any sufficient reason, the application had to be dismissed. The Court did, in fact, dismiss the application on the 8th September, 1931. O. 21, r. 63 reads as follows:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, *subject to the result of such suit, if any, the order shall be conclusive.*"

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

In order to determine the character of the order passed by the executing Court, the last words of the section should be borne in mind. The section, as we read it, lays down in unmistakable terms that the order of the executing Court passed on a claim or an objection is conclusive, the only exception being as to the result of the suit which the decree-holder or the third party, against whom the objections may have been decided, may bring to establish his respective contentions in regard to the property in dispute. The words, "subject to the result of such suit" were, in our opinion, meant to come into operation only when the result of such suit was different from the result arrived at by the executing Court. The order of the executing Court is otherwise declared to be conclusive, that is to say, according to our reading, it was final and conclusive when it was passed and continued to be so. It would have been different if the contingency, that is, of a different conclusion having been arrived at in such suit, had arisen. Since the final result of the suit brought by the decree-holder in O.S. No. 774 of 1931 was against him, the order passed by the executing Court accepting the respondent's objections and the consequential dismissal of the application for execution remained undisturbed and, to use the language of the section, conclusive. The Oudh Chief Court has however taken a different view, in *S. Hasan Shah* v. *Mohammad Amir Mirza*[1], and held that an order cancelling or maintaining an attachment by the executing Court becomes final only on the date of the decision of the suit authorised by this rule and the order passed by the executing Court dismissing or filing the application on the adjudication of the claim petition cannot be construed as a final decision. With great respect to the learned Judges who decided that case, we are unable to concur in this opinion. The order was, as we have already observed, conclusive and, in view of the fact that the decision of the Civil Court was not in any way different, it continued to be so. Had no suit been brought under the provisions of this rule, the order would not have remained in a state of suspended animation until the period of limitation provided for the institution of such a suit expired. Why should a different result be held to follow if a suit such as permitted by this rule is instituted after the expiry of say eleven months unless there is something in the words of this rule or

1. (1930) I.L.R. 6 Luck. 234.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

any other provision of law which may compel us to employ the fiction of a relation back and unsettle its finality or effectiveness that existed before that date? If a claim by a third party were disallowed, the execution would have proceeded and the property attached by the decree-holder would have been brought to sale. The mere institution of the suit would not have had the effect of stopping the course of execution. It is true that a *decree* or an order against which an appeal has been preferred continues to remain executable in spite of the appeal; but this is so on account of the provisions contained in O. 41, r. 5 (1) Civil Procedure Code. There is no corresponding provision in regard to the orders passed in execution and the person who wants the execution of the order passed by the executing Court stayed will have to move the Court, hearing the suit brought under r. 63, for an injunction. It may also be remembered in this connection that two orders were passed by the execution Court on the 8th September, 1931. The objections of the appellant were allowed by one and the execution petition of the respondent was dismissed by the other. One may have followed the other both in point of time and consequence, but the appellant-objector was not a party to the latter order dismissing the application for execution and could not get it set aside by any process of law. This would have been open to the decree-holder alone against whom the third party's objections were accepted and that only when and if the Civil Court had been of a different opinion. In that case, not only the order passed by the Civil Court would have been substituted for the order passed by the executing Court but the consequential order of dismissal would have been, in order to give effect to the judgment of the Civil Court, as contemplated by the words 'subject to the result of such suit', vacated.

Let us now examine the decision in *S. Hasan Shah* v. *Mohammad Amir Mirza*[1], in order to elicit any further reasons which may have been given by the learned Judges to come to a different finding. This matter, we find, has been very briefly dealt with towards the end and the only reason given to differ from the view taken in *Raghunandun Pershad* v. *Bhugoo Lall*[2], is that the learned Judges in the latter case failed to consider the effect of the declaratory suit brought under the provisions of O. 21, r. 63, Civil Procedure Code. Had the learned Judges

1. (1930) I.L.R. 5 Luck. 234.
2. (1889) I.L.R. 17 Cal. 268.

Rama Subbayya v. Thimmiah. — Abdur Rahman, J.

of the Oudh Chief Court, and we speak with deference, borne in mind that the attachment in regard to the one-third share in the Calcutta case was never set aside by the executing Court and

> ". . . . that the decree-holders could, notwithstanding the order in the claim case, have prosecuted their application for execution against the one-third share which was not released then,"

and the suit in respect of this one-third share even if brought, was superfluous, they would not have said what they did in regard to the declaratory suit brought under r. 63. No other reason has been given for the opinion that:

> ". . . . if the suit succeeds, proceedings continue. If the suit fails, the proceedings fail simultaneously."

It is not quite correct to say first of all that if the suit succeeds, proceedings continue in all cases. They would not, if the suit that succeeded was brought by a third party. In that case, proceedings in execution would, at least as far as the third party's claim was concerned, come to an end. Moreover, if they had stopped on account of the decision of the executing Court being against the decree-holder, they would be, in the event of his success, capable of being revived; but to say that they would continue in that case may create a little ambiguity and give rise to an impression that they had never stopped in fact, which is far from being correct. The latter statement, however, that if the suit fails, the proceedings fail simultaneously cannot be, for the reasons that we have already given, accepted by us. The order by the executing Court cancelling or maintaining an attachment is liable to be affected by the result of the suit, if the result is different and not otherwise.

In support of his contention that the proceedings in a suit under O. 21, r. 63, Civil Procedure Code, are a continuation of the proceedings in execution, reliance was placed by Mr. Sampath Aiyangar on the line of cases represented by the decisions in *Krishnappa Chetti* v. *Abdul Khader Sahib*[1] and *Musammat Bas Kuer* v. *The Gaya Municipality*[2], where the alienations of the property attached by a decree-holder were held to be hit by the rule of *lis pendens* even if they were effected after the acceptance of objections raised to the attachments by third parties and before suits to test the correctness of these orders were brought by decree-holders. The other

1. (1913) 26 M.L.J. 449: I.L.R. 38 Mad. 535.
2. (1938) I.L.R. 17 Pat. 588.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

decision cited in support of his contention by learned counsel for the respondent was in the *Raja of Ramnad* v. *Subramaniam Chettiar*[1] where a suit under r. 63, was held to be in continuation of the execution proceedings when the question relating to the want of a separate notice before a suit was brought against a body like the Court of Wards was raised in defence.

In order to appreciate these decisions it is well to remember that an enquiry into the objections raised to the attachment of a property in execution of a decree under O. 21, r. 58 Civil Procedure Code is, as the terms of that rule indicate, a limited one; but, inasmuch as they can be raised by a third party only and an appeal is therefore incompetent in law, some machinery had to be devised for a further examination of the question whether the property was either wholly or partially liable to be sold for the debt due under the decree. This was provided by giving a remedy to the aggrieved party in the form of a separate suit. What had to be done, therefore, by the executing Court itself under S. 47, Civil Procedure Code, in case any objection to the liability of the property for being sold in execution was raised by the judgment-debtors or their legal representatives, and the appellate tribunal from that Court, had to be done on the intervention of a third party by a Civil Court in an independent action. The appeal, therefore, as against the decision of the executing Court had, instead of being taken to the Court which had appellate jurisdiction over it, to be made to an independent tribunal which may be even inferior in status, and in practice it very often is so, to that of the Court executing the decree. Since the real point to be decided in both these proceedings relates to the liability of the property to be sold, either wholly or partly, for the debt due under the decree (although the grounds for that decision may be either put more elaborately or stated more extensively in the subsequent action) and the *lis* is necessarily the same, the application of the rule of *lis pendens* to any alienation made after the decision of the executing Court and before that of the Civil Court or Courts, is understandable. In fact, the very words, 'subject to the result of such suit' used in r. 63, make it clear that the Legislature did not, after the decision of the executing Court, intend to set the attached property at large, so that it could be alienated or otherwise disposed of without being affected by a contrary

1. (1928) I.L.R 52 Mad. 465.

Rama Subbayya v. Thimmiah. — Abdur Rahman, J.

result, if any, arrived at in the Civil Court. If the result happens to be the same as that in the executing Court, the alienation by the claimant or the sale in execution of the decree remains unaffected. If, on the contrary, the result is different, the foundation of title on the basis of which the claimant in the one case and the decree-holder in the other were acting disappears, with the result that any alienation or sale must be, in view of the words 'subject to the result of such suit', regarded to have been made as dependent on the adjudication of the title in favour of the alienor or in that of the judgment-debtor as the case may be.

We must for the above reasons dissent from the view taken by the Oudh Chief Court in *S. Hasan Shah* v. *Mohammad Amir Mirza*[1] and hold that the finality or conclusiveness of the order passed in execution was not disturbed by the decision of the Civil Court particularly when the result of adjudication by both the tribunals was the same.

Nor is it possible to accept the contention that the execution application in spite of the order of dismissal passed on the 8th September, 1931 could be deemed to remain pending either from that date up to the time when the civil suit under r. 63 was instituted or between the date of its institution and of its final disposal. As observed before, two orders were passed on the 8th September, 1931. The objections by the third party were accepted by one and since by reason of the decree-holder's default in not asking for any further relief in those proceedings the Court was unable to proceed further with the application for execution, it was dismissed. The last words of O. 21, r. 57 lay down the effect of such a dismissal. By virtue of those words the attachment ceased to exist. It may have been revived if the Civil Court came to a conclusion different from that arrived at by the executing Court. But in the absence of that event, the orders of the executing Court passed on the 8th September, 1931 were conclusive. The execution application E. P. No. 610 of 1930 cannot, therefore, be regarded to have remained pending until the decision of the Subordinate Judge in Appeal No. 70 of 1935.

This brings us to the contention advanced on behalf of the respondent that the institution of the civil suit O. S. No. 774 of 1931 should be regarded to be a step in execution of the decree

1. (1930) I.L.R. 6 Luck. 234.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

within the meaning of Art. 182, sub-clause 5 of the Limitation Act and limitation should be held to start from the date of the final order passed in appeal by the Subordinate Judge of Kurnool in A.S. No. 70 of 1935. This article of the Limitation Act gives a period of three years for the execution of a decree or order of any Civil Court (not provided by Art. 183 or S. 48 of the Code of Civil Procedure) starting from the date of the final order passed on an *application* made in accordance with law, where such an application has been made, to the *proper Court* for execution or to take some step-in-aid of execution of the decree or order. Explanation II to this article defines the expression 'proper Court' to mean the Court whose duty it is to execute the decree or order.'

In order to attract the provisions of this article, it is contended on behalf of the decree-holder that the plaint filed by him in O. S. No. 774 of 1931 should be regarded to be in the nature of an application as used in Art. 182 (5) and as that was presented by him to the Court which was bound to execute the decree with the object of taking a step-in-aid of execution of his decree, it should be held to fall within the ambit of that clause of the Limitation Act and limitation should be held to start from the date of the final order passed thereon. There is no doubt that if the plaint can be, for the purpose of Art. 182 (5) of the Limitation Act, regarded to be an application made in accordance with law, the Court receiving the plaint as the Court whose duty it was to execute the decree, and the act of filing the plaint as a step-in-aid of the execution of his decree, this contention ought to prevail It may be conceded that the plaint was filed by the decree-holder with the object of getting rid of the finding of the executing Court which was to the effect that the property was not liable to be proceeded against in execution of his decree and that this may be therefore regarded as a step-in-aid of execution. The next question is whether it was filed in the proper Court, *i.e.*, the Court whose duty it was to execute the decree. It may be that the Court executing the decree and the Court receiving the plaint and trying the suit were by accident and not by design, the same; but we are of opinion that this accidental coincidence is immaterial and does not make the Court entertaining the civil suit as the proper Court whose duty it was to execute the decree. But assuming our opinion to be incorrect in that respect and

Rama Subbayya *v.* Thimmiah.

Abdur Rahman, J.

admitting that the Court trying the suit was bound by law to execute the decree, the main point to consider is whether the plaint can be regarded to be an application for the purposes of this Article of the Limitation Act and made in accordance with law. Learned counsel for the respondent contends that it should be so and relies again on the decision in *S. Hasan Shah* v. *Mohammad Amir Mirza*[1] to which we had occasion to refer in another connection. This decision is undoubtedly in favour of his contention but the question is if it is correct. The reasons given by the learned Judges for their opinion are: firstly, that as long as the Court receiving the plaint happens to be the Court whose duty it is to execute the decree, the requirements of the Article that the application must be made to the proper Court must be deemed to have been complied with. We have referred to this aspect of the matter already although very briefly and in view of what was said by the learned Judges of the Bombay High Court in *Murugeppa Mudiwallappa Kottanhalli* v. *Basawantrao Khalilappa Desai*[2], it is unnecessary to discuss the matter at any length. The reasons given by the learned Judges of the Oudh Court are not, in our opinion, sufficient or convincing. What is it but an accident that there happened to be only one Court in existence in the place in which the suit could be, with reference to the value and the territorial situation of the property involved, instituted? Why should a reference to the question involved in the two proceedings be considered to be relevant to determine whether the Court is proper or otherwise? Broadly speaking, it is improper for a Court to sit in judgment on its own decision and an attempt is usually made by the person who is aggrieved by the order of the executing Court to institute his suit in another Court. This is proper. Even if there may be no technical objection in some cases to the hearing of the suit by the executing Court, the opinion may have been formed after such an elaborate enquiry that it may not be easy for the Judge trying the civil suit to hear and determine the suit without being affected to some extent at least by his previous conclusions. The learned Judges of the Bombay Court were not considering the case of a plaint at all but that of an application under the Succession Certificate Act and had therefore no occasion to say anything about the plaint being treated as an application

1. (1930) I.L.R. 6 Luck. 234. 2. (1913) I.L.R. 37 Bom. 559.

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

within the meaning of Art. 182. The second reason given by the learned Judges for holding that a plaint may be, in certain cases, treated as an application for the purposes of the article was that unless there was anything to indicate that the term 'application' has been used in the Article in any narrow or restricted sense or by way of an antithesis to a 'plaint' or to any other document such as a memorandum of appeal, it may be held to cover a plaint as well. As a reason for this decision they referred to section 47 (2) Civil Procedure Code and observed that in proper cases, a plaint in a suit could be treated as an application. They attached great importance to the fact that in such cases the article of limitation held in various Courts to be applicable is one that would apply to applications and not to suits thereby implying that the plaints have been held in certain cases to have lost their individuality altogether and were to be regarded as mere applications. But in converting a plaint into an application for the purposes of Art. 182 of the Limitation Act, we are afraid the learned Judges happened to overlook the provisions of S. 2 (10) and S. 3 of the Limitation Act. There is no definition of "suit" in the Act but S. 2 provides that unless there is something repugnant in the subject or context, 'suit' does not include an appeal or an application. S. 3 of the Act also makes a distinction between the institution of a 'suit' and the making of an 'application'. It was unnecessary to rest the distinction on what the learned Judges called 'ordinary parlance'. Since a suit is, according to the explanation in S. 3, instituted when the plaint is presented to the proper Court, the Act clearly draws a line between the presentation of a plaint and making an application and it cannot be obliterated unless there was something repugnant in the subject or context. There is nothing in Art. 182 which may call for that treatment, *Hansraj Gupta* v. *Official Liquidators of Dehra Dun etc., Company*. The reason given by the learned Judges that the Court may in certain cases treat a proceeding under S. 47 of the Civil Procedure Code as a suit and a suit as a proceeding seems to be however beside the point. Even if a suit is to be treated as a proceeding under S. 47 (2) of the Code, it nonetheless remains a suit and this in spite of the fact that the Courts have, in treating the suit started on the institu-

1. (1932) I.L.R. 54 All. 1067.

tion of a plaint as an execution proceeding, applied Art. 185 (2) of the Limitation Act which would be applicable to applications only and not to suits. It must be remembered that a suit could only be treated under this section as an application when it was found that a suit could not otherwise be competent. It was an indulgence granted to a party at the option of the Court to treat the suit as a proceeding in execution and once the suit was treated as such a proceeding, the limitation under Art. 185 (2) was held to be applicable. It must, however, be remembered that the suit did not become an application for all purposes but it was at the option of the Court treated as a proceeding for a certain purpose and that is about all. The provision in sub-cl. 2 of S. 47 Civil Procedure Code does not convert the suit into an application for all purposes. On the contrary the very fact that a clear provision was made in S. 47 leaves it beyond any doubt that the suit was not for any other purpose to be treated as a proceeding.

In view of the provisions contained in Ss. 2 and 3 of the Limitation Act, it was incorrect, if we may say so with respect, to rely on the interpretation put on the rules of the Supreme Court and it is not, for that reason safe to look to the English decisions for guidance in this respect. Nothing else was contained in this judgment or was said at the bar which may lead us to construe the plaint presented in O. S. No. 774 of 1931 to be an application within the meaning of that term as used in Art. 182 (5) of the Limitation Act. Nor can it be said to have been made in accordance with law. Applications to constitute a step-in-aid of execution have to be filed in the execution proceedings themselves and not in any other suit or proceeding—however intimately connected the latter might be with the proceedings of the former.

A feeble attempt was made by learned counsel for the respondent in the end to show that the orders passed by the Subordinate Judge of Kurnool dismissing the appeal (A. S. No. 70 of 1935) was, in view of his finding that a sum of Rs. 600 had out of the price, remained unpaid, wrong and that he should have granted a declaration that the above-mentioned sum of Rs. 600 along with the vendor's lien on the property, if not the property itself, were liable to attachment. But this point was considered by the learned Subordinate Judge in the above quoted paragraphs 9 to 11 of his judgment and

Rama Subbayya v. Thimmiah.

Abdur Rahman, J.

decided against the respondent rightly or wrongly—it is unnecessary to say now,—with the result that the decree-holder's suit was ordered to be dismissed. This became final and it is impossible for us while hearing a second appeal on the question whether the application for execution presented in 1936 was within time, to hold that O. S. No. 774 of 1931 should not have been dismissed but decreed in the manner suggested by learned counsel for the respondent. The result of the civil suit was, as contemplated by O. 21, r. 63 that of a dismissal and this is enough to decide the fate of the respondent's contention and of the appeal.

For the foregoing reasons, the decision of the Subordinate Judge must be reversed and E. P. No. 338 of 1936 held to be barred by limitation. The appellant will have his costs of the appeal in this Court.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Chelikani Sitaramayya ... *Appellant** (*Appellant*)

v.

Koppula Pedda Venkanna ... *Respondent* (*Respondent.*)

Sitaramayya v. Venkanna.

Civil Procedure Code (V of 1908), S. 144—Execution proceeding not pending—Party applying for stay of decree—Stay granted on condition of furnishing of security—Defendant choosing to deposit amount in Court—Interest cannot be granted on amount deposited on reversal of decree.

Where, though there was no application for execution pending, the defendant obtained a stay, on condition that security was to be given to the Court for the decree amount and instead of furnishing security he chose to deposit the decree amount in cash, on a reversal of the decree, he will not be entitled to claim any interest on the amount deposited and there is no scope for the application of the principle embodied in S. 144, Civil Procedure Code.

Appeal under Cl. 15 of the Letters Patent against the order and judgment of the Hon'ble Mr. Justice Wadsworth dated the 18th July, 1939 and passed in A. A. A. O. No. 107 of 1936 (reported in (1939) 2 M.L.J. 509) preferred to the High Court against the order of the Court of the Subordinate Judge of Cocanada dated the 26th July, 1935 and passed in C. M. A. No. 7 of 1935 (E. A. No. 1199 of 1934 in O. S. No. 193 of 1931 District Munsif's Court, Peddapur).

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* L. P. A. No. 63 of 1939. 7th November, 1940.

Sitaramayya *v.* Venkanna.

Leach, C.J.

K. Bhimasankaram for Appellant.

Ch. Raghava Rao for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—In 1931 the appellant obtained a decree against the respondent in the Court of the District Munsif of Peddapur for the payment of Rs. 2,948-15-8. The respondent appealed to the Subordinate Judge of Cocanada and was successful, the appellant's suit being dismissed with costs. While the appeal was pending, the appellant applied for the execution of the decree which he had obtained, but as the result of an arrangement with the respondent the application was dismissed on payment of costs. Apparently fearing that the appellant might institute further proceedings in execution, the respondent applied for a stay of execution. A stay was ordered on the condition that the respondent furnished security to the Court for the amount of the decree. It was not convenient for the respondent to furnish security in the form of immovable property and instead he deposited the sum of Rs. 2,948-15-8 in cash. On paying the money in, he asked the Court to direct that the decree-holder should only withdraw it on furnishing security and this the Court directed.

When the appeal was allowed, the respondent withdrew his money from the Court and at the same time applied for an order against the appel ant directing him to pay interest thereon. The District Munsif refused to do so, but on appeal the Subordinate Judge reversed his decision and awarded the respondent interest at the rate of 12 per cent. per annum. The appellant then appealed to this Court. The appeal was heard by Wadsworth, J., who with some hesitation agreed with the Subordinate Judge. Wadsworth, J., considered that the general principle embodied in S. 144 of the Code of Civil Procedure applied and on this footing the respondent was entitled to recover any loss he might have suffered as the result of the first Court's decree.

We are unable to concur in the opinion of the learned Judge that S. 144 applies here. Although there was no application for execution pending, the respondent applied for stay and he got the stay on certain terms. The terms did not include the payment of the money into Court. If he had furnished security in the form of immovable property, there would have been no question of payment of interest. He could also

Sitaramayya v. Venkanna. — Leach, C.J.

have guarded himself against loss by converting the money into Government Promissory Notes, but he did not choose to do this and was content to leave the money lying in Court. If the respondent has suffered any loss, the blame must rest with him. The appellant is clearly not liable to pay interest in the circumstances.

The appeal is allowed with costs throughout.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

V. S. Velayutha Pandaram ... *Appellant** (*Defendant*)

v.

S. Suryamurthi Pillai ... *Respondent* (*Plaintiff*).

Velayutha Pandaram v. Suryamurthi Pillai.

Hindu law—Marriage—Money paid by bride-groom as condition of marriage, to the bride's father for making jewels for the bride, is not bride-price and marriage is not asura.

Money paid by the bride-groom to the bride's father for the specific purpose of making jewels for the bride in pursuance of a stipulation for such gift as a condition of giving the girl in marriage, is not 'bride-price' and does not make the marriage an *asura* marriage.

Kailasanatha Mudaliar v. *Vadivanni*, (1934) 69 M.L.J. 142: I.L.R. 58 Mad. 488 and *Samu Asari* v. *Anachi Ammal*, (1925) 49 M.L.J. 554, referred to.

Appeal against the decree of the District Court of West Tanjore at Tanjore dated the 29th July, 1939 and passed in A. S. No. 164 of 1938 preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 175 of 1936.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

R. Sundaralingam for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal brought by the defendant from a decree of the District Court of West Tanjore made in favour of the respondent in a suit for recovery of the plaint mentioned jewels or their value Rs. 1,400 with interest. The jewels belonged to one Sundarambal who was the daughter of the appellant and the wife of the respondent. She died without leaving any issue and the dispute relates to the respondent's right to succeed to the jewels as her heir. This depends, of

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* S.A. No. 626 of 1939. 6th December, 1940.

Velayutha Pandaram v. Suryamurthi Pillai.

course, under the Hindu law, upon the form of Sundarambal's marriage to the respondent. The trial Court held that it was in the *asura* form and dismissed the respondent's claim. On appeal, the learned District Judge came to the conclusion that it was in the *Brahma* form and accordingly decreed the suit. The appellant challenges the correctness of that conclusion in this appeal.

It is well settled that *prima facie* every marriage under the Hindu law must be presumed to have taken place according to the *Brahma* form. This presumption can, of course, be rebutted by evidence and it is sought in this case to rebut it by showing that the appellant, before giving Sundarambal in marriage, stipulated for a payment of Rs. 500 from the respondent as bride price. The respondent admits the payment of Rs. 500 to the appellant, but his case is that it was paid not for the appellant's own benefit but for the specific purpose of making jewels for the bride and they were accordingly made. This case was accepted by the trial Court and the finding was not challenged in the Court below or before me in this second appeal. The trial Court, however, took the view that the marriage was in the *asura* form because the payment was not a voluntary payment by the bridegroom for making ornaments for the bride but was the result of bargain and stipulation. According to the learned District Munsif, a *Brahma* marriage involves a pure gift of the girl (*kanya danam*), and though a voluntary gift of money or jewels to the bride out of courtesy or affection may not be inconsistent with such form of marriage, a stipulation for such gifts as a condition of giving the girl in marriage, though intended entirely for the benefit of the bride, makes it an *asura* marriage as understood in the Hindu law. This view has been pressed before me by Mr. T. M. Krishnaswami Aiyar for the appellant and the question is whether it is well founded.

It has been held, and this is not disputed by Mr. Krishnaswami Aiyar that gifts of jewels or money made to the bride do not make the marriage an *asura* marriage (*Kailasanatha Mudaliar* v. *Vadivanni*)[1], but he maintains that even such gifts if they are not purely voluntary but are made in fulfilment of stipulations in that behalf, bring it within that category. There

1. (1934) 69 M.L.J. 142: I.L.R. 58 Mad. 488.

Velayutha Pandaram v. Surya-murthi Pillai.

is no direct decision on this point, at any rate none was cited at the bar, but the principles applicable are, to my mind, perfectly plain. Marriage, according to Hindu Shastras, is a holy sacrament and the gift of a girl to a suitable person is a sacred duty enjoined upon the father which, if duly performed, is held to confer upon him great spiritual benefit. Manu laid down:

> "No father learned in the Shastras shall receive even a particle (of money) for giving his daughter in marriage. By receiving such money out of avarice he becomes a seller of his offspring." (Chapter III, Verse 51).

The Rishis thus discountenanced a father exploiting his power of disposal of his girl in marriage for his own pecuniary benefit in disregard of his parental duty of bestowing her on a duly qualified person. The vice of the discredited *asura* form consists therefore in the father out of his greed turning his fiduciary obligation into a source of profit for himself thereby transforming a sacrament into a commercial bargain. Such being the object and principle underlying the prohibition of the *asura* form, there is no apparent reason why a *stipulation* by the father for a dowry for the girl as a condition of giving her in marriage, should be viewed as involving a breach of his parental duty and amounting to a sale of his offspring (*apathya vikraya*). On the other hand, verse 54 of the same Chapter of Manu indicates that the acceptance of a dowry from the bridegroom does not turn the marriage into a sale. It says:

> "When the sulka given for the damsel is not taken by the kinsmen for their own use, there is no sale. It is only honouring (*arhanam*) the bride and is totally free from sin."

Medhatithi, in his commentary on this text, points out that the receipt of money or money's worth for the benefit of the girl (*kanyarthe*) does not amount to her sale, and is desirable as it tends to enhance her self-esteem and also raises her in the estimation of others, and concludes with the observation that receipt of a dowry for the girl (*kanyartham dhanagrahanam*) is prescribed by thus stating the good arising from it (*artha-vadena*). This would seem to clinch the matter, for if the receipt of a dowry for the girl is to be regarded as a thing *prescribed* (*vidhiyate*) by the Shastras, it would be part of the father's duty to obtain it for her if possible, and a stipulation for its payment by the bridegroom cannot have the effect of making the marriage an *asura* which is, as already observed, essentially founded on a breach of parental duty.

Velayutha Pandaram v. Surya-murthi Pillai.

Reference was made to the decision in *Kailasanatha Mudaliar* v. *Vadivanni*[1], where Varadachariar, J., delivering the judgment of the Court observed:

"The form or value of the jewel was not even the subject of a bargain, but merely left to the pleasure of the bride-groom's father. This can in no sense be called 'bride-price'."

Here the learned Judge was merely emphasizing that in no view was it possible, in the circumstances of that case, to hold that the marriage there in question was in the *asura* form, and I cannot regard the passage as involving a decision that a bargain or a stipulation made with the bridegroom in regard to the present of jewels to the bride turns such present into a 'bride price' and makes the marriage an *asura*, especially as the learned Judge has stated in the sentence next following that the distinctive feature of the *asura* form is 'the giving of money or money's worth to the bride's father *for his benefit or as a consideration* for giving the girl in marriage.' Mr. T. M. Krishnaswami Aiyar argued that the appellant had intended to make jewels for his daughter himself and that by stipulating for and receiving the sum of Rs. 500 from the respondent, he was relieved from the expenses of making such jewels and thus indirectly benefited himself, and reference was made to *Samu Asari* v. *Anachi Ammal*[2], in support of this argument. I see no force in this contention. In the first place, this was not the case of the appellant at all. He alleged that the money was received only in consideration of his giving his daughter in marriage to the respondent and this has been found to be false. The money, as already observed, was found to have been received by the appellant for the specific purpose of making jewels for his daughter, and I cannot agree, in such circumstances, that even if the appellant had intended to present his daughter with jewels and abandoned the idea subsequently in view of the payment received for the purpose from the respondent, that would affect the character of the marriage. The appellant was under no obligation to make any jewels for his daughter before the receipt of the money, and there can be no question of his being relieved from any obligation by such receipt. In the case in *Samu Asari* v. *Anachi Ammal*[2], the father of the bride received a contribution from the bride-

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1. (1934) 69 M.L.J. 142: I.L.R. 58 Mad. 488.
2. (1925) 49 M.L.J. 554.

Velayutha Pandaram *v.* Surya-murthi Pillai.

groom's party towards the expenses of the marriage, and Ramesam, J., held that as the father was benefited by such contribution in that he was relieved to that extent from defraying such expenses himself, the marriage was one in the *asura* form. This view has been criticised in the latest edition of Mayne's Hindu Law as not really warranted by the Hindu law texts, and the point may have to be reconsidered when it arises. The decision has no application to the facts of the present case which are entirely different.

For the reasons indicated, I have no hesitation in holding that the marriage of Sundarambal to the respondent was in the *Brahma* form and the respondent is her heir. The second appeal is accordingly dismissed with costs.

Leave refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Vinai-theerthal Achi, *In re*.

Vinaitheerthal Achi *alias* Annapurani Achi... *Appellant**

Court-Fees—Memorandum of appeal against decree refusing to give a first charge on assets valued at Rs. 9,500 in respect of a debt of Rs. 19,000 *decreed—Relief for first charge—Whether capable of valuation and liable to court-fee on its value.*

A widow filed a suit against her minor son for the recovery of a sum of Rs. 18,897-0-9 as a first charge from and out of the separate properties inherited by him from his father and the joint family properties which on the death of his father he got by survivorship. Her case was that her *stridhanam* property was entrusted by her father to her husband, on trust, to improve and return to her when she was in need of it, that he mixed the same with his own assets, both separate and joint family property, and that therefore she had a first charge on all the assets. The assets were valued by her at Rs. 9,500. The trial Court gave a decree for the amount claimed but declined to give a first charge as prayed for. The plaintiff preferred an appeal against the decree disallowing her prayer for a first charge.

Held, that the relief sought is not incapable of valuation and the appellant should pay court-fee on Rs. 9,500, the value of the assets over which the charge is sought as fixed by her.

Case-law discussed.

Appeal sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge of Devakottai in O. S. No. 69 of 1939.

K. Rajah Aiyar for Appellant.

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* S. R. No. 29885 of 1939. 23rd October, 1940.

Vinaitheerthal Achi, *In re.*

T. Krishna Rao for the Government Pleader for the Government.

The Court made the following

ORDER. This is a reference made to me on the correct court-fee payable on the memorandum of appeal presented against the decree of the Subordinate Judge of Devakottai in O. S. No. 69 of 1939 on his file. The plaintiff sued to recover a sum of Rs. 18,897-0-9 from the defendant as a first charge from and out of the properties possessed by him, namely, the separate properties inherited from his father and the joint family properties which he and his father possessed and which on the death of his father he got by survivorship. The defendant is the minor son of the plaintiff. Her case was that her *stridhanam* property was entrusted by her father to her husband, the defendant's father, on trust, that he agreed to hold such property in trust for her, to improve it and return it to her when she was in need of it, that he mixed it with his own assets both separate and joint family and that therefore the defendant was bound to return her money from and out of the said assets and that she has got a first charge on them. The learned Subordinate Judge gave a decree for the amount claimed but declined to give a first charge as prayed for. The plaintiff has preferred this memorandum of appeal against the decree disallowing her prayer in respect of the first charge and seeks in this appeal to get a charge on the said assets which she has valued in the memorandum of appeal at Rs. 9,500.

The appellant has paid a court-fee of Rs. 100 on the memorandum of appeal on the ground that the relief is incapable of valuation. The Office and the Taxing Master felt a doubt as to whether the relief can be said to be incapable of valuation and accordingly referred the matter to me. Before the Taxing Master reliance was placed on a decision of mine In re *Subbiah Pandaram*[1], and Mr. Rajah Aiyar who appeared for the appellant relied on the same decision before me. The contention of Mr. Rajah Aiyar is that under S. 23 of the Trusts Act his client is entitled to get a charge on the assets, both separate and joint family property of the father which had come into the hands of the defendant, that the decree that has been given by the lower Court is admittedly executable against the said assets, that there is no dispute as to the

1. 1937 M.W.N. 672: A.I.R. 1937 Mad. 840.

Vinaitheerthal Achi, *In re.*

amount payable to the plaintiff nor as to the liability of the said assets in the hands of the defendant but that the plaintiff is only seeking to establish her preferential right to be paid out of the said assets and that that right is incapable of valuation. After listening to his arguments I am of opinion that his contention is not sound. It cannot be said that the relief is incapable of valuation. The plaintiff is seeking to make all the said assets liable to the extent of Rs. 18,897 odd and therefore there is no question about the extent of the liability sought to be imposed on the said assets. Again, so far as the assets are concerned, it cannot be said that they are incapable of valuation. The assets have got a money value and are capable of valuation. In In re *Duraiswami Aiyar*[1], following *Bunwari Lal* v. *Daya Sunker Misser*[2], it was pointed out that the word 'estimate' in Art. 17 (*b*) of the Court-Fees Act involves the idea of approximation and all that is necessary is that the subject-matter should be capable of being approximately and by no means accurately valued. The plaintiff has valued the assets approximately in the sum of Rs. 9,500. This case in my opinion is governed by the principle of the Full Bench decision in *Ramakrishna Reddi* v. *Kotta Kota Reddi*[3]. It was a case which arose out of a suit upon a mortgage and the decree which was granted by the trial Court exonerated certain properties from the decree on the ground that the mortgage was not binding on the said properties. The appellant by his memorandum of appeal sought to make the said properties also liable. The decree that was granted by the Court in favour of the plaintiff was for a sum of Rs. 9,420 but he valued the properties sought to be charged at Rs. 4,000. The question that arose was, what is the court-fee payable? The learned Judges held that primarily court-fee should be paid upon the amount of the decree but inasmuch as the properties were worth only Rs. 4,000 it would be enough if he paid court-fee on Rs. 4,000. The reasons for their conclusion were given thus:

"The amount of the decree is not in dispute. The liability of the lands other than the lands claimed by defendants 6 to 9 is not in dispute. The question in dispute is the liability of the lands claimed by defendants 6 to 9 to be proceeded against for the debt. If the plaintiff succeeds in the appeal he will no doubt be entitled to proceed against the lands claimed by defendants 6 to 9 for the satisfaction of the whole debt but he can only recover the

1. I.L.R. (1937) Mad. 980. 2. (1909) 13 C.W.N. 815.
3. (1906) 16 M.L.J. 458: I.L.R. 30 Mad. 96 (F.B.).

Vinai-theerthal Achi, *In re.*

sale proceeds of these lands. The lands have been valued at Rs. 4,000 and unless this valuation is successfully impeached by the respondents it must * * * * be taken as the value of the subject-matter in dispute in this appeal."

I would follow this decision and hold in this case that court-fee is payable on the sum of Rs. 9,500, the value which the plaintiff-appellant has placed on the assets.

My decision In re *Subbiah Pandaram*[1], on which reliance was placed is not applicable to the facts of this case. As pointed out by me in that case there were two mortgages on the property and the question was one of priority. The amount of the decree in that case was not disputed and the liability of the property in respect of both the mortgages was not disputed and there was an order for sale. The decree directed that the amount payable in respect of one mortgage should be paid first and that the amount due under the other mortgage should be paid later. The question of priority was the only question in dispute and I held that the relief for declaration was enough and can be valued as such. I also pointed out that even if I was not correct in the view I took, having regard to the form of the decree in that case it could be said that the relief was one which was incapable of valuation. This decision is therefore distinguishable.

In the result I direct the appellant to pay the deficit court-fee as required by the office note, that is, the court-fee payable on Rs. 9,500 the value fixed by her less the sum of Rs. 100 already paid by her. Time for payment is four weeks.

In the course of the argument I suggested that it would be better to have a specification of the assets both from the point of view of valuation and from the point of view of the Court being able to define the charge with reference to specific property at the time of the passing of the decree. No statement has been filed but I give leave to the appellant to do so at the time of payment of the additional court-fee ordered here.

I fix the Government Pleader's costs at Rs. 35 which he is entitled to realise from Government.

K. S. *Reference answered.*

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1. 1937 M.W.N. 672: A.I.R. 1937 Mad. 840.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE HAPPELL.

Bysani Venkataratnam Chetti .. *Appellant** (*3rd Respondent*)

v.

R. Venkatayya of Kadiri and others. *Respondents* (*Petitioner 1st Respondent & Nil*).

Venkataratnam Chetti *v.* Venkatayya.

Provincial Insolvency Act (*V of* 1920), *S.* 16—*Petition by one creditor alleging the execution of a mortgage by the debtor within three months—Petitioner not proceeding with due diligence—Another creditor allowed to continue the proceedings long after three months from date of mortgage—Date of presentation of the petition by the first creditor whether available to base adjudication of debtor an insolvent.*

A petition for adjudication of a debtor as insolvent was originally filed by one of the creditors on 25th August, 1934 and it stated that the act of insolvency was the execution of a mortgage deed by the debtor on 17th August, 1934. In 1937 the second petitioner, another creditor was allowed to continue the insolvency under the provisions of S. 16 of the Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due diligence. There was no contest on the question of the nature of the mortgage executed by the insolvent and an order of adjudication accordingly followed. On appeal,

Held, that the order of adjudication was proper and that the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so will not prevent the creditor subsequently allowed to continue the proceedings under S. 16 of the Provincial Insolvency Act from taking advantage of the date of the presentation of the petition originally by the other creditor.

In re *Maund*, Ex parte *Maund*, (1895) 1 Q.B. 194 distinguished.

Venkata Hanumantharao v. *Gangayya*, (1928) 55 M.L.J. 168: I.L.R. 51 Mad. 594 relied on.

Appeal against the order of the District Court of Anantapur dated 3rd July, 1939 and made in I. P. No. 62 of 1934.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

G. V. Ramalingam, R. S. Swaminathan and *S. Ranganatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question at issue in this appeal is whether a certain Sathrasala Appayya has or has not been rightly adjudicated an insolvent. The petition upon which the order of adjudication has been passed was originally filed by one of his creditors on 25th August, 1934 and stated that the act of insolvency was the execution of a mortgage deed by the debtor on the 17th of August, of that year. In 1937 the second

* A. A. O. No. 340 of 1939. 18th September, 1941.

petitioner was allowed to continue the insolvency under the provisions of S. 16 of the Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due diligence. At the enquiry into the petition it was held that the second petitioner's debt entitled him to ask for the adjudication of the insolvent as such and on the question of the nature of the mortgage executed by the insolvent there was no contest. His adjudication accordingly followed.

One of the arguments taken against the adjudication was by the present appellant who is another creditor of the insolvent and was proceeding in execution against him at the time of the insolvency petition. His point was that the first petitioner was not in fact a creditor of the insolvent at all, and therefore under S. 9 of the Act was not entitled to present this petition in August, 1934, and that when the second petitioner was allowed to continue the petition in 1937 it was incumbent upon him not to prove his own status as a creditor for more than Rs. 500 but to prove the status of the first petitioner as such a creditor, and that as he has failed to do this, the order of adjudication must be set aside and the matter remanded for further enquiry. The appellant in the lower Court relied in support of this argument upon a case reported in *Chockalingam Chettiar* v. *Muthiah Chettiar*[1]. This case has not been discussed by the learned District Judge and we cannot see in what way any such discussion would be material to the solution of the present issue. On the other hand the respondents relied upon a case reported in *Venkata Hanumantharao* v. *Gangayya*[2]. That is also a case of the substitution of one creditor for another creditor under the provisions of S. 16. That substitution took place at the time when the second creditor's debt had become barred by limitation. It was held by this Court that in spite of that fact, substitution might be allowed and the second creditor might continue the petition, taking advantage of the date on which it was originally presented. This ruling also does not deal directly with the point now in issue but as will be shown presently, it seems to us to proceed upon principles which may fairly be applied to the facts of the present case also.

In the argument in appeal, learned counsel for the appellant has referred us to an English case, In re *Maund*, Ex parte

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1. (1938) 2 M.L.J. 390.
2. (1928) 55 M.L.J. 168: I.L.R. 51 Mad. 594.

Venkata-ratnam Chetti v. Venkatayya.

Maund[1]. That was a case in which a petition in bankruptcy was filed by three creditors, who had occasion to fear that the Court would find that the amount of their debts did not entitle them to file the petition. They then sought to amend their petition by joining with themselves two other creditors, so that the total indebtedness of the five might qualify them for taking action. At that time more than three months had elapsed from the date of the alleged act of bankruptcy. It was held by the Court that such amendment could not be allowed and it is stated in page 197:

> " It is perfectly clear that the Court ought not to allow, after three months have elapsed from the date of the committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors, who could not themselves present a petition, and the introduction of a debt which, after the same period has elapsed, would not be a debt upon which a petition could be founded".

This case is to some extent analogous with the case which is now before us, but we are not prepared to follow it where the facts are so dissimilar. In the English case, as has been stated, the three creditors who originally presented the petition were continuing to prosecute it, and merely wanted to strengthen their position by joining two other creditors with themselves. In the present case an order under S. 16 presumes the fact that the original petitioner does not proceed with due diligence on his petition. The English decision was not therefore upon any provisions in the English Bankruptcy Act which correspond to S. 16. In those circumstances, we do not feel ourselves called upon to consider whether the principles upon which the English decision was given could be applied to the facts of this case. On the other hand, *Venkata Hanumantharao* v. *Gangayya*[2], deals directly with the question of S. 16, and it points out that the object of the section is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. *Venkata Hanumantharao* v. *Gangayya*[2], gives the second creditor in a case of this kind the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into the case; and we see no reason on principle why a second creditor, as in the present case, should not have the benefit of that date not only in regard to the ques-

1. (1895) 1 Q.B. 194.
2. (1928) 55 M.L.J. 168: I.L.R. 59 Mad. 594.

tion of whether his own debt is barred by limitation, but in regard to the question of the act of insolvency of the insolvency himself. If it once be conceded that the purpose of S. 16 is that the general body of creditors should be benefied, and if it also be remembered that other creditors will very probably hold their hand and decline to file unnecessary insolvency petitions themselves when they know that one creditor has already done so, we do not think that the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so should prevent a subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date.

One further point of practical importance appears to us to support the view that the Legislature can hardly have expected a creditor substituted under S. 16 to be compelled to prove the qualification of the original creditor to file a petition, and that is, that in the circumstances of the case, it would inevitably be difficult for one creditor to prove the existence of another creditor's debt. The original creditor who *ex hypothesi* has no further interest in the case would naturally be in possession of the necessary documents, and have knowledge of the necessary evidence.

On these grounds we see no good reason to interfere with the decision of the learned District Judge and dismiss this appeal with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Rajah Saheb Meharban I Dosthan Sree Rajah Ravu Venkatakumara Mahipathi Surya Rao Bahadur Garu, Sardar Rajahmundry Circar and Maharajah of Pithapuram ... *Petitioner** (*Plaintiff*)

v.

Yedlapalli Mangamma and others ... *Respondents* (*Defendants*).

Madras Estates Land Act (*I of* 1908), *Ss.* 124, 163 *and* 163-*A—Landlord purchasing at rent sale—Possession subsequently obtained—Suit for* mesne

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* C. R. P. No. 1209 of 1939. 19th November, 1940.

Surya Rao Bahadur *v.* Mangamma.

profits *against person in occupation between date of sale and obtaining of possession—Procedure under S. 163 alone will be available and claim in civil Court for a different remedy with enhanced period of limitation is untenable.*

Where a landlord has bought part of a holding at a revenue sale, he may by proceedings under S. 124 of the Estates Land Act and without suit obtain delivery. If such proceedings are not taken, an inference will arise that he is prepared to accept the rent and damages claimable under S. 163 from the actual occupant during the interval between sale and delivery. Without taking action either under S. 124 or S. 163 it is doubtful if he can file a suit under S. 163-A after possession has been got; or whether that section will permit a suit for *profits* only to be brought.

A person who has unauthorisedly occupied ryoti land and has not been evicted by a suit will be liable to pay such sums as can be claimed under S. 163. A special remedy having been provided by the Act, whereby the landlord can recover compensation for unauthorised occupation of ryoti lands in cases where a suit for eviction is unnecessary, it is not possible to claim in the ordinary civil Courts a different remedy with an enhanced period of limitation for the same wrong.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Amalapuram in S. C. S. No. 124 of 1936.

Ch. Raghava Rao for Petitioner.

K. Bhimasankaram for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition arises out of the dismissal of a suit filed for mesne profits alleged to be due on land admittedly ryoti, situated within an estate under the Madras Estates Land Act, forming part of a holding which has been sold for arrears of rent. The facts are not very clear, but from the plaint it appears that defendants 1 to 8 in the suit were the pattadars and that there was a default and the plaintiff applied for sale and bought the land in revenue Court auction in two sales, one on 12th September, 1931, and the other on 3rd June, 1932. From the date of the sales defendants 9 to 17 were alleged to be cultivating the land and it is stated that this cultivation was without permission from the plaintiff. The landlord got possession of part of the land on 25th April, 1933, and of the rest on 20th June, 1933. Having got possession, the plaintiff waited for approximately three years and then filed the present suit in the civil Court claiming mesne profits from all the defendants for the period intervening between the sales and the deliveries. When objection was taken to the jurisdiction of the Court, the plaintiff appears to have given up the suit against all the other defendants and asked leave to

Surya Rao Bahadur *v.* Mangamma.

confine his suit to the claim against the seventeenth defendant, whose legal representatives are the respondents here. Apparently, the idea was that this plaint, which clearly is based on the termination of a tenancy and a demand for mesne profits from the tenants and other persons in occupation, should be treated as having been *ab initio* based on the assertion of an unauthorised entry at some unknown date by one only of the defendants in circumstances entirely unconnected with the tenancy, so as to enable the plaintiff to treat him as a person whose occupation had never been either recognised or acquiesced in. S. 163 of the Madras Estates Land Act provides the ordinary machinery whereby a landlord can recover rent and damages for unauthorised occupation of ryoti land. This section, though not very explicit, appears to be intended to cover the usual case in which a person cultivates ryoti land on the implied understanding that he will, when asked to do so, pay the rent for it. In the vast majority of cases, on such cultivation, the landlord's officials collect the usual rent and unless action is taken with reference to the third explanation to S. 6 (1), the occupant in time acquires occupancy rights. If, however, the landlord does not desire that the occupant should continue in occupation of this land, he may treat him as a trespasser, in which case, a machinery is provided under S. 163 (A) whereby a suit may be filed and, the landlord may claim mesne profits and also damages which are to be assessed on the basis given in S. 163 and therefore must not exceed one year's rent, subject to the proviso that in respect of any year for which rent has been actually been paid damages would not be payable. As I read S. 163-A, it is not intended to provide a machinery for collecting mesne profits from unauthorised occupants except as an incident of their eviction by suit. When as in the present case, the landlord has bought in the property at a revenue sale either himself or through his agent, a machinery is provided whereby he can get delivery without suit, namely, by proceedings under S. 124. If he refrains from taking those proceedings, it is a reasonable inference that he is prepared to accept the rent and damages which can be claimed under S. 163 from the actual occupant during the interval between the sale and the delivery. I doubt very much whether he can abstain from taking action either under S. 124 or under S. 163 and file a suit under S. 163-A, after possession has been surrendered, for this section only relates to the eviction of persons who have not been

Surya Rao Bahadur *v.* Mangamma.

admitted as ryots whereas, the ordinary case of a sale under the Estates Land Act would relate to a person who has been admitted as a ryot. Still less is it clear that the landlord, instead of recovering the rent and damages as laid down under S. 163, can treat S. 163-A as if it were split into two parts and having got possession without a suit can bring a separate suit merely for mesne profits. As I understand these sections the underlying idea is that a person who has unauthorisedly occupied ryoti land and has not been evicted by a suit shall be liable to pay such sums as can be claimed under S. 163. A special remedy having been provided by the Act, whereby the landlord can recover compensation for unauthorised occupation of ryoti lands in cases where a suit for eviction is unnecessary, it is not to my mind possible to claim in the ordinary civil Courts a different remedy with an enhanced period of limitation for the same wrong. In any case, the present plaint, based as it is on an allegation of a terminated tenancy and a joint trespass by a large number of people, including the former tenants, does not contain such averments as would suffice to establish a claim of separate trespass by one only of these people under such circumstances as to take him out of the provisions of S. 163.

The civil revision petition is therefore dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Pethuraju Kone .. *Appellant* (Plaintiff)*

v.

Thenirkulam Muthuswami Aiyar and others. *Respondents (Defendants).*

Pethuraju Kone *v.* Muthuswami Aiyar.

Res judicata—*Plea of—Claim suit under O. 21, r. 63, Civil Procedure Code (V of 1908)—Identical subject-matter essential—"Crops on land" and "land" not same subject-matter—Decree-holder cannot call himself representative of the judgment-debtors—Resistance by one creditor cannot be construed as on behalf of all creditors.*

An order on a claim petition passed in relation to the crops on a land which were the subject of attachment by a decree-holder will not operate as *res judicata* in a subsequent claim petition relating to the attachability of the land itself at the instance of another decree-holder, the subject-matter involved in the two proceedings not being identical.

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* S. A. No. 805 of 1938. 5th August, 1941.

Ashna Bibi v. *Awaljadi Bibi*, (1916) I.L.R. 44 Cal. 698 followed.

A decree-holder attaching the property of the judgment-debtor cannot be regarded as a representative of the latter, since the attachment is effected by him by virtue of a right inherent in him to attach what was really the property of the judgment-debtor at the date of attachment.

Gnanambal v. *Parvathi*, (1892) 2 M.L.J. 212: I L.R. 15 Mad. 477 followed.

A suit by a creditor to set aside an adverse claim order may in certain circumstances be in essence a suit under S. 53, Transfer of Property Act, but when one creditor merely resists a claim by a claimant his resistance in those summary proceedings cannot be deemed to be on behalf of all the creditors.

Jagannath v. *Ganesh*, (1896) I.L.R. 18 All. 413 followed.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 6 of 1938 preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 367 of 1936.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Appellant.

S. Nagaraja Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit under O. 21, r. 63 to vacate an order on a claim petition. Plaintiff is the attaching creditor: defendant 1 is the claimant; defendants 2 to 4 are the judgment-debtors. Defendant 1's title is based upon two sale-deeds, Ex. IV by defendants 2 to 4 to one Muthukrishna Aiyar in 1927 and Ex. I by Muthukrishna Aiyar to himself in 1932. It has been held as a question of fact that defendant 1 was a *bona fide* purchaser for consideration under Ex. I and plaintiff's suit has been dismissed. In this appeal plaintiff contends that the issue between himself and defendant 1 is *res judicata* in his favour.

This contention is based upon the following facts. One T. V. Krishna Aiyar another creditor of defendants 2 to 4, attached in execution of his decree against them the crops standing on the land now in dispute. Muthukrishna Aiyar claimed under Ex. IV to be the owner of the land and the crops. His claim was dismissed. Against that order of dismissal he filed no suit. Muthukrishna Aiyar was, of course, the predecessor-in-title of defendant 1, and it is now argued that plaintiff represents the interests of defendants 2 to 4. What therefore was *res judicata* between Muthukrishna Aiyar and defendants 2 to 4 is *res judicata* between defendant 1 and plaintiff and defendant 1 cannot claim title to the subject-matter of this suit. The argument, as thus put forward, was

Pethuraju Kone v. Muthu-swami Aiyar.

not considered by the learned Subordinate Judge, who has dismissed the plea of *res judicata,* on the ground that the subject-matter of the claim order *i.e.,* the crops on the land is not identical with the subject-matter of the present suit *i.e.,* the land itself. In view of the decision in *Ashna Bibi* v. *Awaljadi Bibi*[1], I think this reasoning is sound, and of itself sufficient for rejecting the plaintiff's plea, but as the general question of the status of the plaintiff in his relationship to defendants 2 to 4 has also been argued I proceed briefly to discuss it.

The statement that plaintiff is now the representative of defendants 2 to 4 is a legal fiction, and though it may derive support from some observations in *Venkatachariar* v. *South Indian Bank*[2], that is a case in which in fact the judgment-debtors had unsuccessfully resisted the future claimant and I find myself quite unable to act in the circumstances of this case, where defendants 2 to 4 are never shown to have pleaded anything upon a legal fiction which it is universally known, is almost always in direct conflict with the actual facts. In the strict sense of the word a decree-holder can never, in a suit of this kind, be the representative of his judgment-debtors. In so far as the judgment-debtors take any interest in the case at all they have their own point of view to put forward which almost invariably is in opposition to that of the decree-holder. As is stated very clearly in *Gnanambal* v. *Parvathi*[3], the attachment by a decree-holder is not effected by him as the privy or representative of the judgment-debtors, but 'by virtue of a right inherent in him to attach what was really their property at the date of the attachment'. I have not been shown any authority in which this proposition has been overruled and being the decision of a Bench of this Court it is binding upon me.

Finally appellant's learned advocate falls back upon the position that he as one of the creditors of defendants 2 to 4 can take advantage of an adjudication obtained by another of those creditors. This position is directly negatived by *Jagannath* v. *Ganesh*[4], but it is now contended that since the date of that decision S. 53 of the Transfer of Property Act has been amended so as to make all suits under that section representative suits. Now, of course a *suit* by a creditor to set aside an adverse claim order may well in certain circumstances be in

1. (1916) I.L.R. 44 Cal. 698. 2. (1937) 1 M.L.J. 575.
3. (1892) 2 M.L.J. 212: I.L.R. 15 Mad. 477 at p. 480.
4. (1896) I.L.R. 18 All. 413.

Pethuraju Kone v Muthuswami Aiyar.

essence a suit under S. 53, but it cannot possibly be argued, I think, that when one creditor merely resists a claim by a claimant his resistance in those summary proceedings should be deemed to be on behalf of all the creditors. I see no reason therefore why I should not still follow *Jagannath* v. *Ganesh*[1].

The plea of *res judicata* must therefore fail at all points, and there being no other question of law in this appeal, it is dismissed with the costs of respondent 1.

Leave refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

K. K. Narayanan Nambiar ... *Petitioner* (Accused).*

Narayanan Nambiar, *In re.*

Criminal Procedure Code (V of 1898), S. 540—Scope—Court's discretion to examine witnesses.

The wording of S. 540, Criminal Procedure Code, is extremely wide and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential for the just decision of the case, he is bound to do so. S. 540 is not limited only for the benefit of the accused and it will not be an improper exercise of the powers of the Court to summon a witness under that section merely because the evidence supports the case of the prosecution and not that of the accused.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the South Malabar Division at Calicut dated 21st July, 1941 and passed in C. A. No. 36 of 1941, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Calicut in C. C. No. 47 of 1941.

V. V. Srinivasa Aiyangar and *M. C. Sridharan* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted under S. 409 of the Indian Penal Code, of committing criminal breach of trust by dishonestly misappropriating a sum of Rs. 118-15-0 entrusted to him in his capacity as Head Clerk, District Court, North Malabar; and the offence is said to have been committed between the 2nd December, 1940 and the 17th of that month. His

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1. (1896) I.L.R. 18 All. 413.

* Crl. R. C. No. 739 of 1941 (Crl. R. P. No. 694 of 1941). 24th September, 1941.

Narayanan Nambiar, *In re.*

appeal was dismissed, the conviction and sentence being affirmed.

The principal question which arises in this petition is whether the learned Magistrate, purporting to act under S. 540 of the Criminal Procedure Code, exercised his discretion improperly in admitting the evidence of a person who was examined as C. W. 1. The prosecution let in evidence through P. Ws. 8 and 9 that on the 14th December, 1940, the petitioner took a sum of Rs. 2 out of the bag in which he kept his money as Head Clerk and gave it to P. W. 9 to purchase seven stamp papers, which were subsequently handed over to P. W. 8. Formal evidence was given to this effect and there was not much cross-examination on this point. The reverse sides of the stamp papers however show that six of them were purchased in the name of one Appu Nair and one in the name of a still different person. There was therefore a possibility that the Court might be unable to accept the evidence of P. W. 9 in the face of the endorsements of the stamp vendor. The seventh paper was dated the 4th December, 1940, ten days before P. W. 9 is said to have made the purchase. Not unnaturally, the accused exploited these endorsements and examined a man who bore the name of Appu Nair and who deposed that he had purchased these papers. Faced with the possibility that P.Ws. 8 and 9 might be disbelieved because of an apparent discrepancy which he knew could be easily explained, the Public Prosecutor filed an application in the Magistrate's Court asking him to exercise his discretion under S. 540 of the Criminal Procedure Code and examine the stamp vendor as a witness. He did so; and the stamp vendor explained how it was possible for a person to purchase a stamp paper and yet for one to find some other name on the reverse. He also deposed that the Appu Nair whose name appeared on the reverse of six of the stamp papers was not D. W. 6, but an Appu Nair residing in an entirely different village to that in which D. W. 6 was living.

As will be seen from the wording of S. 540 of the Criminal Procedure Code, it is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and, where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate requires, however, a corresponding caution in using these powers.

Narayanan Nambiar, *In re.*

In the many cases cited by Mr. Srinivasa Aiyangar on behalf of the petitioner, various views have been expressed with regard to the power of the Court to examine witnesses after the defence case has been closed; but in all those cases it was obvious that the power had been misused. In *Rex* v. *Dora Harris*[1], the Recorder permitted the examination as a Court witness of a co-accused who had throughout the trial been standing in the dock by the side of the accused against whom this evidence was let in and who was admittedly an accomplice. Avory, J., who delivered the judgment of the Court, quotes at page 594 the rule laid down by Tindall, C.J., in *Reg* v. *Frost*[2]:

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown."

However, in expressing the considered opinion of the Bench, Avory, J., himself lays no restricting rule. He says:

"In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant."

In India we are governed by the express provisions of S. 504 of the Criminal Procedure Code, which, as I have said is extremely wide in its terms. In *Sital Singh* v. *Dalganjan Singh*[3], after the prosecution case had been closed, the prosecution put in an entirely fresh list of witnesses to be called, and the learned Judge held that that was an abuse of S. 540 of the Criminal Procedure Code. In *Ramachandra Prasad* v. *Emperor*[4], the learned Judge found that the object of the additional evidence was merely to fill in an important gap in the prosecution case and that it would be wrong for a Court to invoke S. 540 of the Criminal Procedure Code, for that purpose. In *Narayana Nair* v. *Bhargavi Ammal*[5], Curgenven, J., found that the prosecution evidence as originally let in disclosed no case against the accused at all and that the Court had based its

1. (1927) 2 K.B. 587. 2. (1839) 9 Car. & P. 129 at 159: 173 E. R. 771.
3. (1913) 12 All. L.J. 15. 4. A.I.R. 1937 Pat. 246.
5. (1926) 52 M.L.J. 118: 25 L.W. 151.

Narayanan Nambiar, *In re.*

finding against the accused exclusively on evidence adduced subsequently. In *Collett* v. *Emperor*[1], the Prosecuting Inspector had deliberately refrained from examining the wife of the accused because he knew that she would not give evidence in support of the prosecution. He therefore adopted the plan of persuading the Judge to examine her as a Court witness, so that he could cross-examine her. It was held that that was a gross abuse of the exercise of the powers given to the Magistrate under S. 540 of the Criminal Procedure Code. Nevertheless, it was found that there was abundant other evidence, and the convictions were confirmed. In *Natabar Ghose* v. *Adya Nath*[2], some general remarks on the use of S. 540 are found, but no reasons are given for the particular decision arrived at. In *Emperor* v. *Satyendra Kumar*[3], the abuse of S. 540 of the Criminal Procedure Code, was of the same nature as in *Collett* v. *Emperor*[1]. In *Udho Ram* v. *The Crown*[4], the Magistrate, after hearing the evidence of both sides and the arguments, when nothing remained but to pronounce judgment, suddenly decided to hold a local inspection, and, without any notice either to the prosecution or the accused, examined four witnesses at the scene of offence.

Mr. Srinivasa Aiyangar particularly relies on some remarks to be found in *Sital Singh* v. *Dalganjan Singh*[5], that no witnesses should be examined at the bidding of any person; and he argues in this case that this C. W. 1 was examined at the bidding of the prosecution and that therefore the accused was prejudiced. I cannot however see how a Court is precluded from exercising its discretion under S. 540 of the Criminal Procedure Code merely because somebody asks it to do so. It is also argued that S. 540 of the Criminal Procedure Code is intended only for the benefit of the accused. I see no reason why S. 540 of the Criminal Procedure Code should be so limited. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the

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1. 1929 M.W.N. 395.
2. A.I.R. 1923 Cal. 690.
3. A.I.R. 1923 Cal. 463.
4. (1928) I.L.R. 10 Lah. 790.
5. (1913) 12 All. L.J. 15.

Narayanan Nambiar, *In re.*

powers of the Court to summon that witness under S. 540 of the Criminal Procedure Code merely because the evidence supports the case of the prosecution and not that of the accused. It is possible to argue that the Public Prosecutor should have foreseen that there was a discrepancy between what P. W. 9 was going to speak to and the endorsements on the stamp papers, which the accused would be certain to exploit, and that he should therefore have examined the stamp vendor to explain this discrepancy; but I do not think that this lack of foresight on the part of the prosecution should preclude the Court from examining the stamp vendor and clearing up the point. It is true that C. W. 1 not only gave evidence to explain the apparent discrepancy but contradicted D. W. 6 by saying that the Appu Nair whose name appeared on the reverse of the stamp papers was not this witness. I am of opinion that the Court has power under S. 540 of the Criminal Procedure Code to examine a witness even to rebut defence evidence; but clearly those powers should be sparingly invoked for such a purpose. If a witness were examined under S. 540 to contradict defence witnesses, then the accused might demand that further witnesses should be examined by the Court under the same section to contradict the prior witness examined and thus lead to that improper prolonging of a case so strongly condemned in the Allahabad case. If, in the present case, the learned Magistrate had examined C. W. 1. for the sole purpose of contradicting D. W. 6, I might have been inclined to hold that he had not exercised his powers under S. 540 judicially; but the main object of his examination was undoubtedly to explain how the name of a person could appear as vendee on the back of a stamp paper when that person had not purchased it. I am unable to say therefore that the Magistrate did not exercise his discretion properly in examining C. W. 1.

It has been said that no notice was given to the accused of the intention of the Court to examine C. W. 1. That is not legally necessary; but if an accused person is suddenly called upon to meet evidence which he does not know is going to be adduced, he may well be prejudiced. The order here was passed on the 12th May, and he was not examined until the 26th May, and, as can be seen from the cross-examination of that witness, the learned counsel for the accused was quite prepared to meet this additional evidence.

Narayanan Nambiar, *In re.*

On the appreciation of the evidence of the prosecution witnesses, the defence witnesses, and the Court witness, I see no reason to interfere. There are concurrent findings of fact in the Magistrate's Court and in the Sessions Court.

The petition is accordingly dismissed.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

The Maharaja of Cochin, by his Agent the Secretary to the Government of Cochin .. *Appellant* (Respondent)*

v.

Thupran ...*Respondent (Petitioner).*

Maharajah of Cochin *v.* Thupran.

Res judicata—*Applicability to execution proceedings—Order for sale in execution and proclamation—Claimant objecting to sale of item—Failure to substantiate at hearing—Final order for sale—Subsequent application to exclude property from sale—Barred by* res judicata.

Sale was ordered and notice of the proclamation of sale was issued under O. 21, r. 66 to the respondent (a claimant) who filed objections contending that the site in question was not included in the boundaries of the property with which the decree dealt, and that the respondent had to be paid for buildings on the site as improvements. As the respondent made no attempt to substantiate his contentions the sale was ordered to be held on 27th February, 1935. There was no sale on that day and after a fresh proclamation, 5th June was fixed for sale. On 4th June, 1935 the respondent applied under S. 47, Civil Procedure Code for an order excluding the property in dispute from the sale.

Held, that the application is barred by *res judicata.*

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 68 of 1937 (A. S. No. 2 of 1937 District Court, Calicut) preferred against the decree of the Court of the District Munsif of Chowghat in R. E. A. No. 814 of 1935 in R. E. P. No. 49 of 1934 in O. S. No. 436 of 1929.

V. Radhakrishnaiya and *K. P. Ramakrishna Aiyar* for Appellant.

B. Pocker for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises in execution, and raises a question of the application of the principle of *res judicata.* The appellant, who is the decree-holder applied in execution to sell

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* A. A. A. O. No. 68 of 1939. 20th August, 1940.

Maharajah of Cochin *v.* Thupran.

the properties which he alleged were included in his decree. Amongst them was a certain site on which stands a school building, and to this property the respondent who was defendant 31 in the suit lays claim. Sale was ordered and notice of the proclamation of sale issued under O. 21, r. 66 to the respondent. In response to this notice respondent filed objections contending that the site in question was not included within the boundaries of the property with which the decree dealt, and also that in any case the school building was an improvement for which he had to be paid. On the day of hearing, however, the respondent made no attempt to substantiate these contentions, and sale was ordered to be held on 27th February, 1935. There was no sale on that day. A fresh proclamation was ordered on 1st March, fixing 5th June, as the date of the sale. On 4th June, respondent applied under S. 47 of the Code of Civil Procedure for an order excluding the property now in dispute from the sale. This application was dismissed by the learned District Munsif of Chowghat on the ground that the matter in issue was *res judicata.* On appeal the learned Subordinate Judge of Ottapalam reversed this finding and gave a declaration that respondent is not debarred from proving in later proceedings that he is entitled to be compensated for his improvements. It is against this order that the present appeal has been filed.

The reason given by the learned Subordinate Judge for allowing the appeal before him is one which cannot be supported, and has not been supported in the arguments before me. He says in effect that in law the respondent's claim to have his improvements exempt from sale in this suit was unanswerable, and that therefore he need have paid no attention to the notice served upon him. This appears to mean that if a party has a good point of law to raise, he need not raise it, but can rely upon the omniscience of the Court—and it ignores altogether the elementary principle that a decision may be *res judicata* whether it be right or wrong.

The question then arises whether the learned Subordinate Judge's decision can be supported on any other ground. I do not think it can. No doubt this case does not fall strictly within the provisions of S. 11 of the Code of Civil Procedure but as the Privy Council has pointed out (see *Ram Kirpal* v. *Rup*

Maharajah of Cochin v. Thupran.

Kuari[1], and *Hook* v. *Administrator-General of Bengal*[2],) the provisions of S. 11 are not exhaustive, and the principle of *res judicata* can be extended to cases which do not fall strictly within their terms. No doubt also there is no direct authority for the application of the principle to a subsequent stage of the *same* execution application but cases like the present in which negligence at the stage of settling the sale proclamation is followed by reawakened activity before the sale is actually held are certain to be rare; and I can see no logical reason why a decision which would be final if the sale were not held, and a fresh execution application were filed should not be equally final in the circumstances of this case.

The question to my mind really depends upon the nature of the decision. Is it a decision which would be final if not appealed against? Some matters which a Court decides in approving a sale proclamation are of course administrative only —others cannot from their nature be *res judicata.* If for instance, there is a personal decree against *A* and the decree-holder applies to sell certain property on the ground that it belongs to *A*, the Court may hold that he may do so, but if that sale is not held, and a subsequent application is filed it is obviously open to an assignee from *A* to contend that after the assignment the property is no longer saleable. That is to say, the decision is merely one that property is saleable in particular circumstances and at a particular time. But the decision to sell the present property is one which would clearly be binding upon an assignee. It goes to the root of the construction of the decree. The decree provides that certain property may be sold. If this property comes within the description of the property specifically covered by the decree it *must* be sold. Similarly the question whether compensation is payable to the respondent must depend upon the construction of the decree. On these questions of title it cannot seriously be denied that the respondent had the right of appeal (see *Thoppai Vedaviasa Aiyar* v. *Madura Hindu Labha Nidhi Co., Ltd.*[3]). He has not appealed and in approaching the executing Court itself with a petition under S. 47 has misconceived his remedy. Cases are numerous in which a decision on the construction of a decree

1. (1883) L.R. 11 I.A. 37: I.L.R. 6 All. 269 (P.C.).
2. (1921) 40 M.L.J. 423: L.R. 48 I.A. 187: I.L.R. 48 Cal. 499 (P.C.).
3. (1923) 45 M.L.J. 478.

has been held to be *res judicata*. (See *Kondama Naidu* v. *Venkalakshmi*[1], *Subbarama Aiyar* v. *Nagammal*[2], *Ram Kirpal* v. *Rup Kuari*[3]).

Maharajah of Cochin *v.* Thupran.

Respondent's learned advocate relies upon *Subramania Aiyar* v. *Raja Rajeswara Dorai alias Muthuramalinga Sethupathi*[4], but I find nothing in that case which assists him. The learned Judges who decided it point out that though caution should be used in applying the principle of *res judicata* to execution proceedings the Judicial Committee has pointed out that 'parties should not be allowed to agitate the same question after it has once been decided'; and they base their judgment in the case on the fact that the judgment-debtors there had no notice that execution was proceeding against any particular item of property. In the present case the title to the property in dispute was directly in issue.

I am of opinion therefore that the decree of the learned Subordinate Judge must be set aside and the decree of the learned District Munsif restored dismissing respondent's application with costs throughout.

Leave granted.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Panuganti Seshayya and others ... *Petitioners** (*Defendants*)

v.

Lankireddi Swamireddi (died) and others. *Respondents.*

Seshayya *v.* Swamireddi.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Scaling down—Basis of, whether original principal even if debt is after October, 1932—Interpretation of S. 9.

There is nothing in S. 9 of the Act IV of 1938 which justifies the treatment of the principal of the debt as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8, which S. 9 does not seem to contemplate except for the specific purpose of reducing debts which originated before 1st October, 1932.

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1. (1911) 10 I.C. 632.
2. (1901) 11 M.L.J. 432: I.L.R. 24 Mad. 683.
3. (1883) L.R. 11 I.A. 37: I.L.R. 6 All. 269 (P.C.).
4. (1916) I.L.R. 40 Mad. 1016.

* C. R. P. No. 658 of 1939. 3rd October, 1941.

Seshayya
v.
Swamireddi.

Where a suit was brought on a promissory note dated 22nd September, 1937, executed for the balance due on a prior mortgage in favour of the same creditor executed on 19th December, 1932, on the question whether the defendants-petitioners were entitled to have the debt scaled down on the basis of the original mortgage advance,

Held, that the debt could not be scaled down on that basis, unless one could import into the first part of the proviso to S. 9 (1) the explanation to S. 8 which treats the original principal as the principal for the purposes of S. 8, a course which on the facts of the case is not open, the debt being incurred subsequent to 1st October, 1932.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Tenali dated 28th February, 1939 and passed in S. C. S. No. 7 of 1939.

K. Kotayya for Petitioners.

V. Subrahmanyam for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises the question of the interpretation of S. 9 (1) of Act IV of 1938. The suit was brought on a promissory note dated 22nd September, 1937, executed for the balance due on a mortgage bond in favour of the same creditor executed on 19th December, 1932, by the present defendants and some others. There had been considerable payments made under the mortgage bond.

The contention of the defendants-petitioners here is that under S. 9, they are entitled to have the debt scaled down on the basis of the original mortgage advance of 1932, payments thereunder made towards interest being adjusted to interest on the original principal at five per cent. The contention is based on the language of the proviso to S. 9 (1) which states:

"Provided that any part of the debt which is found to be a renewal of a prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred, and if such debt had been contracted prior to the 1st October, 1932, shall be dealt with under the provisions of S. 8."

Now, in the present case the prior debt was not contracted before 1st October, 1932, so that the last part of the proviso has no application. It is difficult to see how the debt can be scaled down on the basis of the mortgage advance, unless one can import into the first part of the proviso the explanation to S. 8 which treats the original principal as the principal for the purposes of S. 8. It has no doubt been held that when under the latter part of the proviso to S. 9 the debt is deemed to be a debt incurred before 1st October, 1932, then the debt is to be

Seshayya v. Swamireddi.

scaled down in accordance with the provisions of S. 8 including the explanation thereto and the principal sum payable will be the principal sum originally advanced with any further sums advanced as principal. But S. 9 contains no machinery for scaling down debts originating after the 1st of October, 1932, except on the basis of the actual contract sued on with such re-appropriation of payments towards interest as are expressly prescribed. The section does not seem to contemplate any going back to any earlier debt except for the single purpose of ascertaining what is the theoretical date of the debt in order to find out whether it has to be scaled down under S. 8 or not. The proviso certainly allows the Court to treat as the date of the debt, the date of the original advance; but it is still dealing with the debt that is sued on and it is that debt which under the first clause is to be scaled down by the process of re-calculating interest at five per cent. and adjusting to the interest so calculated the amount paid towards interest of that debt. In my opinion, the section does not contemplate the re-calculation of interest on the antecedent debt and the re-appropriation of payments towards interest made under that antecedent debt. The process of going back to the earlier debt is a peculiar feature of S. 8 applicable only to debts which originated before the 1st of October, 1932. Evidently the Legislature had in mind the date on which there was an economic upheaval which made it impossible for many agriculturists to pay their debts without some very drastic relief. Such debts, whether they subsist under the original document or under renewals, are dealt with under S. 8 on the basis of the original sum advanced. Debts originally incurred after this economic upheaval do not require such drastic treatment and for such debts the Legislature has provided only a moderate scaling down of interest by the process set forth in S. 9. There is nothing in S. 9 which, in my opinion, justifies the treatment of the principal of the debts as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8 which S. 9 does not seem to contemplate except for the specific purpose of reducing debts which originated before 1st October, 1932.

In this view, I dismiss the Civil Revision Petition with costs.

K. C. ——— *Petition dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Vasi Reddi Venkayya ... *Appellant** (*2nd Plaintiff*)

v.

Gopu Sreeramulu and others ... *Respondents* (*Defendants*).

F.B.
Venkayya
v.
Sreeramulu.

Hindu law—Adoption—Authority to adopt given by nearest sapinda *expressed in general terms—Adoption in pursuance of—Validity.*

An authority to adopt given to a Hindu widow by the nearest *sapinda* is not invalid merely because it is in general terms. Where in pursuance of an authority worded "You shall therefore, whenever you like, bring and adopt duly a boy whom you like according to Shastras", an adoption took place within five months of its conferment and there was no change in the circumstances of the family,

Held, that the adoption is valid.

Kamesam v. *Butchamma*, (1914) 1 L.W. 511, approved.

Suryanarayana v. *Venkataramana*, (1903) 13 M.L.J. 318: I.L.R 26 Mad. 681, *Veera Basavaraju* v. *Balasurya Prosada Rao*, 1914 M.W.N. 502 and *Anne Brahmayya* v. *Rattayya*, (1924) 20 L W. 503, not approved.

Veerabasavaraju v. *Balasurya Prasada Rao*, (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.), explained.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 108 of 1935 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 79 of 1930.

V. Govindarajachari and *Y. G. Krishnamurthi* for Appellant.

P. Satyanarayana Rao, *Ch. Raghava Rao* and *K. Kameswara Rao* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—The only question involved in this appeal is whether an adoption by a Hindu widow of a son to her deceased husband is valid when the authority to adopt has been given by the nearest *sapinda* and expressed in general terms. In other words, must the *sapinda* consent to the adoption of a particular person in order to make the adoption valid? The first plaintiff in the suit out of which this appeal arises was adopted on the 7th May, 1920, by Venkamma, the widow of one Sivaramayya. No authority had been given by

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* S. A. No. 803 of 1938. 1st September, 1941.

F.B.

Venkayya v. Sreeramulu.

Leach, C.J.

Sivaramayya to his widow, but she informed the nearest *sapinda* of her intention to adopt and sought his consent. The *sapinda* gave his consent in writing, the operative portion of the document being in these words:

"You shall therefore, whenever you like, bring and adopt duly a boy whom you like according to Shastras. This is the deed of authority to adopt executed and delivered by me wholeheartedly".

The first plaintiff sued as the adopted son and asked for a declaration that certain alienations were not binding on him. The second plaintiff, who is the appellant, claimed a half share in the properties in suit by reason of a deed of assignment executed in his favour by the first plaintiff. The defendants challenged the validity of the first plaintiff's adoption on the ground that the *sapinda's* consent was invalid because it was couched in general terms and this plea was accepted by the trial Judge, the District Munsif of Bezwada, and by the Subordinate Judge of Bezwada on appeal. The result was that the suit was dismissed. The appellant then appealed to this Court and the appeal has been placed before a Full Bench because certain judgments of this Court which have bearing are in conflict.

In *Kamesam* v. *Butchamma*[1], Wallis and Sadasiva Aiyar JJ., held that an authority to adopt given by *sapindas* was not invalid because it was expressed generally and empowered the widow "to adopt any boy at any time she liked". The words in quotation marks are from the judgment. The exact words of the authority given in that case are not quoted in the report, but we have examined the deed authorising the adoption and find that the second paragraph reads as follows:

"As your son Jogi Ramachandrudu died unmarried, and as you have asked me that permission should be granted for adopting for the increase and perpetuity of the family permission is granted through this approving your request. Therefore, this is the deed of permission executed heartily that adopting the boy you like whenever you like, the increase and perpetuity of the family should be accomplished".

The Court had no hesitation in holding that a document so expressed conferred a valid authority on the widow. In disputing the correctness of this decision the contesting respondents rely on observations made in the judgments in *Suryanarayana* v. *Venkataramana*[2], *Veera Basavaraju* v. *Balasurya Prosada Rao*[3], and *Anne Brahmayya* v. *Chelasami Rattayya*[4].

1. (1914) 1 L.W. 511.
2. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.
3. 1914 M.W.N. 502.
4. (1924) 20 L.W. 503.

F.B.
Venkayya v. Sreeramulu.
Leach, C.J.

The first of these cases was decided by Subrahmania Aiyar and Davies, JJ. There the *sapindas* had signed a document assenting to the adoption by the widow of any boy at any time, but she did not make an adoption until nine years later and during the interval the circumstances had materially changed. It was not necessary for the purpose of deciding that case for the Court to express an opinion on whether a general power given to a widow to adopt was valid or whether the fact that the circumstances had materially changed in the course of the nine years made any difference, because the Court found that the widow had received authority from her deceased husband. The judgment in *Suryanarayana* v. *Venkataramana*[1], was considered by Wallis and Sadasiva Aiyar, JJ., in *Kamesam* v. *Butchamma*[2]. They did not think that Subrahmania Aiyar and Davies, JJ., intended to say that a general authority cannot be availed of by the widow when she adopts almost immediately after the authority has been given. The learned Judges who decided *Suryanarayana* v. *Venkataramana*[1] may not have intended to say that a general authority to adopt is void in all cases, but their remarks were considered to amount to this by White, C.J., and Oldfield, J., in *Veera Basavaraju* v. *Balasurya Prosada Rao*[3], In that case White, C.J., and Oldfield, J., said:

> " But on the evidence available and the terms of Ex. R-1, we must hold that it at the highest authorised the adoption of any boy at any time and therefore was useless, vide *Suryanarayana* v. *Venkataramana*[1], and that, as the learned District Judge opines, it expresses only a general willingness to consider the making of an adoption favourably, the necessary final consent, to a specific adoption being reserved, until details are available."

It was not necessary for the decision of *Veera Basavaraju* v. *Balasurya Prosada Rao*[3], for the learned Judges to make these observations and therefore they must also be regarded as *obiter*, but at the same time they are in direct conflict with the decision in *Kamesam* v. *Butchamma*[2]. *Anne Brahmayya* v. *Rattayya*[4], was decided by Ramesam, J., who held that the *sapinda* must indicate the person to be adopted and the authority to adopt must be used within a short period.

We are of the opinion that the law was correctly stated in *Kamesam* v. *Butchamma*[2], and that the judgments in *Suryanarayana* v. *Venkataramana*[1], *Veera Basavaraju* v. *Balasurya*

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1. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.
2. (1914) 1 L.W. 511.
3. 1914 M.W.N. 502.
4. (1924) 20 L.W. 503.

F.B.
Venkayya *v.* Sreeramulu.
Leach, C.J.

Prosada Rao[1], and *Anne Brahmayya* v. *Rattayya*[2], should be disregarded, when the authority has been exercised within a reasonable period and the circumstances have not changed materially. We do not wish to be understood to imply that if the authority is not exercised quickly it ceases to be valid. That question does not arise here and the effect of the lapse of years and the change of circumstances must be decided when the question does arise. In the present case the adoption took place within five months of the receipt of the *sapinda's* letter and it is not suggested that the circumstances had changed. It cannot be disputed, nor has any attempt been made to dispute it, that a husband can give to his wife a general authority to adopt. When she has received authority from her husband the widow is at liberty to adopt whomever she likes as a son to her deceased husband. The *sapindas* take the place of the husband when he has died without giving authority to his widow. Why should they not also leave the choice entirely to the widow? There is nothing in the ancient texts to indicate that they cannot and we can see no justification whatsoever for the opinion that the *sapindas* must name the boy to be adopted. Of course if the *sapindas* only give their consent conditional on the widow adopting a named person that will be a different matter. To ignore such a condition would mean acting beyond the scope of the authority.

It has been said in the course of the arguments that a passage in the judgment of the Privy Council in *Veera Basavaraju* v. *Balasurya Prasada Rao*[3], supports the opinion expressed in *Suryanarayana* v. *Venkataramana*[4]. In the case before the Privy Council the widow had made an adoption with the consent of remote *sapindas* without having asked for the consent of the nearest *sapindas* and it was held that the adoption in the circumstances was invalid. There were five grades of *sapindas* and one member of the fourth grade had given his assent in a letter addressed to the widow. In describing this letter Mr. Ameer Ali, who delivered the judgment of the Board observed:

"This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption."

It is this passage which it is said indicates approval of the opinion expressed in *Suryanarayana* v. *Venkataramana*.[4]

1. 1914 M.W.N. 502. 2. (1924) 20 L.W. 503.
3. (1918) 36 M.L.J. 40: L.R. 45 I A. 265: I.L.R. 41 Mad. 998 (P.C.)
4. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.

F.B.
Venkayya
v.
Sreeramulu.
Leach, C. J.

When the whole of the paragraph from which this statement has been extracted is read it is obvious that their Lordships were merely describing the letter and were not intending to lay down any principle. If there should be any doubt whether this is so it can be set at rest by reference to the judgment of the Judicial Committee in *Kristnayya* v. *Lakshmipathi*[1], where Viscount Cave said (page 659 of the report):

"Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (1) that an authority given by sapindas to adopt "any boy at any time" is invalid, (see *Suryanarayana* v. *Venkataramana*[2], (2) that an authority given by sapindas in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (3) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Krishnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there; and their Lordships accordingly refrain from expressing any opinion upon them."

Nothing could be clearer than this and it is not suggested that the question has arisen before the Judicial Committee since.

We hold that the authority given to the widow in this case was a valid authority and that the first plaintiff was lawfully adopted by Venkamma to her late husband. It is accepted by all parties that on this finding the appeal must succeed to the extent of a half share in the properties described in entries Nos. 8, 9, 10 and 11 in the schedule to the plaint and that the suit must be remanded to the trial Court to decide the questions if any, which are consequential on this decision. If any such questions arise the trial Court will pass a final decree when it has decided them. The appellant is entitled to his costs in this Court and before the Subordinate Judge. The costs in the trial Court will be decided by the District Munsif when he passes the final decree.

K. S. *Appeal allowed.*

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1. (1920) 39 M L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).
2. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Kandulapati Kanakaratnam .. *Appellant** (*2nd Defendant*)

v.

Kandulapati Narasimha Rao, being minor by mother and next friend K. Nagaratnam, and another. *Respondents* (*Plaintiff and 1st Defendant*).

F.B.

Kanakaratnam *v.* Narasimha Rao.

Hindu law—Adoption by widow with valid authority from nearest sapinda—*Improper motive in making adoption—If invalidates the adoption.*

Where a widow has received authority to adopt from the nearest *sapinda* the adoption by her should be regarded as valid notwithstanding that she was actuated, not by a sense of religious duty, but by an improper motive, namely, to defeat her co-widow.

Kandasami Goundar v. *Chinnammal,* (1933) 37 L.W. 729, *Murahari Brahma Sastri* v. *Sumitramma,* (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411 on this question and the observations of the Full Bench in *Annapurnamma* v. *Appayya Sastri,* (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 overruled.

Appeal against the decree of the Court of the Subordinate Judge of Ellore dated 9th August, 1938 and passed in O. S. No. 40 of 1937.

P. V. Rajamannar, K. Subba Rao and *C. Sanjeeva Rao* for Appellant.

Sir A. Krishnaswami Aiyar and *B. V. Subramanyam* for 1st Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which arises for decision in this appeal is whether the adoption by a Hindu widow of a son to her deceased husband is invalid when the widow is actuated, not by a sense of religious duty, but by an improper motive.

On the 8th June, 1931 one Kandulapati Gopalam died leaving two widows, the second respondent and the appellant. The second respondent was the senior widow. On the 20th October, 1931 the second respondent purported to adopt the first respondent and it is not suggested that any of the necessary formalities were ignored. On the 17th December, 1935 the first respondent filed in the Court of

* Appeal No. 426 of 1938. 28th August, 1941.

F.B.

Kanakaratnam v. Narasimha Rao.

Leach, C.J.

the District Judge of West Godavari the suit out of which this appeal arises to recover possession of Gopalam's estate. The suit was subsequently transferred to the Court of the Subordinate Judge of Ellore. The first respondent alleged that Gopalam had by will given authority to the second respondent to adopt a son. He also alleged that irrespective of the will the adoption was valid as the nearest *sapinda* had given his consent. The appellant denied that the will had been executed by the testator and disputed the validity of the consent of the nearest *sapinda*. The will was not produced, but the Subordinate Judge held that the first respondent had been validly adopted because the second respondent had in fact received the consent of the nearest *sapinda*, and this is not now disputed. It may be taken for the purposes of the appeal that in adopting the first respondent the second respondent was not actuated by any religious motive and that her object was to prevent the estate falling into the hands of the appellant.

Two arguments have been advanced on behalf of the appellant. In the first place it is said that a Hindu widow cannot make a valid adoption when she has been prompted by a corrupt motive. In the second place it is said that here the consent of the nearest *sapinda* cannot be regarded as being a lawful consent because he gave it under the impression that Gopalam had by will directed the second respondent to adopt a son to him. The second contention was not seriously pressed and calls for little comment. The nearest *sapinda* was Kandulapati Bullivenkayya, the elder brother of Gopalam. He gave evidence and stated that his consent was given independently of any authority received from Gopalam. His statement was believed by the Subordinate Judge and we see no justification for disbelieving it.

The appellant mainly relies on a passage in the judgment of the Privy Council in *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1], which is usually referred to as the Ramnad case. It was there held that according to the law prevalent in the Madras Presidency a Hindu widow who has not received authority from her husband may nevertheless adopt a son to him if she has received the consent of his kinsmen. Subsequent decisions make it clear that by kinsmen

1. (1868) 12 M.I.A. 397.

F.B.

Kanaka-ratnam *v.* Narasimha Rao.

Leach, C.J.

is meant the nearest *sapindas*. The passage relied upon by the appellant reads as follows:

"It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

We will assume that where a senior widow adopts a son in order to prevent her husband's estate falling into the hands of a junior widow her motive is "corrupt" in the sense that it is improper.

On behalf of the first respondent it is contended that the widow's motive in making the adoption is not really a factor and that weight should not be attached to the words "and neither capriciously nor from a corrupt motive" which appear in the judgment in *The Ramnad case*[1]. For reasons which we shall state we consider that there is great force in this contention.

The judgment in *The Ramnad case*[1], was delivered in 1868. In 1876 the Privy Council had occasion to consider their observations in that case in *Venkatakrishna Rao* v. *Venkatarama Lakshmi*[2], and in delivering the judgment of the Board Sir James Colvile observed:

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

Here the weight is attached to the consent of the nearest *sapindas*. Their consent is the important factor and this has been emphasised in numerous decisions given by the Judicial Committee since. In quoting from the judgment in *The Ramnad case*[1], Sir James Colvile pointed out that the evidence which was required was evidence of the assent of the kinsmen and not evidence of the widow's motives. In 1935, the Privy Council expressly left open the question whether the widow's motive could be disregarded when the consent of the nearest

1. (1868) 12 M.I.A. 397.
2. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.)

F.B.

Kanaka-ratnam v. Narasimha Rao.

Leach, C.J.

sapinda had been obtained, but in doing so their Lordships did express doubt whether her motive is relevant. This occurred when the Board delivered judgment in *Sri Krishnayya Rao* v. *Suryarao Bahadur Garu*[1]. In that case their Lordships observed:

"The last objection urged by the respondent is based on the motives of the first defendant. She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the sapindas has been obtained, the motive of the adopting widow is relevant. They do not, however, consider it necessary to decide this question in the present case, as assuming it to be so, they think that there is no ground for imputing a corrupt motive to the lady."

At this stage it will be convenient to refer to three decisions of this Court on which the appellant also relies. In *Kandasami Goundar* v. *Chinnammal*[2], Madhavan Nair and Jackson JJ., applied the dictum in *The Ramnad case*[3], and held that if the consent of the *sapinda* was given with the object of benefiting himself or the facts showed that the widow was making the adoption to defeat the interest of a *sapinda* and not to promote the spiritual welfare of her husband, the adoption was invalid. In *Annapurnamma* v. *Appayya Sastri*[4], a Full Bench (Coutts Trotter, C. J., Madhavan Nair and Jackson, JJ.,) said that the consent of the son who is the nearest *sapinda* would be sufficient:

"if the circumstances showed that the adoption was made by the widow in the proper and *bona fide* performance of a religious duty, and the real motive which actuated her was the conferment of spiritual benefit on her husband".

It was not necessary to say this for the purpose of deciding the question which was raised in the case, and Mr. Rajamannar, on behalf of the appellant, has very properly conceded that these observations must be regarded merely as *obiter*. The question of the widow's motive was also discussed in *Murahari Brahma Sastri* v. *Sumitramma*[5], where Madhavan Nair and Jackson, JJ., again felt themselves bound by the observations of the Judicial Committee in *The Ramnad case*[3], although Jackson, J., indicated in his judgment that if he were not bound by what had gone before he might have decided otherwise. These three decisions were, of course, all given

1. (1935) 69 M.L.J. 388. 2. (1933) 37 L.W. 729.
3. (1868) 12 M.I.A. 397.
4. (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 (F.B.).
5. (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411.

F.B.

Kanaka-ratnam v. Narasimha Rao.

Leach, C.J.

before the judgment of the Privy Council in *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*[1]. That judgment, was, however, considered by this Court (Cornish and Varadachariar, JJ.,) in *Hari Ramayya* v. *Venkatachalapati*[2]. The learned Judges apparently regarded the judgment of the Judicial Committee in *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*[1], as actually deciding that the only person whose motive requires to be canvassed is the *sapinda* and not the widow, but the passage which we have just quoted from the judgment of the Board shows that this is going too far.

The question was fully debated by the Bombay High Court in *Ramachandra Bhagawan* v. *Mulji Nanabhai*[3], which was decided by a Full Bench of five Judges. The Court held, one Judge dissenting, that in the Bombay Presidency any discussion of the widow's motive in making an adoption was irrelevant, because a widow in the Bombay Presidency had the power to adopt without any consent and the adoption resulted in religious benefit to her deceased husband.

As the result of the judgment of the Privy Council in *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*[1], the Court can now decide the question untrammelled by the observations in *The Ramnad case*[4], on which the appellant so much relies. In *Amarendra Mansingh* v. *Sanatan Singh*[5], the Privy Council emphasised the importance of the spiritual significance of the act of adoption. In the Madras Presidency a widow cannot adopt unless she has received direct authority from her husband, either before his death or at his death by will, or the consent of the nearest *sapindas*, unless such consent is improperly withheld in which case she can go to the next nearest *sapindas*. Bearing in mind that the adoption confers spiritual benefit on the deceased husband, that in the Madras Presidency a widow can only adopt when she has received authority to do so it seems to us that her motive is entirely irrelevant. However spiteful her action may be towards others the benefit conferred upon her deceased husband by her action is in no way affected, and the fact that she cannot act without authority makes the position all the more clear. The English law does not inquire

1. (1935) 69 M.L.J. 388.
2. (1935) 70 M.L.J. 619.
3. (1896) I.L.R. 22 Bom. 558.
4. (1868) 12 M.I.A. 397.
5. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.)

F.B.

Kanakaratnam *v.* Narasimha Rao.

Leach, C.J.

into the motive for the exercise of a power when the power exists and we can see no justification for applying a different rule here. Consequently we hold that when a widow has received valid authority to adopt her motive in doing so can be ignored. It follows that we consider that the decision in *Kandasami Goundar* v. *Chinnammal*[1], and *Murahari Brahma Sastri* v. *Sumitramma*[2], on this question should be overruled and that the observations of the Full Bench in *Annapurnamma* v. *Appayya Sastri*[3], to which we have referred should not be given effect to.

In the present case the widow received authority from the nearest *sapinda* and consequently her adoption of the first respondent should be regarded as valid notwithstanding that her object was to defeat the appellant. We dismiss the appeal with costs in favour of the first respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Karuppa Goundan ... *Appellant* (Defendant)*

v.

T. R. Narayanaswami & Co., by partner Rao Bahadur P. S. G. Rangaswami Naidu. *Respondent (Plaintiff)*.

Karuppa Goundan *v.* Narayanaswami & Co.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 and 8—Endorsee of pronote—If "creditor"—Pronote partly for cash consideration and partly for interest due under a mortgage —Scaling down—Negotiable Instruments Act (XXVI of 1881) S. 120—If bar.

A promissory note which was made up partly of cash consideration and partly of interest due under a mortgage was sought to be scaled down as against an endorsee of the note.

Held, that (*i*) the endorsee of a promissory note is a "creditor" under Act IV of 1938 and is an assign of the promisee. (*ii*) S. 120 of the Negotiable Instruments Act does not prevent the setting up of any defence open to the promisor under Act IV of 1938, inasmuch as the section only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. (*iii*) Though Act IV of 1938, may affect the rights of parties under the Negotiable Instruments Act its provisions cannot be deemed to be invalid in view of the decision in *Nagaratnam* v. *Seshayya*, (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.) (Certificate under S. 205 of the Government of India Act given).

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1. (1933) 37 L.W. 729. 2. (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411.
3. (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 (F.B.)

*S. A. No. 764 of 1940. 22nd September, 1941.

Karuppa Goundan v. Narayanaswami & Co.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 689 of 1939 preferred against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 558 of 1938.

S. Ramachandra Aiyar and *M. Krishna Bharathi* for Appellant.

K. S. Sankara Aiyar and *T. B. Balagopal* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal arises out of a suit on a promissory note. The note in question was executed by the appellant in favour of one Aiyasami Naicken on 30th July, 1931 for a sum of Rs. 1,000 of which Rs. 500 was advanced in cash at the time of the execution, and the balance represented a payment towards interest on an earlier mortgage, Ex. III in favour of one Rangasami Naicken. In February, 1936 the note was assigned to the plaintiff by an endorsement. The trial Court held that the defendant was entitled to plead Act IV of 1938 and that, to the extent to which the note was in discharge of interest on the prior mortgage, the principal was liable to be reduced to the sum actually advanced in cash. He gave credit for a payment of Rs. 100 made towards principal, passed a decree for Rs. 400, scaling down the interest under the Act. The lower appellate Court, without going into the question whether to the extent of the payment towards the prior mortgage, the promissory note was a renewal, came to the conclusion that the endorsee of the promissory note was not a creditor under Act IV of 1938 and that the debtor was barred by S. 120 of the Negotiable Instruments Act from pleading the defects in the note or the transaction. It seems to us that on both these points the learned District Judge is clearly in error. S. 120 of the Negotiable Instruments Act only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. It does not bar any defence which is independent of a plea that the instrument as originally made or drawn was invalid. S. 3 of Act IV of 1938 defines a creditor as including his assigns and there can be no doubt that the endorsee of a promissory note is the assign of the original promisee even though he has greater rights than an assign by deed in that he is a holder in due course. It has been suggested on behalf of the respondent, relying on observations in the judgment of the Federal Court,

Karuppa Goundan v. Narayanaswami & Co.

Wadsworth, J.

Subramanyam Chettiar v. *Muthuswami Goundan*[1], that Act IV of 1938 must be deemed to be invalid in so far as it affects the rights of holders in due course of negotiable instruments; or, alternatively, that it must be deemed that this Act does not affect such rights. It seems to us that these are questions which, so far as we are concerned, are governed by the decision of the Full Bench in *Nagaratnam* v. *Seshayya*[2], which went fully into the effect of Act IV upon negotiable instruments and decided that the provisions of Act IV were not invalid even though they may affect the rights of parties under the Negotiable Instruments Act. In this Court therefore, the contention of the respondent cannot succeed. But we certify with reference to S. 205 of the Government of India Act, 1935 that the case involves a substantial question of law as to the interpretation of the Government of India Act.

The Courts below have not considered the question whether the portion of the principal of the promissory note which consists of interest due on the earlier mortgage can be deemed to be interest under the explanation to S. 8, having regard to the fact that the mortgagee under Ex. III was one Rangaswami Naicker whereas the promisee under the promissory note was Aiyaswami Naidu. It may be that there are facts which would enable the defendant to plead that the interest under the mortgage was due to the same creditor as the creditor under the promissory note. That is a matter which will have to be gone into in the lower appellate Court. We therefore allow the appeal and remand the case to the lower appellate Court for fresh disposal in the light of this judgment. The costs of the second appeal will abide by the result. Court-fee on the second appeal will be refunded.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Vempati Venkayya ... *Petitioner** (*Respondent.*)

v.

The Official Receiver, Guntur ... *Respondent* (*Petitioner*).

Venkayya v. Official Receiver, Guntur.

Provincial Insolvency Act (V of 1920), S. 54—Fraudulent preference of creditor—Onus of proof on whom—Explanatory circumstances—Inference of Court regarding intent—How far legal.

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1. (1941) 1 M.L.J. 1 (Supp.): (1940) F.C.R. 189.
2. (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.).

* C.R.P. No. 980 of 1937. 15th August, 1940.

Venkayya *v.* Official Receiver, Guntur.

It is well settled that the burden of proving that an alienation by an insolvent amounts to a fraudulent preference under S. 54 of the Provincial Insolvency Act, is on the Official Assignee or Receiver. According to decisions in English Courts, though the onus of proving the intent to prefer lies on the Receiver and never shifts, it is open to the Court to infer such intention when that is the only way of explaining the transaction and no other explanation is possible. The law under the Indian statutes in this respect is not different.

Petition under S. 75 of Act V of 1920 praying that the High Court will be pleased to revise the order of the District Court of Guntur dated 23rd February, 1937 and made in C. M. A. No. 67 of 1935 preferred against the order of the Court of the Subordinate Judge of Guntur in I. A. No. 1758 of 1933 in I. P. No. 44 of 1930.

V. Subramaniam for Petitioner.

V. Rangachari for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is directed against an order of the District Court of Guntur setting aside a sale in favour of the petitioner as a fraudulent preference under S. 54 of the Provincial Insolvency Act. One Ramachandrayya and another were adjudicated insolvents on August 7, 1930. The sale deed in question (Ex. III) was executed by them in favour of the petitioner on July 11, 1930. The total liabilities of the insolvents amounted to about Rs. 4,000 of which about Rs. 3,000 was due to the petitioner. The sale deed comprised all the insolvents' properties except their residential house in the village which, according to P.W. 4, was worth from Rs. 300 to Rs. 400 at the time of the sale. The sale was executed for Rs. 1,400 in *pro tanto* discharge of the debt due to the petitioner, a promissory note being given for the balance. The deed was registered in Guntur though the lands comprised therein are within the jurisdiction of the Sub-Registrar of Gurzala where it should ordinarily have been registered. The petitioner's case which was accepted by the trial Court was that he had been pressing the insolvents for payment of the debt due to him and had gone to Guntur with a view to file a suit against them when having come to know of his intention, they came there and executed the sale deed and got it registered in order to avert such suit. In those circumstances the sale was upheld as not being a fraudulent preference. On appeal, the learned District Judge disbelieved the petitioner's

Venkayya v. Official Receiver, Guntur.

case and found that the finances of the insolvents were in a hopeless state at the time of the sale, that all their creditors were pressing them for payment, and that it was impossible to believe that the insolvents could have thought of protecting themselves from any threatened suit by a sale of their properties. The learned Judge also considered that the execution and registration of the sale deed at Guntur was suspicious, and that, as the petitioner and the insolvents belonged to the same village, it must have been executed with a view to prefer the petitioner.

Learned counsel for petitioner contended that this decision is unsustainable as there is no evidence to show that the dominant intention of the insolvents in effecting the sale was to prefer the petitioner. It was pointed out that all the creditors of the insolvents except P. W. 4 to whom a trifling sum was due were residents of the same village and that the learned Judge was wrong in inferring a motive to prefer from the petitioner's residence in the same village. It must be admitted that residence in the village of the insolvents can be no ground for inferring an intention to prefer when practically all the creditors of the insolvents also lived in the same village, nor can the execution and registration of the sale deed at Guntur instead of Gurzala be evidence by itself of such intent. Apart from these facts, there is no affirmative evidence to show that the sale was effected with a view to prefer the petitioner over other creditors. The position therefore reduces itself to this: the insolvents' financial condition was so hopeless that any threat or pressure of the creditors could have had no influence on them. The petitioner as well as the other creditors knew of such condition and were demanding payment. For some reason which has not been affirmatively established, the insolvents sold most of their properties to the petitioner in partial discharge of the debt due to him, and this sale had the effect of giving him a preference over their other creditors. The question is whether, in these circumstances, the sale can be set aside as a fraudulent preference under S. 54 of the Act.

It is well settled that the burden of proving that the transaction impugned amounts to a fraudulent preference is on the Official Assignee or Receiver. Learned counsel for respondent however, broadly contends that in seeking to establish the insolvent's intent to prefer, all that is necessary for the Official

Venkayya v. Official Receiver, Guntur.

Receiver to show is that the transaction was voluntary in the sense that it was not induced by real or genuine pressure exerted upon the insolvent and that it resulted in the preference of one creditor over other creditors. If the creditor who is in fact preferred fails to give any other explanation for the transaction, it must be presumed to have been done with the view or intent of preferring that creditor. Several decisions were cited in support of this proposition but most of them are not helpful as they were concerned with their own peculiar facts. It must however be admitted that the decision of the English Court of Appeal in In re *Cohen*[1], and of the Division Court in *Re Drage (John) and Sons* v. *Knight*[2], on which counsel particularly relied lend support for the proposition contended for. The relevant part of the headnote of the former case runs thus:

> "*Held*, further (Pollock M. R. dissenting), that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, a *prima facie* case of fraudulent preference is established."

This was apparently based upon what Sargant, L.J., observed at pages 543 and 544:

> " And amongst all the cases referred to in the text-books we have not been referred to one in which an actual preference in view of imminent bankruptcy has been supported, except by showing affirmatively that the actual preference was caused by some other reason—such as pressure, threats, fear or the like, which the Court considered as constituting the dominant motive, and as showing an intention displacing the *prima facie* intention to be gathered from the mere fact of preference. No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained and where that preference in fact has been held good."

To the same effect more or less are the observations to be found in the other decision referred to above. A decade later however the House of Lords had to consider this question in *Sir William Henry Peat* v. *Gresham Trust, Ltd*[3]. A director of an insolvent company caused the withdrawal of opposition to a judicial proceeding instituted by a creditor company to perfect their title to the security given by the former company for their debt. The said director was also the managing director of the creditor company. The Liquidator of the debtor company claimed that the withdrawal of the opposition was the

1. (1924) 2 Ch. 515.
2. (1926) 134 L.T. 765.
3. (1934) A.C. 252.

Venkayya v. Official Receiver, Guntur.

suffering by it of a judicial proceeding with a view of giving the creditor company a preference. Apart from the dual position of the director referred to above, there was nothing to show that there was any intention to prefer. In upholding the transaction as not being a fraudulent preference, Lord Tomlin observed:

> "In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the Court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is no direct evidence and there is room for more than one explanation it is not enough to say, there being no direct evidence the intent to prefer must be inferred. In my opinion there is nothing in the decision in In re *Cohen*[1], to justify the doctrine for which the appellant contends, and I do not think that such a doctrine could be reconciled with the opinion expressed in your Lordships' House in the case of *Sharp* v. *Jackson*[2] and in particular with the views indicated by Lord Halsbury at pages 421 and 422 of the report. I may add that I do not think that the headnote in the case of In re *Cohen*[1], accurately expresses the result of the decision in the Court of Appeal. The majority of the Court held that upon the evidence the intent to prefer was made out, but it is only in the judgment of Sargant, L.J., that any support can be found for the headnote as expressed."

Later on, he observed:

> "It is improper to speculate what the reasons for his actions were, and in my opinion upon the material available the inference that the intent was to prefer cannot in law properly be drawn."

It will be observed that Lord Warrington who was one of the majority Judges in the Court of Appeal in In re *Cohen*[1], concurred in these observations. This decision appears to lay down that mere proof of a voluntary payment and a preference in fact of a particular creditor does not shift the onus from the Official Receiver to the creditor preferred. The onus still lies on the former to prove that the dominant or the real intention of the insolvent was to prefer and the Court must be satisfied upon the evidence before it that such intention was present. Inference of such intention cannot be justified by the mere unexplained fact of preference and ought not to be drawn as a matter of speculation where it is possible to attribute the payment by the insolvent to other reasons or motives than an intention to prefer. The Court is not bound to infer such intent if the creditor preferred fails to establish such reasons or motives.

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1. (1924) 2 Ch. 515. 2. (1899) A.C 419.

Venkayya *v.* Official Receiver, Guntur.

This decision was applied by the Court of Appeal in, Re *Lyons* v. *The Trustee*[1]. The father of the insolvent in that case had guaranteed to the insolvent's bankers the payment of the overdraft, and the insolvent, after he was aware of his insolvency, paid in cheques and thereby reduced the overdraft. The trustee in bankruptcy claimed that the payments thus made amounted to a fraudulent preference of the bank and its guarantor. Apart from the kinship of the insolvent with the guarantor of the bank, there was nothing to show that the insolvent paid in the cheques with intent to prefer the bank over his other creditors and thereby relieve his father's liability to the bank. Clauson, J., inferred the insolvent's intention to prefer from his relationship to the surety, but the Court of Appeal reversed the decision and upheld the payments as not amounting to a fraudulent preference. It is no doubt true that notwithstanding the dual position of the director in the former case, and the insolvent's kinship with the surety in the latter, the Court refused to infer an intention to prefer and upheld the transaction impugned. But it is worthy of note that in each case the Court laid stress on the possibility of the transaction being otherwise explained on the facts and circumstances of the case, though it was held that it was not incumbent on the preferee to show that that was the real explanation. In other words, according to these decisions, though the onus of proving the intent to prefer lies on the receiver and never shifts, it is open to the Court to infer such intention when that is the only way of explaining the transaction and no other explanation is possible.

If this, as I conceive, is the law as explained and laid down by these decisions of great authority under the English Bankruptcy Acts—and it is not suggested that the law under the Indian statutes in this respect is different—I consider that an intention to prefer the petitioner over other creditors can properly be inferred in the circumstances of this case. The only explanation which was put forward by the petitioner namely, that the sale was effected in order to avert the suit which the petitioner had gone to Guntur to file was, as already stated, rejected by the Court below as untrue, and learned counsel for petitioner was unable to suggest any other reason

1. (1934) 152 L.T. 201.

Venkayya v. Official Receiver, Guntur.

why the insolvents sold practically all their properties to the petitioner when their insolvency was imminent.

On the whole, I am of opinion that the order of the Court below setting aside the sale should be sustained though on different grounds and this revision petition dismissed with costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KUNHI RAMAN.

Minor Ramanathan Chettiar by next friend Chidambaram Chettiar. *Appellant* (Plaintiff)*

v.

Muthuraman Naidu and others ... *Respondents (Defendants and L. Rs. of Defendants).*

Ramanathan Chettiar v. Muthuraman Naidu.

Hindu law—Debts—Trading family—Debt contracted for firm—Promissory note by manager—Endorsement of note by payee—"Debt" not transferred—Decree against manager personally—Executability against other members of the family, not parties to the suit.

The payee of a promissory note executed by the manager of a joint Hindu family may either base his suit on the note, in which case only the maker of the note can be made liable, or on the debt, in which event he may seek to make the sons or other undivided members of the family of the maker also liable. When however the payee merely indorses the note to a third party, without formally assigning the debt also to the indorsee, the latter can sue only on the note and not on the debt. A decree obtained against the maker of such note (the cause of action being based purely on the negotiable instrument) cannot be executed against any other undivided member of the family of the maker of the note when the element of pious obligation of a son to discharge his father's debts is absent.

Authorities discussed.

Appeals against the decrees of the Court of the Subordinate Judge of Kumbakonam dated 20th December, 1937 and passed in O. S. No. 32 of 1935 and O. S. No. 30 of 1935 (A. S. No. 194 of 1938 on the file of the District Court, West Tanjore) respectively.

T. V. Ramiah for Appellant.

R. Sundaralingam for Respondents.

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*Appeals Nos. 227 of 1938 and 256 of 1939. 31st July, 1941.

Ramanathan Chettiar v. Muthuraman Naidu.

Mockett, J.

The Court delivered the following

JUDGMENTS. *Mockett, J.*—This is an appeal from the judgment and decree of the learned Subordinate Judge of Kumbakonam in O.S. No. 32 of 1935. In that suit the plaintiff (the present appellant) prayed for a decree declaring in substance that his (plaintiff's) half share in a house was not liable to be attached in execution of a decree passed in O. S. No. 33 of 1932 in the East Tanjore District Court. He also prayed for an injunction restraining the first defendant from executing the said decree against his half share. O. S. No. 33 of 1932 was a suit by one Muthuraman Naidu against R. M. M. S. T. Vairavan Chettiar for money due on a promissory note. Vairavan Chettiar is the natural father of the appellant (the plaintiff in O. S. No. 32 of 1935). The promissory note was executed on the 6th October, 1929 by Vairavan Chettiar to Thambuswami Naidu and this note was endorsed by the payee to Muthuraman Naidu, the plaintiff in O. S. No. 33 of 1932. The promissory note is marked Ex. VI. The judgment in O. S. No. 33 of 1932 is marked as Ex. VII-B and the decree based thereon as Ex. B. As the arguments in this case have been directed to one aspect only it is unnecessary to set out at any great length the details of this suit. It will be enough to state that the plaintiff alleged that he was adopted by the widow of Chidambaram Chettiar, the brother of Vairavan Chettiar in 1924 and that in 1926 there was a division in status and an actual division of one house in that family. The lower Court found the allegation of adoption to be proved and no arguments have been addressed to us attacking that finding. The lower Court also found that the allegation regarding the division in status was not proved and that finding has not been attacked before us. The decree in O. S. No. 33 of 1932 was assigned to the third defendant, the second respondent in this case. The essential facts in this case, and it is upon these facts that the arguments have been based, can therefore be summarised as follows:

The appellant's natural father executed a promissory note to Thambuswami Naidu who endorsed it to the first defendant Muthuraman Naidu and on the basis of the decree passed in the suit on that promissory note, O. S. No. 33 of 1932, in which Muthuraman was plaintiff execution was sought to be levied on the appellant's share in the joint family property at the instance of defendant 3 the assignee of the decree from Muthuraman. The effect of the finding of the learned trial Judge

Ramanathan Chettiar v. Muthu-raman Naidu.

Mockett, J.

with regard to the adoption in 1924 is that in 1929, the date of the execution of the promissory note, the plaintiff (appellant) was no longer the son of Vairavan Chettiar, the maker of the promissory note, having been adopted by the widow of Vairavan Chettiar's brother Chidambaram Chettiar. This is said to have an important bearing on this case. The learned trial Judge has dismissed the appellant's suit. The appellant contends that his property is not liable in execution because no liability of any sort can attach to him in view of the fact that the original decree against his father Vairavan Chettiar was based on a promissory note to which he (the appellant) was not a party and that Vairavan Chettiar was sued not by the payee but an endorsee from the payee. There has been no contest on the facts as I have indicated. The learned Judge has investigated the status of the appellant's family. There is no doubt about who they are. They are an old-established Nattukottai Chetty firm whose hereditary business is money-lending and rice trade and their style and vilasam is R. M. M. S. T. Such families and such businesses are well known in South India and Burma. The appellant has contended in the first place that the learned Judge was wrong in his finding with regard to the form of the promissory note and the form of the suit. In paragraph 53 of his judgment there appears the following:

"It is clear on a reading of Ex. VI that it was executed by Vairavan Chettiar not merely in his individual behalf but as representing his firm and trading business. The promissory note was in fact executed by the firm and the endorsee thereof has the same rights on the negotiable instrument as the endorser to sue the firm which is the executant of the promissory note. The suit was also against the firm represented by the manager who had executed the note on behalf of the firm".

On an examination of the promissory note and the pleadings and the decree I am unable to agree with this finding. The promissory note is signed by R. M. M. S. T. Vairavan Chettiar. It is in renewal of a former promissory note which is stated to have been executed by Subbayya Chettiar "who was the agent of our firm at Velipalayam". It is not signed on behalf of the firm. It is true that the words 'we shall pay' are used, but it is not possible in view of the practice of Nattukottai Chetti agents who frequently use the word 'we' as meaning 'I', to attach any great importance to this. I observe that the translations of Exs. VI and A vary. Ex. A says, "On demand I shall pay you" whereas Ex. VI has the words "we

Ramanathan Chettiar v. Muthuraman Naidu.

Mockett, J.

shall pay". We have had therefore recourse to the Tamil Interpreter of this Court who informs us that actually the word 'we' is not present in the original, nor is the word 'I', but the subsequent 'shall' denotes the plural. But whether the suit could have been filed against the firm, vide *Ghulamsa Ravuthar* v. *Visvanathan Chettiar*[1], is of no great importance in this case. It may well be, that the plaint could have been so framed. The plaint in fact is not, in my view, framed against the firm. The defendant is R. M. M. S. T. Vairavan Chettiar and he is described as "R. M. M. S. T. Vairavan Chettiar, father's name not known". Paragraph 1 alleges that the defendant is carrying on money-lending etc., business under the vilasam (name and style) of R. M. M. S. T. at Velipalayam. That is a personal allegation that he himself is a firm or the proprietor of a firm. Paragraph 2 states that the money was borrowed in connection with and for the benefit of the defendants' ancestral family business and the prayer is for a decree against 'the defendant personally and out of the properties of the defendant's business vilasam'. It must be observed that the plaint is not filed as against the R. M. M. S. T. firm, in which case particulars could have been demanded as to its members under O. 30, of the Code of Civil Procedure, but appears to allege that the defendant owns the business. The decree describes the defendant as "R. M. M. S. T. Vairavan Chettiar, father's name not given" and the decree is that the defendant do pay to the plaintiff the sum of Rs. 22,341-14-0. It may be, as the learned counsel for the respondents has argued, that this firm was so well known, that the draftsman of the plaint overlooked the necessity for a careful pleading. The allegation in paragraph 2 is very clear that the money was borrowed for the benefit of the defendant's ancestral family business and there is no shadow of doubt on the record, nor is it suggested before us that that is not so and that the present appellant was not a member of the trading family of R. M. M. S. T. The conclusion I therefore arrive at is that, although the plaint is directed against the defendant personally and there is no allegation that the appellant is in any way concerned with the R. M. M. S. T. firm there is no doubt that this money was borrowed for purposes of the joint family trade and that the appellant was a member of the joint family.

1. (1917) 5 L.W. 721.

Ramanathan Chettiar *v.* Muthuraman Naidu.

Mockett, J.

In *Sadasuk Janki Das* v. *Sir Kishen Pershad*[1], the Privy Council have made it abundantly clear that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be easily recognised as the document passes from hand to hand. Their Lordships observe:

"In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the *hundis*, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal".

In *Abdul Majid Khan* v. *Saraswati Bai*[2], cited to us their Lordships have laid down that:

"Where the karta of a Hindu trading family borrows money on promissory notes executed in his own name and not in the name of the firm, there is no presumption that the borrowing was for the purposes of the joint family business, and the lender must prove that the money was required for the family business".

The first of these decisions supports, I think, my construction of the promissory note and with regard to the second decision, I concur with the learned Judge's finding, which has not been attacked, that the money was borrowed by Vairavan Chettiar for the benefit of the R. M. M. S. T. Firm.

But Mr. A. V. Viswanatha Sastri has argued that notwithstanding this view of the pleadings, which we indicated to him appealed to us, the decree was still executable against the share of the appellant. Mr. T. V. Muthukrishna Aiyar has argued that the findings in this case that at the time of the making of the promissory note the appellant had been adopted by the widow of Chidambaram Chettiar combined with the view we take that the suit and the decree were *prima facie* against Vairavan Chettiar personally are fatal to the decision of the lower Court that this decree could be executed against the appellant. Mr. Muthukrishna Aiyar has argued that since the decision of the lower Court a decision of a Full Bench of this High Court has concluded the matter in his favour. That case is *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[3]. In that

1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).
2. (1933) 66 M.L.J. 65: L.R. 61 I.A. 90 (P.C.)
3. (1938) 1 M.L.J. 378; I.L.R. (1938) Mad. 568.

Ramanathan Chettiar *v.* Muthuraman Naidu.

Mockett, J.

case, the facts were that a Hindu father executed a promissory note which was endorsed by the payee to the plaintiff. A suit was brought based on the promissory note and by the indorsee making the sons of the maker defendants. The decision of the Full Bench was that the sons were not liable on a negotiable instrument on which their names did not appear. Reference was made to the decision in *Sadasuk Janki Das* v. *Sir Kishen Pershad*[1], to which we have also referred, and the statement of the law by Lord Buckmaster cited. Leach, C. J., in the course of his judgment, with which the other members of the Bench concur, after reviewing the case-law, stated:

> "From these decisions, it will be observed that there are two principles to be borne in mind. The first is the principle which I have already stated, namely, that no one whose name does not appear on a negotiable instrument can be sued on it. The second is that there is no privity of contract between an indorsee and the maker or acceptor".

The reference to the Full Bench was:

> "Whether an indorsee of the promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu law or whether he is limited to the remedy available on the note."

And the answer of the Full Bench was:

> "The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the endorsement is so worded as to transfer the debt as well and the Stamp Law is complied with, and therefore, in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law.'

At page 576, the learned Chief Justice observes:

> "The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the family or by the father for his own purposes, provided they are not incurred for illegal or immoral purposes, does not affect the principle involved."

It seems to me that the decision of the Full Bench was concerned only with the question of an action on a promissory note. At no time was any question of rights in execution under Hindu law discussed. On the contrary the remarks and the observations in the judgment of the learned Chief Justice make it clear that this case was decided on the basis of a right of suit and that the discussion of any other right under Hindu law was expressly excluded. But the latter question is raised in this appeal. This Full Bench decision related to a promissory note made by a father and the liability under discussion was

1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).

Ramanathan Chettiar v. Muthuraman Naidu.

Mockett, J.

the liability of the son to an indorsee in a suit. We have to consider here the liability of a member of a trading family not in a suit but in execution for debts incurred by the manager for the purpose of the trading family. It is clear from the decision of the Full Bench that in a suit it matters not what the relationship between the maker and the person sought to be made liable is, if the latter's name is not upon the promissory note. There is a further decision of this High Court which is instructive. In *Krishnan Naidu* v. *Somi Naidu*[1], Leach, C. J., and Krishnaswami Aiyangar, J., had before them an appeal in which a question of execution came up for consideration. The appellants obtained a money decree against the third respondent making the third respondent's sons parties to the suit. The suit was on a promissory note executed by the father alone and the decree was passed against the father alone, the plaintiff deciding not to ask for a decree against the sons, who were dismissed from the suit. Notwithstanding this dismissal, the Bench held that execution can be levied against the sons' share in the joint family property on the basis that under Hindu law the sons were liable to pay their father's debts. There was of course no question of endorsement of a promissory note in that case, but it is a clear case of execution being levied on a person in respect of the debt due under a promissory note by the maker of that promissory note, although the name of the person on whose property execution was sought to be levied was not upon the promissory note. The Bench was largely concerned with the consideration of principles of *res judicata*, but the facts are of interest for the reason I have indicated. I derive this from that decision, that although under the law relating to negotiable instruments and the framing of suits thereon the sons would not be liable in a suit by the payee against the father the sole maker nevertheless the result will ultimately be in the circumstances of that case, that, although not liable in the suit, they were nevertheless liable in execution under a totally different system of law, namely, the Hindu law.

But, to return to the argument of the learned counsel for the appellant, does the fact that in the case now before us the promissory note was endorsed alter the position? In *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[2], a distinction is made

1. (1940) 1 M.L.J. 363: I.L.R. (1940) Mad. 815.
2. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

between the indorsee's remedy on a mere endorsement of the note and his remedy on an endorsement transferring the debt as well and complying with the Stamp law. It has been naturally a matter for careful consideration as to whether that affects the question before us; it seems to me that it does. The absence of such a formal assignment of the debt is no doubt fatal to a suit by the indorsee purported to be based on the debt and with which the Hindu law is concerned. It seems to me that for the appellant to escape liability we must hold that there is no debt due by the manager (he happens to be their natural father) to the decree-holder which they are under an obligation to pay. In so far as a father and son are concerned, a decree passed against a father creates a debt *prima facie* dischargeable by the sons, *Periaswami Mudaliar* v. *Seetharama Chettiar*[1], see also Mayne's Hindu Law, 10th edition, page 420. It seems to be established that the judgment against the father having created a debt which the son is liable to discharge, the consequent proceedings against the son will not be upon the judgment but upon the debt created by the decree. But to create a debt payable by the son, I think it reasonable to suppose that the decree itself must relate to a debt for which he is liable. Whether the decree now sought to be executed not against the son but against a member of a joint trading family did relate to a debt will be a matter for consideration. So far the relationship of a father and son has been discussed.

So far as the powers of a manager to contract debts for family purposes are concerned it seems clear that the manager of a joint family business has an implied authority to contract debts for the ordinary purpose of the family business, and, where such debts have been incurred, the other co-parceners are liable but only to the extent of their interest in the joint family: vide Mayne, 10th edition, pages 449 and 450 for a summary of the law. In *Venkatanarayana* v. *Somaraju*[2], Venkatasubba Rao, J., points out that:

> "There is a legal duty cast upon the son, as upon any other junior co-parcener, to discharge a liability incurred by the father in his capacity of manager for family purposes, and it is therefore unnecessary on the facts here to invoke the doctrine of pious obligation".

It will be seen that the learned Judge emphasizes that, although the manager may also be the father, all the junior co-

1. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
2. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).

Ramanathan Chettiar v. Muthuraman Naidu.

Mockett, J.

parceners are under a duty to discharge liabilities properly incurred by him because of his position as manager.

I have already indicated that the circumstances of this case show that, although the suit is not framed as against the firm, there is no doubt that it is against the manager for money advanced for the firm. The Full Bench decision in *Venkatanarayana* v. *Somaraju*[1], also held that the principle of representation by the managing member was not confined to immovable property but to other transactions as well, for instance, loans. I have been unable to understand why there should ever have been such a distinction. This decision of the Full Bench is, I consider, important in this case because it is an authority binding on me for the proposition that a Hindu father, by virtue of his position as manager, can represent the entire family in all transactions, not only with regard to immovable property but with regard to other transactions as well; that the decree need not be specifically passed against him as such; and that, once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability.

Our attention has been drawn to the decision of this High Court in *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[2], which was not cited to the Full Bench in *Venkatanarayana* v. *Somaraju*[1]. It appears from the facts of that case that the money borrowed was a personal debt and did not concern a trading family or an endorsed promissory note but it is evident that the learned Judges were reluctant to allow investigations in proceedings in execution to be made against persons who are not sons or descendants of the judgment-debtor. Where a suit is brought by an original payee against an original maker there appears to be no difficulty about the legal position of the members of the maker's family in execution proceedings; it is argued that the fact that the decree on which execution is sought to be levied against the appellant's property is based upon an endorsed promissory note materially affects his liability as a member of his family.

Except for the decision in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[3], and the cases therein cited, no case relating to an endorsed promissory note has been brought to our notice

1. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
2. (1934) 68 M.L.J. 104.
3. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

Ramanathan Chettiar v. Muthuraman Naidu

Mockett, J.

and no case relating to execution on a decree on an endorsed promissory note. As in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1], so in this appeal, the following facts are in my view of vital importance: (1) The promissory note was endorsed to Muthuraman Naidu, and, (2) the debt was not assigned to Muthuraman Naidu. There is the further fact that the element of pious obligation between a father and son is absent.

There is a wealth of authority:

> "that a decree obtained against a managing member for a debt binding on the family can be executed against the shares of the other members".

Vide *Daulat Ram* v. *Mehr Chand*[2], and the numerous cases cited by Mayne, 10th Edition, at page 450.

The question in this appeal therefore seems to be whether there is a debt in the hands of the third defendant which the plaintiff is bound to pay: In my view, there is not. I consider that the general principle laid down in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1], is applicable to this case. No debt was ever assigned to Muthuraman Naidu by Thambuswami Naidu, the promisor under Ex. VI. It could have been assigned, but it was not. By his endorsement and delivery Thambuswami Naidu transferred the property in the note to Muthuraman Chettiar—S. 50 of the Negotiable Instruments Act. The subsequent decree therefore can only have been on the note, and not on the debt. There is not therefore in existence any decree based on a debt. Any decree against the maker of the note will be as Varadachariar, J., points out in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1], at page 569, for compensation and not for debt—S. 117 of the Negotiable Instruments Act. It seems to me therefore that the present decree-holder cannot on the principle that the members of this trading family are liable to pay debts properly incurred by the manager make their property liable in execution in respect of a decree against the manager not for a debt but for a remedy under the provisions of a statute. I see no reason to stretch the principles of Hindu law in so far as they relate to the liability of persons not parties to suits, nor to extend the meaning of the word 'debt'. I again emphasise that the

1. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).
2. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).

Ramanathan Chettiar v. Muthuraman Naidu.

Mockett, J.

element of pious obligation by a son which seems to have given a somewhat comprehensive meaning to the word 'debt' is absent in this appeal. That the payee might, had the plaint been correctly framed or the debt correctly assigned, have been entitled to recover from the plaintiff is no reason for taking another view; nor is the possibility that, had there been no endorsement, no difficulty would have arisen for Thambuswami Naidu to recover. Indeed I consider that the fact that the plaintiff in the suit on the note preferred other methods is a reason for a holder of the decree therein being confined rigidly to his rights as they work out logically.

For the above reasons this appeal must be allowed with costs here and below.

It must follow also that Appeal No. 256 of 1939 will also be allowed with costs, which will be limited to the stamp duty paid, printing charges and other out of pocket expenses.

Kunhi Raman, J.

Kunhi Raman, J.:—I have had the advantage of perusing the judgment just delivered by my learned brother. In stating that I concur in the views expressed in it I wish to add a few words.

There is no doubt at all that the decree in O. S. No. 33 of 1932 was not against a firm represented by Vairavan Chettiar as manager, but that it was against the individual Vairavan Chettiar. The decree cannot therefore be executed against other members of the firm or their properties.

It is clear from the decision of a Full Bench of this Court reported in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1], which is binding on us, that the payee of a promissory note executed by the manager of a joint Hindu family may, if he wishes to sue, base his suit on the note, in which case, only the maker of the note can be made liable, or on the debt, in which event, he may seek to make the sons or the other undivided members of the family of the maker also liable. When however, the payee indorses the note to a third party, without assigning the debt also to the indorsee, the latter can sue only on the note and not on the debt. In the present case, the suit was by such an indorsee who did not therefore acquire any wider rights in respect of the debt under the Hindu law. The decree he obtained was only against the maker of the note, the

1. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

Ramanathan Chettiar *v.* Muthuraman Naidu. — Kunhi Raman, J.

cause of action being based purely on the negotiable instrument. Such a decree cannot obviously be executed against any other undivided member of the family of the maker of the note. Seeing that the appellant who is the natural son of the maker of the note was given away in adoption to his paternal uncle, no question of pious obligation to discharge the debt created by the decree in this case can also arise.

In the circumstances, I agree that the appeals must be allowed as indicated in the judgment of my learned brother.

K. S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Chandanmal .. *Appellant** (*Plaintiff—Appellant*)

v.

Rupakula Ramakrishnayya and another. .. *Respondents* (*Defendants 2 and 3—Respondents*).

Chandanmal *v.* Ramakrishnayya.

Contract Act (IX of 1872), S. 23—Consideration for promissory note, non-prosecution for cheating—Enforceability of the promissory note.

In the case of offences specified in S. 345 (2) of the Criminal Procedure Code, the matter may be lawfully compounded before it goes to Court and a promissory note taken in consideration therefor is notvoid under S. 23 of the Contract Act and is therefore enforceable.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 108 of 1938 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 51 of 1936.

K. Rajah Aiyar and *S. Srinivasachari* for Appellant.

K. Bhimasankaram and *P. Somasundaram* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff appeals against the decrees of the lower Courts dismissing his suit against the defendants 2 and 3. The suit was filed to recover Rs. 2,086-14-6 being the amount due under a promissory note (Ex. A) executed by defendants 1 to 3 in favour of the plaintiff. The defence which found acceptance in the lower Courts is that the consideration so far as defendants 2 and 3 are concerned was the stifling of a criminal prosecution against the first defendant and therefore

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* S. A. No. 789 of 1939. 19th August, 1941.

Chandanmal v. Ramakrishnayya.

illegal under S. 23 of the Indian Contract Act. Both the Courts found against the plaintiff.

The first defendant pledged certain packages of goods representing that they contained bottles of condensed milk and 'jeevamrutham' bottles and borrowed money from the plaintiff. The money was not paid and the pledgee took steps to have the goods sold. When the packages were opened for the purpose of sale, it was found that they contained stones, husk, saw dust, waste paper etc. This was clearly a case of cheating. The discovery was made on the 19th September, 1935. That evening the third defendant who is a pleader practising at Masulipatam came to Bezwada and that night there were talks between the plaintiff and the defendants. Second defendant is the brother of the first and the third defendant is his son-in-law. All three took part in the discussion. There was a mediation. P. W. 3 and D. W. 4 are admittedly two of the mediators, who took part in the mediation. The result was that at about 6 o'clock next morning, that is, the 20th, Ex. A the suit promissory note, came into existence which was executed by all the three defendants for Rs. 2,050. The promissory note recites that a sum of Rs. 2,800 was settled by the mediators to be paid in full settlement of all the claims of the plaintiff and that a sum of Rs. 750 was paid that day. For the balance of Rs. 2,050, the three defendants executed the promissory note. It appears that a larger sum than Rs. 2,800 was in fact due. The mediators settled that the plaintiff should give up a portion and be content with Rs. 2,800. It also appears that the defendants wanted time to pay; thus acceptance of a smaller sum than what was due and giving time for the payment of the sum settled were, at any rate, part of the consideration for defendants 2 and 3 joining in the execution of the promissory note. But the question is: was it also a part of the bargain that the consideration for defendants 2 and 3 joining in the promissory note was that the plaintiff should refrain from prosecuting the first defendant and if so, whether it vitiates the promissory note altogether as one opposed to public policy? One of the plaintiffs went into the box and swore:

"We believed first defendant committed an offence and cheated us . . . . We contemplated criminal action against the first defendant but did not take any steps in that direction . . . . . It was known in the town that the defendant played mischief. There was talk in the night that defendant No. 1 should be saved from prosecution by settling the matter that night. We did

not take any action thereafter as the matter was settled. We said we would give up taking action if defendants 2 and 3 joined in the execution of the promissory note. They had nothing to do with the business of the first defendant. We would have taken action if defendants 2 and 3 had not joined in the execution of the promissory note. We sought the advice of Mr. C. Venkatapayya at that time . . . . . We never saw defendant No. 3 before."

The evidence of P.W. 3 makes it further clear that defendants 2 and 3 were asked to join the execution of the promissory note partly, at any rate, for the purpose of saving the first defendant from criminal prosecution. They were not under any pre-existing liability. On the evidence therefore the consideration for defendants 2 and 3 joining in Ex. A is partly, at any rate, abstention on the part of the plaintiff from prosecuting the first defendant.

The question is whether in such a case the consideration or object of the agreement is unlawful within the meaning of S. 23 of the Indian Contract Act. The section runs thus:

" The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Stifling prosecution is a recognised head of public policy. The law is clearly laid down by the Judicial Committee in *Kaminikumar Basu* v. *Birendranath Basu*[1]. There a prosecution for forgery was launched and during the pendency of the criminal proceedings, an agreement was entered into, the validity of which came up for consideration. The complaint in that case was in respect of offences under Ss. 465, 567, 193 and 194, Indian Penal Code, which are all non-compoundable. The matters were referred to arbitration and the arbitrators delivered an award. Subsequent to the award, the parties entered into an *ekrarnama* or agreement embodying the result of the decision of the arbitrators. The criminal proceedings were subsequently dropped. The Subordinate Judge held that the

1. (1930) 59 M.L.J. 82: L.R. 57 I.A. 117: I.L.R. 57 Cal. 1302 (P.C.)

Chandanmal v. Ramakrishnayya.

object of the arbitration proceedings and of the agreement was the securing of the withdrawal of the criminal proceedings and that the consideration was unlawful and void. The High Court differed from the Subordinate Judge and held that the reference to arbitration was a *bona fide* one for the settlement of the disputes as to title. The High Court further held that as the Magistrate dismissed the complaint under S. 203, Criminal Procedure Code, it could not be said that the prosecution was dropped, implying thereby that the stage at which the prosecution could be said to have commenced had not been reached within the meaning of the Code of Criminal Procedure. The High Court also held that there was no tampering with the administration of justice by the complainant and gave a decree on the basis of the agreement. On appeal to the Judicial Committee it was held that it was immaterial whether the stage of prosecution had been reached within the meaning of the Criminal Procedure Code or not:

"If it was an implied term of the reference or the *ekrarnama* that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the *ekrarnama*, as the case may be is unlawful (see *Jones* v. *Merionethshire Permanent Benefit Building Society*[1]) and the award or the *ekrarnama* was invalid, quite irrespective of the fact whether any prosecution in law had been started . . . . . In a case of this description it is unlikely that it would be expressly stated in the *ekrarnama* that a part of its consideration was an agreement to *settle* the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful. . . . . Their Lordships have no hesitation in holding that, prior to the execution of the *ekrarnama*, it was an implied though not an expressed term, that in consideration of the executants admitting the shares of the plaintiffs they would not proceed with the charges laid by them against the accused."

It is clear from this decision that even if part of the consideration was the undertaking not to proceed with the prosecution, the entire agreement would be illegal.

It is urged by Mr. Rajah Aiyar, the learned advocate for the appellant, that the offence complained of in the case before the Judicial Committee was a non-compoundable one and that in this case the offence is not of that nature but is compoundable, though if a prosecution has been started, it cannot be compounded without the leave of the Court. He points out that it is well established that the compounding of a purely private complaint in which the public is not interested at all, *e.g.*, the case of

1. (1892) 1 Ch. 173.

assault is perfectly valid and that an agreement to pay a sum of money in consideration of the prosecution not being started or the dropping of the prosecution already started would not vitiate the contract. Public policy requires that in cases where public interests are involved, the parties should not compound the offence. In *Windhill Local Board of Health* v. *Vint*[1], Cotton, L.J., says:

"I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here, because this was merely a prosecution on a public matter—a matter which concerned the public. It was an interference with the public highway in a very serious manner."

Fry, L.J., observed:

"Now, I confess it appears to me that the law upon this point is determined by the case of *Keir* v. *Leeman*[2]. That lays down this principle, which I take to be one of general application, that where the matters of indictment are matters of public concern, they are not the subject of compromise. To use the language of the learned Judge who delivered the judgment in the Court of Queen's Bench in *Keir* v. *Leeman*[2], 'these are matters of public concern, and therefore not legally the subject of a compromise'."

Lopes, L.J., observed:

"As a general principle, it may be stated that it is the duty of every prosecutor where the public are interested to prosecute either to conviction or to acquittal . . . . . If the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it. Now, there can be no doubt that in the present case the offence was of a public nature."

In a case where a trade mark was alleged to be infringed, the Court of Appeal held in *Fisher & Co.* v. *Apollinaris Co.*,[3] that it is not illegal to compound it. James, L. J., observed:

"This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured person to enter into a compromise with regard to them."

The decisions of the English Courts do not further elucidate the matter. In each case the Court will have to decide on which side of the line the case falls.

In India, the Criminal Procedure Code, lays down what offences can be compounded; some are compoundable without

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1. (1890) 45 Ch. D. 351. 2. (1844) 6 Q.B. 308: (1846) 9 Q.B. 371.
3. (1875) 10 Ch. Ap. 297.

Chandanmal v. Ramakrishnayya.

the permission of the Court; some others are compoundable only with the leave of the Court before which a prosecution for the offence is pending. Others are not compoundable at all. In the first class of cases, there is no difficulty in saying that an agreement to compound such an offence is lawful, there being no law or public policy violated in such a case. In the case of a non-compoundable offence, as pointed out by the Judicial Committee in *Kaminikumar Basu* v. *Birendranath Basu*[1], the agreement is unlawful. The difficulty arises in cases where the offences are compoundable with the leave of the Court. Cl. (2) of S. 345 obviously refers to a stage where a prosecution is already launched and provides that the offences specified therein are compoundable only with the leave of the Court before which the prosecution is pending. What is the principle to be applied to a case where the offence is one falling under S. 345 (2) but the matter has not yet reached the Court? That is the case which arises for decision here.

In *Veerayya* v. *Sobhanadri*[2], a charge was laid for an offence under S. 420 of the Indian Penal Code. After the prosecution was launched an agreement was entered into, part of the consideration being the dropping of the criminal proceedings and leave of the Court was not obtained for compounding the offence. Venkataramana Rao, J., after discussing the question whether the object of the transaction was or was not the dropping of the prosecution says this on page 478:

> "There can be no doubt that in this case the offence must be deemed to be non-compoundable as the permission of the Court to compound was not obtained."

It will be noticed that the prosecution had already been launched and the case was exactly covered by S. 345 (2) and so the offence could not be compounded except with the leave of the Court. In the present case, the matter did not reach the Court and therefore S. 345 (2) does not in terms apply. In *Rajaram* v. *Charanjilal*[3], a Bench of the Lahore High Court held that where the offence is compoundable with the leave of the Court, a compromise during the pendency of a case is perfectly lawful. This of course is in direct conflict with the decision of Venkataramana Rao, J., in the case just cited.

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1. (1930) 59 M.L.J. 82: L.R. 57 I.A. 117 : I.L.R. 57 Cal. 1302 (P.C.).
2. (1936) I.L.R. (1937) Mad. 471.
3. A.I.R. 1939 Lah. 98.

Chandanmal v. Ramakrishnayya.

The question therefore reduces itself to this: where the matter has not reached the criminal Court, is there any rule of public policy preventing the parties from compounding offences specified in S. 345 (2) of the Criminal Procedure Code? The fact that after the matter has reached the Court, leave of the Court is necessary does not, in my opinion solve the difficulty. Is the offence of cheating of such a nature that an agreement to compound it before the matter reaches the Court is illegal and void? Suppose the parties desire to compound an offence of cheating involving a few rupees. Is it necessary for them to file a complaint, place the agreement before the Court and then alone compound it? That means that a complainant who is no longer desirous of prosecuting must file a complaint; else the agreement which he enters into by which he secures reparation for the pecuniary loss sustained by him will be invalid. Both parties agree that there should be no prosecution; yet the complainant must launch the prosecution and then seek the permission of the Court, thus breaking the agreement. The whole thing is reduced to a farce.

In a case where a man is cheated of a few rupees, how are the public interests so much involved as to prevent the parties from adjusting the matter? Extreme cases on both sides of the line may be put. But after giving the matter my best consideration, I hold that in the case of offences specified in S. 345 (2), Criminal Procedure Code, the matter may be lawfully compounded before it goes to Court.

After a prosecution is launched, S. 345 (2) expressly provides that these offences are compoundable only with the leave of the Court. In such a case, an agreement to compound it without the leave of the Court would if permitted defeat the provisions of S. 345 (2) of the Criminal Procedure Code, and hence void under the second paragraph of S. 23 of the Indian Contract Act.

I therefore reverse the decision of both the lower Courts and decree the suit as prayed for with costs throughout.

Leave to appeal is granted.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

Nadiminti Satyanarayanamurthi .. *Appellant** (*Petitioner*)

v.

Malluri Papayya and another .. *Respondents* (*Respondents—Decree-holder-defendant.*)

Satyanarayanamurthi *v.* Papayya.

Provincial Insolvency Act (*V of* 1920), *S.* 28 (4)—*Construction—Decree for costs in insolvent's favour after date of adjudication—Transfer of decree for value—Transferee applying to Court to be recognised under O.* 21, *r.* 16 —*Whether decree vested in Official Receiver because of adjudication on an earlier date—English and Indian law as to vesting during insolvency.*

Under S. 28 (4) of the Provincial Insolvency Act all property acquired by an insolvent subsequent to the date of adjudication and before discharge vests in the Official Receiver, the moment the acquisition is made. It is not permissible, in construing the section, to invoke any doctrine of intervention by the Receiver and to hold that till he intervenes there is no vesting of such property in him and dealings with it by the insolvent will be valid. A transfer, therefore, by the insolvent in favour of a person dealing with him *bona fide* and for value of such property is not valid. The doctrine of *Cohen* v. *Mitchell* (1890) 25 Q.B. 262, does not apply to cases arising under S. 28 (4).

Where the transferee of a decree for costs passed in favour of an insolvent after adjudication and before discharge applied under O. 21, r. 16, C. P. Code for recognition of the transfer with a view to execute it against the property of the judgment-debtor and the Court refused to recognise the transfer, on the question whether the transfer was valid in the circumstances,

Held, that the decree for costs vested in the Official Receiver the moment it was passed and that he was the only person entitled to transfer it, and the transfer in question was therefore invalid.

Kalachand Banerjee v. *Jagannath Marwari*, (1927) 52 M.L.J. 734: L.R. 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.) followed.

Appeal against the order of the Court of the Subordinate Judge of Amalapuram dated 2nd August, 1937 and made in E. P. No. 108 of 1936 in O. S. No. 1 of 1927.

M. S. Ramachandra Rao for Appellant.

K. Ramamurti and *K. Someswara Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the order of the learned Subordinate Judge of Amalapuram dismissing an application by a transferee decree-holder under O. 21, r. 16 to recognise the transfer of the decree in his favour and to

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* C. M. A. No. 365 of 1938. 31st January, 1941.

Satya-narayana-murthi v. Papayya.

execute it against the judgment-debtor's property. The decree that was transferred was a decree for costs in favour of an undischarged insolvent. He obtained the decree after the order of adjudication under the following circumstances. The order adjudging the transferor insolvent was passed in 1923. On a mortgage executed by him before the adjudication a suit was instituted in 1927 being O. S. No. 1 of 1927 on the file of the Subordinate Judge's Court, Amalapuram. An *ex parte* decree was passed against him and he sought to set aside that decree. The learned Subordinate Judge who heard the application dismissed it on the ground that he had no right to present the application because he was an undischarged insolvent and the right to redeem vested in the Official Receiver. Against the said order an appeal was presented to the High Court. Their Lordships Reilly and Anantakrishna Aiyar, JJ., took the view that though the insolvent was not a necessary party to the suit, yet as the plaintiff therein chose to make him a party, he was entitled to be heard on his petition to get costs at least for having been unnecessarily impleaded. But since nothing would be gained by getting the suit heard, they did not go into the merits' whether he had sufficient reason for not appearing on the date of the trial and dismissed the appeal. They however directed the plaintiff to pay the costs of the insolvent in the appeal and in the application out of which the said appeal arose. It was this decree for costs that was transferred in favour of the appellant transferee decree-holder.

The ground on which the Subordinate Judge declined to recognise the transfer was that under S. 28 (4) of the Provincial Insolvency Act the decree vested in the Official Receiver and the insolvent was not competent to transfer it. He followed a decision of this Court reported in *Lingayya* v. *Venkatapathy*[1]. It was a decision of our learned brother Pandrang Row, J. In that case the insolvent succeeded to certain property as reversioner subsequent to the date of the order of adjudication and before his discharge. He sold the property to the plaintiff in that case who sued to recover possession on the strength of the said sale deed. The suit was dismissed on the ground that the property vested in the Official Receiver and that the insolvent had no title to convey. It was contended before Pandrang Row, J., that the dismissal was improper on

1. A.I.R. 1935 Mad. 694.

Satya-narayana-murthi *v.* Papayya.

the ground that inasmuch as the Official Receiver did not intervene, the insolvent had title to convey relying on the decision in *Cohen* v. *Mitchell*,[1] but the learned Judge took the view that the doctrine of *Cohen* v. *Mitchell*,[1] did not apply to cases arising under S. 28 (4) of the Provincial Insolvency Act and in coming to this conclusion he relied on the decision of the Privy Council in *Kalachand Banerjee* v. *Jagannath Marwari*.[2] It is contended by Mr. Ramachandra Rao before us that this view is wrong, that the rule of English law as laid down in *Cohen* v. *Mitchell*,[1] namely:

> "Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee",

has been applied to cases in India arising both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act and if that rule is given effect to, the transfer in favour of his client ought to be recognised. He relied also on a number of cases including the latest Full Bench decision of this Court reported in *Sobhanadri* v. *Nagayya*,[3] with which we shall presently deal.

The question therefore is how far this contention is tenable. S. 28 (4) of the Provincial Insolvency Act runs thus;

> "All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver".

Unfettered by authority and on the plain language of the section all property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the Official Receiver the moment the acquisition was made. The word 'forthwith' in the section leaves no room for any other interpretation. S. 28 (4) of the Provincial Insolvency Act (V of 1920) which governs this case is almost identical in language with S. 16 (4) of the Provincial Insolvency Act (III of 1907). It runs thus:

> "All such property as may be acquired by or devolve on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver".

1. (1890) 25 Q.B. 262.
2. (1927) 52 M.L.J. 734: L.R. 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.).
3. (1938) 1 M.L.J. 413: I.L.R. (1938) Mad. 578 (F.B.).

Satya-narayana-murthi *v.* Papayya.

Lord Salvesen in delivering the judgment of the Judicial Committee in *Kalachand Banerjee* v. *Jagannath Marwari*[1], interpreted the section thus:

"This provision is perfectly clear. *The moment the inheritance devolved* on the insolvent Amulya, who was still undischarged, *it vested in the Receiver already appointed* and he alone was entitled to deal with the equity of redemption."

(The italics are ours). Later on he remarked thus:

"The Court only acts through a Receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the Receiver's actual appointment."

The question in that case arose thus: There was a suit in January, 1915 for foreclosure instituted against one Tara Prasanna Bose whose son the insolvent was. The suit was subsequent to the adjudication in insolvency, namely, 21st February, 1914. There was a compromise entered into between Tara Prasanna Bose and the mortgagees and the deed of compromise was filed on the 6th March, 1915. Under the deed of compromise time was given for the payment of the mortgage debt and in default of payment on the due date the mortgage was to be foreclosed. Before any decree could be passed in terms of the compromise Tara Prasanna Bose died leaving the insolvent as his sole heir. Thus the equity of redemption devolved by inheritance on the insolvent. The mortgagees brought the insolvent on record who ratified the compromise and obtained a preliminary decree on the 15th March, 1916. The Official Receiver put in applications to set aside the decree but they were rejected and a final decree was passed. Thereupon the Receiver instituted a suit to set aside the said decrees and for redemption. Their Lordships of the Privy Council held that he was entitled to do so. After placing the above interpretation on S. 16 (4) of the Provincial Insolvency Act, 1907 their Lordships observed as follows:

"*The latter alone* (that is, the Official Receiver) *is entitled to transact in regard to it* and *he and not the insolvent has the sole interest* in the subject matter of the suit. To him, therefore, must be given the opportunity of redeeming the property". (The italics are ours).

Therefore this decision is absolutely clear on the point, *viz.*, the property from the moment of its acquisition vests only in the Receiver and he is the person having the sole interest therein competent to deal with it thus excluding the idea of any property vesting in the insolvent at all and leaving no scope for

1. (1927) 52 M.L.J. 734: L.R. 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.).

Satya-narayana-murthi v Papayya.

any theory of intervention. Since the decision in *Kalachand Banerjee* v. *Jagannath Marwari*[1], the question was considered by both the Bombay and Allahabad High Courts and they reached the same conclusion. In *Girikant Shivlal* v. *Vadilal Vrijlal*[2], Beaumont, C. J., remarked:

"Unless we disregard altogether, the word 'forthwith' we cannot say that the property did not vest until the receivers intervened."

Wadia, J., who concurred with him observed that this view was confirmed by the said decision of the Privy Council. To a similar effect are the observations of Sulaiman, C. J., in the Full Bench decision in *Abdul Rahman* v. *Nihal Chand*[3]. The Lahore and Rangoon High Courts have taken the same view and they rely on the plain language of the section (vide *Diwan Chand* v. *Manak Chand*[4], and *Ma Phaw* v. *Maung Ba Thaw*[5]). It must be noticed that though the *Diwan Chand* v. *Manak Chand*[4], case was after the decision of the Privy Council, no reference was made to it. The preponderance of opinion is thus in favour of the view that it is not permissible to invoke any doctrine of intervention in construing the plain language of S. 28 (4). Mr. Ramachandra Rao contends that the Provincial Insolvency Act is based on the English Bankruptcy Act and that S. 28 (4) must be read in the light of the English decisions and therefore subject to the rule laid down in *Cohen* v. *Mitchell*[6]. He placed considerable reliance on *Ramanatha Aiyar* v. *Nagendra Aiyar*[7], and *Jagadish Narain Singh* v. *Mussammat Ramsakal Kuer*[8], which applied the said rule. To test the soundness of this contention we think it necessary to briefly advert to the relevant provisions of English law and to the cases based thereon. *Cohen* v. *Mitchell*[6], was decided under the English Bankruptcy Act of 1883. The relevant provisions of the said Act are Ss. 44 and 54. Portions of the said sections so far as material to the present case run thus:

"44. The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt....... shall comprise the following particulars:

(*i*) All such property as may belong to or be vested in the bankrupt at

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1. (1927) 52 M.L.J. 734: L.R. 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.).
2. (1935) I.L.R. 60 Bom. 141.
3. (1935) I.L.R. 58 All. 132 (F.B,).
4. (1934) I.L.R. 16 Lah. 392.
5. (1926) I.L.R. 4 Rang. 125.
6. (1890) 25 Q.B. 262.
7. (1923) 45 M.L.J. 827.
8. (1928) I.L.R, 8 Pat. 478.

the commencement of the bankruptcy or may be acquired by or devolve on him before the discharge. ...."

"54. (1) Until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

(2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

In *Cohen* v. *Mitchell*[1], the facts were as follows. The bankrupt before he obtained his discharge was carrying on business in buying and selling agricultural machines. He had a right of action for damages against a person who wrongfully took possession of some of the machines. He sued the wrong-doer and obtained judgment for damages. After the action was commenced the bankrupt assigned his right of action to the plaintiff. After the judgment was recovered the trustee in bankruptcy intervened and claimed to recover the amount. The question was whether the plaintiff or the trustee was entitled to do so. The plaintiff was held entitled to recover. Lord Esher proceeded on the admission of the counsel in the case and on prior authorities particularly *Herbert* v. *Sayer*[2] and Ex parte *Dewhurst.*[3] Fry L. J., dealt with the provisions of the statute and remarked thus:

"If one merely confined one's attention to the words of the section, the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner. But the inconvenience of such a conclusion has been apparent not only from the present statute, but from many statutes which have preceded it, which contain substantially the same language".

After so remarking he observed that there was no difficulty in divesting out of the bankrupt and vesting in the trustee the whole of the property that belonged to the bankrupt at the commencement of the bankruptcy but there was the greatest difficulty in supposing so with reference to the subsequently-acquired property, but that difficulty had been met by establishing a distinction and recognising that in the case of subsequently-acquired property it vests in the trustee absolutely from the moment of intervention and the bankrupt takes some kind of interest therein. He followed *Herbert* v. *Sayer*[2]. The decision in *Cohen* v. *Mitchell*[1], therefore proceeded wholly on prior authority based as it was stated on substantially the same language of the Acts prior to the Bankruptcy Act of

1. (1890) 25 Q.B. 262.
2. (1844) 5 Q.B. 965: 114 E.R. 1512.
3. (1873) Law Rep. 7 Ch. 185.

Satyanarayanamurthi *v.* Papayya.

1883. If one might say with respect to the eminent Judges who dealt with the Bankruptcy enactments in England the language might afford scope for the above interpretation based on the argument *ab inconvenienti.* But if the language is so worded as to vest *eo instanti* the acquisition was made, it would not be possible to apply this argument. And the effect of the language may well be to exclude the theory of intervention. This is clear from the following observations of Tindal C. J., in *Herbert* v. *Sayer*[1], at p. 1518:

> "The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt".

Let us now turn to the consideration of the language of Ss. 44 and 54 of the English Bankruptcy Act of 1883. What S. 54 says is:

> "Immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee".

The property of the bankrupt is defined in S. 44 (1) as including subsequently-acquired property. As Fry, L.J., pointed out in *Cohen* v. *Mitchell*[2], there is no difficulty in the property existing on the date of the bankruptcy being divested out of the bankrupt and vesting in the trustee immediately on a debtor being adjudged insolvent because it follows from the plain language of the section; but immediately on the debtor being adjudged insolvent the future property cannot vest because the property has to be got or acquired and the word "immediately" has *prima facie* reference to the moment of adjudication. S. 54 (2) only provides that as and when the trustee is appointed (vide S. 21 of the same Act) the property will pass from the Receiver to the trustee. Thus it was possible to give effect to the argument based on inconvenience and hardship. But the language of S. 28 (4) is explicit and unambiguous and to use the expression of Tindal, C. J., in *Herbert* v. *Sayer*[1], transfers immediately the property from the insolvent to the Official Receiver.

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1. (1844) 5 Q.B. 965: 114 E.R. 1512.
2. (1890) 25 Q.B. 262.

Satya-narayana-murthi v. Pappayya.

Though the rule as laid down in *Herbert* v. *Sayer*[1] and *Cohen* v. *Mitchell*[2] was wide enough to cover realty and personalty and the reason of the rule might well apply to both, when the question arose as to subsequently-acquired realty, Chitty, J., declined to apply it—In re *New Land Development Association and Gray*[3],—and the decision of Chitty, J., was followed in later cases until Parliament intervened and enacted S. 47 of the Bankruptcy Act of 1914. Thus the English law up to 1914 was that in the case of realty the moment it was acquired it vested in the trustee, whereas in the case of personalty it did not vest in him until he intervened. The reason assigned by Lindley, L.J., in the course of the argument for this distinction was "the real estate passes by conveyance and not by delivery." Even if this is the basis of the rule, the decree in the present case requires a conveyance and the decree cannot therefore vest in the insolvent.

There is no distinction between realty and personalty in Indian law; either the principle of simultaneous vesting or that of vesting being deferred until intervention must apply to both.

We shall now briefly examine the insolvency law in India and see if the Legislature intended to incorporate the English rule and if so, how far it has succeeded in doing so. Up to 1909 in Presidency Towns and Rangoon the law as to insolvency was governed by 11 and 12 Vict., Ch. XXI and so far as the Provincial Insolvency Act is concerned, up to 1907 the law was regulated by the provisions contained in the various Civil Procedure Codes enacted from time to time and they were very limited in scope. The provision relating to the vesting of property in 11 and 12 Vict. was section 7 and the portion of the said section relevant for discussion ran thus:

"All future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects . . . . which may revert, be devised or bequeathed or come to him . . . . do vest in the Official Assignee for the time being of the said Court".

Their Lordships of the Privy Council placed the following interpretation in *Moses Kerakoose* v. *Benjamin Brooks*[4]:

"Under the statute, 11 and 12 Vict. c. 21, the Assignee has a right to the subsequently-acquired property of an insolvent, unless the insolvent has obtained a certificate and discharge; but the Assignee's right to the subse-

1. (1844) 5 Q.B. 965: 114 E.R. 1512.
2. (1890) 25 Q.B. 262.
3. (1892) 2 Ch.138.
4. (1860) 8 M.I.A. 339 at pages 355 and 356.

Satya-narayana-murthi *v.* Pappayya.

quently-acquired property is subject to two qualifications. In the first place, if the insolvent has acquired property subject to liens and obligations then any property taken by the Assignee under the state of things is taken subject to those charges and equities which effect the property in the hands of the insolvent. The second qualification is this, that if the insolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the Assignee under the first insolvency".

It will thus be seen that the interpretation placed by their Lordships would apply both to real and personal property and the property would vest in the Assignee as and when acquired subject to the two qualifications mentioned by their Lordships. So far as the first qualification is concerned, it is clear that the acquisition when made must be subject to the lien or charge. In regard to the second qualification the doctrine of acquiescence or estoppel on the part of the Official Assignee would apply and no question of intervention was suggested by their Lordships of the Privy Council in regard to the vesting. In *Rowlandson* v. *Champion*[1], a question arose whether the mortgage of a subsequently-acquired property was valid as against the Official Assignee. Collins, C. J., held it was valid applying the case of *Cohen* v. *Mitchell*[2], in construing section 7 of the said Act. But on appeal, Best, J., took the view that in order to be binding on the Official Assignee the charge on the after-acquired property must come within the scope of one or the other of two qualifications stated in *Moses Kerakoose* v. *Benjamin Brooks*[3], and *Cohen* v. *Mitchell*[2], was merely an authority for the proposition:

"That when an insolvent is allowed to carry on trade or other business, the Official Assignees' assent thereto (required under the second of the two qualifications mentioned in *Moses Kerakoose* v. *Benjamin Brooks*[3]), will be presumed up to such time as he may intervene".

Muttuswami Aiyar, J., was of the view that the language of S. 7 threw no light on the point beyond the fact that the word 'vest' was used with reference to both kinds of property, that he saw no substantial difference on the point between the Indian Insolvency Act and the English Bankruptcy Act, that the English cases dealt with the question as one of reasonable construction and that the whole of the reasoning was applicable

1. (1893) I.L.R. 17 Mad. 21.
2. (1890) 25 Q.B. 262.
3. (1860) 8 M.I.A. 339 at pages 355 and 356.

Satya-narayana-murthi *v.* Pappayya.

under the Indian Insolvency Act and that as the rule in *Cohen* v. *Mitchell*[1], was qualified with reference to real property by the decision in In re *New Land Development Association and Gray*[2], following the later decision he would hold the mortgage to be invalid. In *Sriramulu Naidu* v. *Andalammal*[3], White, C.J., and Subramania Aiyar, J., took a view different from both Best, J., and Muttuswami Aiyar, J. They held that the rule in *Cohen* v. *Mitchell*[1], would apply to both moveable and immoveable property and that, as in the case they were dealing with, the Official Assignee had not intervened, the plaintiff, an undischarged insolvent was held entitled to maintain the suit for partition and recovery of his share of the property which had dovolved on him by inheritance subsequent to the date of adjudication.

It was in this state of the law the Presidency Towns Insolvency Act was passed in 1909. It was based on the Bankruptcy Acts of 1883 and 1890. Its provisions Ss. 17 and 52 which relate to vesting are almost identical in language with Ss. 44 and 54 of the Bankrutpcy Act of 1883. The question therefore would be whether in interpreting the said provisions of the Presidency Towns Insolvency Act the view in *Sriramulu Naidu* v. *Andalammal*[3], or the view of Best, J., or Muttuswami Aiyar, J., in *Rowlandson* v. *Champion*[4], is to be followed.

So far as the Provincial Insolvency Act is concerned, the only provision as to vesting before 1907 was contained in S. 354 of the Civil Procedure Code, 1882, namely:

"Every order under S. 351 . . . . shall operate and vest in the receiver all the insolvent's property".

In 1907, *i.e.*, two years earlier than the passing of the Presidency Towns Insolvency Act, Act III of 1907 was passed for placing the law of insolvency in the moffussil on a satisfactory basis. In regard to the provisions as to vesting instead of adopting the language of Ss. 44 and 54 of the English Bankruptcy Act, 1883, as was done in the case of the Presidency Towns Insolvency Act, S. 16 was enacted which contains a specific provision by way of Cl. 4 separately as to vesting of subsequently-acquired property thus leaving no scope for any other construction than what the language according to its

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1. (1890) 25 Q.B. 262.
2. (1892) 2 Ch. 138.
3. (1906) 17 M.L.J. 14: I.L.R. 30 Mad. 145.
4. (1893) I.L.R. 17 Mad. 21.

Satya-narayana-murthi *v.* Pappayya.

plain meaning would warrant and which construction was placed by the Privy Council in *Kalachand Banerjee* v. *Jagannath Marwari*[1]. Why this distinction was made between the two Acts it is not possible to understand. Certain provisions of this Act were amended in 1914 (Amending Act X of 1914) the year in which the English Bankruptcy Act of 1914 was passed enacting S. 47 of the Act adopting the principle of *Cohen* v. *Mitchell*[2], both in regard to realty and personalty and yet no provision corresponding to S. 47 was enacted nor even in 1920 when Act V of 1920 was passed. It is not for the Court to divine the reason why the Legislature did not think it fit to do so. The Court is only bound to consider the enactment as it stands uninfluenced by any consideration of what the English law is. It was contended before us that as the provisions of the Presidency Towns Insolvency Act are being construed in the light of the English decisions the Legislature could not have meant to enact a different law for the moffussil and a different construction would lead to hardship and inconvenience. As we have pointed out what the rule of English law to be applied to those sections is itself a matter of doubt. The argument *ab inconvenienti* which found favour in English Courts is of no use when the language of a statute is plain. As stated in Craies' Statute Law at page 87:

"The argument *ab inconvenienti* is only admissible in construction where the meaning of the statute is obscure. Where the language is explicit, its consequences are for Parliament, and not for the Courts, to consider. In such a case the suffering citizen must appeal for relief to the lawgiver, and not to the lawyer".

In *Abdul Kadir* v. *Somasundaram Chettiar*[3], the learned Judges followed *Sriramulu Naidu* v. *Andalammal*[4], a decision based on 11 and 12 Victoria remarking that they saw no reason why they should not follow the principle laid down in that case and that no authority had been cited to show to the contrary. We have already pointed out the difference of view in regard to the interpretation of S. 7 of that Act. *Jagadish Narain Singh* v. *Mst. Ramsakal Kuer*[5], does not carry the matter any

1. (1927) 52 M.L.J. 734: L.R. 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.).
2. (1890) 25 Q.B. 262.
3. (1922) 43 M.L.J. 467: I.L.R. 45 Mad. 827.
4. (1906) 17 M.L.J. 14: I.L.R. 30 Mad. 145.
5. (1928) I.L.R. 8 Pat. 478.

Satya-narayana-murthi v. Pappayya.

further. Both these decisions were before the Privy Council decision in *Kalachand Banerjee* v. *Jagannath Marwari*[1]. With due respect the interpretation placed by the learned Judges in the said decisions can no longer be tenable in view of the clear pronouncement of their Lordships of the Privy Council which we feel bound to follow. The learned Judges in the Full Bench decision in *Sobhanadri* v. *Nagayya*[2], thought it unnecessary to go into this question and left it open as in that case the Official Assignee intervened and the property vested in him and not in the bankrupt.

We have therefore come to the conclusion that the decree for costs vested in the Official Receiver the moment it was passed and that he was the only person entitled to transfer it and the transfer in question is therefore invalid. In the result the appeal fails and is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Insolvency Jurisdiction.]

PRESENT:—MR. JUSTICE KRISHNASWAMY AIYANGAR.

P. D. Curtis, an insolvent .. *Applicant** (*Petitioner*).

Curtis, *In re.*

Presidency Towns Insolvency Act (III of 1909), S. 60—Allocation order —Payment for 34 months—Application for revocation—Civil Procedure Code, S. 60—Applicability of.

When a Court passes an order under S. 60 of the Presidency Towns Insolvency Act, directing an insolvent to pay an allocation, it neither in fact nor in form directs the attachment of the property of the insolvent and hence S. 60 of the Code of Civil Procedure cannot be invoked for the purpose of enabling the insolvent to get rid of the liability placed upon him by the order under S. 60 of the Presidency Towns Insolvency Act.

S. J. S. Fernandes for Applicant.

Official Assignee (*V. Thyagarajan*) in person.

The Court delivered the following

JUDGMENT:—This is an application taken out by the insolvent for an order for the following reliefs:

(*i*) for an order to revoke the order attaching the insolvent's salary,

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1. (1927) 52 M.L.J. 734: 54 I.A. 190: I.L.R. 54 Cal. 595 (P.C.).
2. (1938) 1 M.L.J. 413: I.L.R. (1938) Mad. 578 (F.B.).

* Appln. No. 202 of 1941 in I. P. No. 159 of 1938. 4th August, 1941.

Curtis, *In re.*

(*ii*) for the refund of the amounts of allocation recovered beyond a total period of two years, and

(*iii*) for the suspension of the allocation ordered for a month pending disposal of the present application.

The Insolvent in this case was by an order made by this Court in July, 1938 directed to pay an allocation of Rs. 25 which was subsequently increased by an order dated 9th April, 1940 to Rs. 125. On 22nd October, 1940 the allocation was reduced to Rs. 100. These orders were duly communicated to the insolvent who has in all paid allocation for 34 months. The insolvent now applies for a revocation of the allocation order not by virtue of any provision contained in the Presidency Towns Insolvency Act, but under the provisions of S. 60, Civil Procedure Code relating to attachments. The applicant's learned counsel relies on S. 60 (1) (*i*) which fixes the limit for the portion of the salary of a public officer or a servant of a railway company or local authority, liable to be attached. There is a proviso to this clause which says that:

"Where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree".

It is on this clause that the applicant relies in support of his contention. It is not however suggested that S. 60, Civil Procedure Code applies in terms to the present case. But it is argued that S. 60, Civil Procedure Code and S. 60 of the Presidency Towns Insolvency Act must be read together; even doing so, I do not see how it helps. For S. 60 of the Presidency Towns Insolvency Act is not at all concerned with attachments. Sub-S. (2) under which the orders against the insolvent were made is concerned with the jurisdiction of the Court to make an order for the appropriation of an insolvent's salary and income to the extent to which it is liable to attachment in execution of a decree or of any portion thereof. When a Court makes an order under S. 60, it does neither in fact nor in form direct the attachment of the property of the insolvent; and I am unable to see how S. 60, Civil Procedure Code can be invoked for the purpose of enabling the applicant to get rid of a liability placed upon him by an order under S. 60 of the Presidency Towns Insolvency Act. There is no justification for either prayer No. 1 or

prayer No. 2. Nor can I see any merit in prayer No. 3. The insolvent has had all his salary except the portion appropriated. I am not therefore satisfied that there should be any suspension of the order of allocation. The application is dismissed. Curtis, *In re.*

Leave refused.

K.C. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Insolvency Jurisdiction.]

PRESENT:—MR. JUSTICE KRISHNASWAMY AIYANGAR.

T. N. Panchapakesa Aiyar, an insolvent, *In re.*

Panchapakesa Aiyar, *In re.*

Presidency Towns Insolvency Act (III of 1909), S. 31—One of the creditors prevented by fraud from having her share of the dividends—Distribution not proper—Remedy of payment by the other creditors towards making the amount to the unpaid creditor good.

Where one of the creditors of an insolvent was prevented from receiving her share of the dividend owing to a fraud practised upon the Court by the insolvent,

Held, that the payment to the other creditors in the circumstances could not be held to be duly made within the meaning of that expression in S. 31 of the Presidency Towns Insolvency Act, and that the creditors who had received dividends from the Official Assignee should pay back into his hands such amounts as were necessary to make up the proper dividend payable on the amount of the admitted claim to the creditor who had been wrongly denied participation.

S. Venkatarama Aiyar, V. Srinivasan and *S. Amudachari* for Creditors.

The Official Assignee (V. Thyagarajan) in person.

The Court delivered the following

JUDGMENT.—Prayer (*c*) is the only outstanding matter to be dealt with. The applicant who has been found to be a creditor was denied participation in the dividend by reason of a fraud practised upon the Court by the insolvent. It was represented that the applicant had agreed to have her rights postponed to those of the other creditors and that she was a major at the time. It is clear that she was not a major at the time and there is reason to think that the learned advocate who purported to act for her proceeded upon a mistake of fact in making such a representation to the Court. In these circumstances I hold that the payment of dividends to the other creditors cannot be held to have been duly made within the

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* Appln. No. 122 of 1940.
I. P. No. 123 of 1932. 21st July, 1941.

Panchapakesa Aiyar, *In re.*

meaning of the expression in S. 31 of the Presidency Towns Insolvency Act. The creditors who received dividends from the Official Assignee shall pay back into his hands such amount each as is necessary to make up the proper dividend payable to the applicant on the amount of her admitted claim. The creditors in the list herewith appended will pay to the Official Assignee the several sums set out against their names respectively making a total of Rs. 932-1-9 which I understand will be sufficient to pay Rs. 0-4-3 in the rupee to all the creditors including the applicant.

K.C. *Ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Dosapati Ramayya ... *Petitioner* (Defendant)*

v.

Pattam Anjayya ... *Respondent (Plaintiff).*

Ramayya *v.* Anjayya.

Limitation Act (IX of 1908), Ss. 19 and 20—Open payment endorsed on promissory note insufficient as 'payment of interest as such' under S. 20—Sufficiency as acknowledgment under S. 19 of the subsistence of the debt.

When towards a bond under which a considerable sum is due the debtor makes a payment which is clearly less than the balance due, accompanying that payment with an endorsement to the effect that it is "towards the debt in the bond" or "towards the note", it is legitimate to read the words of that endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed though such payment cannot avail the creditor under S. 20 of the Limitation Act as a payment towards interest as such or towards principal saving limitation.

Case-law reviewed.

Scope of *Rama Shah* v. *Lal Chand*, (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. (1940) Lah. 470 (P.C.), explained.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Repalle in S. C. S. No. 340 of 1939.

S. Sitaraman and *V. Rangachari* for Petitioner.

M. S. Ramachandra Rao and *Y. G. Krishnamurthy* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This civil revision petition* is preferred by the defendant against a decree in a small cause suit based

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* C. R. P. No. 146 of 1941. 30th September, 1941.

Ramayya
v.
Anjayya
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Wadsworth, J.

on a promissory note. Two questions were raised in revision, one relating to the scaling down of the decree under Madras Act IV of 1938 and the other relating to limitation. On the first point, it seems to us clear that the two earlier payments amounting to Rs. 125 must be treated as unappropriated payments available in reduction of principal as on 1st October, 1937, so that the decree should have been one for Rs. 75 with interest at 6¼ per cent. from 1st October, 1937, credit being given as on 15th September, 1938, to the payment of Rs. 2.

Turning to the more difficult question relating to limitation, it is common ground that the suit filed on 11th November, 1939, would have been barred by limitation unless limitation was saved by the endorsement of Rs. 2 on 15th September, 1938. The promissory note was for a sum of Rs. 271-8-6 and the previously endorsed payments were for an amount of Rs. 125. Quite clearly therefore at the time when this payment of Rs. 2 was made a very considerable balance was due on the note. It is argued that the decision of the Privy Council in the case of *Rama Shah* v. *Lal Chand*[1], governs the present case. The endorsement was in the following words:

"Paid on 15th September, 1938, towards this promissory note Rs. 2."

The original Telugu word translated as 'towards' is 'kintha' which literally means 'under'. Now, the Privy Council decided in the case just referred to that where a debtor pays a sum as a part payment of an interest bearing debt, without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under S. 20 of the Limitation Act, it is incumbent upon the creditor to appropriate the sum paid towards the principal before the expiration of the prescribed period of limitation. This decision is clearly authority for the view that an unappropriated payment, such as the payment of Rs. 2 in the present case, cannot avail the creditor under S. 20 of the Limitation Act as a payment towards interest as such or towards principal saving limitation and all previous decisions which took a contrary view must be deemed to have been overruled.

It is, however, contended for the respondent that though this endorsement may not save limitation under S. 20, it can be deemed to be a sufficient acknowledgment of the debt so as to

1. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. (1940) Lah. 470 (P.C.).

Ramayya *v.* Anjayya. — Wadsworth, J.

save limitation under S. 19. Their Lordships of the Privy Council in the case just quoted, though they referred to S. 19 in order to discuss its relation to S. 20, were not dealing with a case in which there was any pleading that the writing would be a sufficient acknowledgment under S. 19, even though the payment was not a payment falling under S. 20, and their Lordships do not consider whether such an alternative plea would have been open to the creditor in the case before them, had it been taken. We are therefore of opinion that the decision in *Rama Shah* v. *Lal Chand*[1], is authority neither for nor against the view that when there is a part payment endorsed in such terms as to make it ineffective for the purpose of S. 20 of the Limitation Act, it may by implication amount to such an acknowledgment as would save limitation under S. 19.

Now, there is a clear line of authority of this High Court for the view that when, as in the present case, there is a bond under which it can be seen by the words and the tenor of the document and the endorsements of payment that a considerable sum is due and when the debtor makes towards that bond a payment which is clearly less than the balance due, accompanying that payment with an endorsement to the effect that it is towards the debt in the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed. No doubt, a contrary view was taken in the very early case of *Lutchumanan Chetty* v. *Mutta Iburaki Marakkayer*[2]. That decision was followed by the first Court in a case which came on appeal before a Bench, vide *Jaganadha Sahu* v. *Rama Sahu*[3]. The learned Judges, who had to deal with a simple endorsement that a certain sum was paid in respect of the promissory note, held, following the decision at page 78 of the same volume *Visvanatha Santhasingaro* v. *Ramachandra Mardraja Deo*[4], that the endorsement signed by the promisor contained a sufficient acknowledgment of liability under the promissory note. This decision was followed by a single Judge in *Ramakrishna Chetty* v. *Venkatasubbiah Chetty*[5],

1. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. (1940) Lah. 470 (P.C.).
2. (1869) 5 M.H.C.R. 90.
3. (1914) 17 M.L.T. 80.
4. (1914) 17 M.L.T. 78.
5. (1914) 17 M.L.T. 139.

Ramayya v. Anjayya.

Wadsworth, J.

and it has been followed more recently in *Venkatakrishniah* v. *Subbarayudu*[1]. It is true that in the last case there was an additional circumstance that the debtor endorsed two successive payments on the same day, the first of which must necessarily have been made with a knowledge that a balance was due, but the learned Judges expressly approved the earlier decisions and purported to follow the same principle. The decision in *Venkatakrishniah* v. *Subbarayudu*[1], has also been followed in Bombay in *Tayarali* v. *Garabad Sadu*[2]. Against this line of authority, the only Madras decision to the contrary quoted before us, besides the early case of *Lutchumanan Chetty* v. *Mutta Iburaki Marakkayer*[3], already referred to, is a very brief judgment in *Lakshminarasimham* v. *Bharata Mahanty*[4], which does not set forth the precise nature of the endorsement and does not contain any detailed discussion of the question.

No doubt where the matter is *res integra*, it might be contended that the endorsement of payment towards the promissory note on which according to the tenor of the document much more than the amount paid was outstanding at the time of payment would not necessarily imply an acknowledgment that the debt continued to subsist after the payment. It might be argued that the payment was made without a calculation of the balance due or it might be argued that the document might have been otherwise discharged by unendorsed payments. But it does not seem to us, in view of the authorities just cited, that these general arguments are now open to us. We are bound by the previous decisions and we must hold that the suit in the present case was not barred by limitation having regard to the endorsement of 15th September, 1938, which was expressly pleaded in the plaint as an acknowledgment saving limitation.

The result, therefore, is that the civil revision petition is allowed to the extent that the decree will be modified as already indicated. The petitioner is entitled to half his costs in revision.

K.S. *Petition allowed in part.*

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1. (1916) I.L.R. 40 Mad. 698.
2. A.I.R. 1939 Bom. 252.
3. (1869) 5 M.H.C.R. 90.
4. (1910) 9 M.L.T. 216.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

D. K. Reddy ... *Petitioner*—(Accused)*.

D.K. Reddy, *In re.*

Criminal Procedure Code (V of 1898), S. 407 (2) and S. 486 (2)—Appeal under S. 486 (1) against sentence under S. 480—District Magistrate if can direct the appeal to be heard by Subordinate Magistrate.

An appeal lies against a sentence imposed under S. 480 of the Criminal Procedure Code only under S. 486 (1) and not under S. 407. Where an appeal has thus been filed to the District Magistrate the appeal cannot as in the case of appeals under S. 407(1)be directed to be heard by any Magistrate of the first class subordinate to him. S. 407 (2) could not be applied to an appeal under S. 486 (1).

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Bellary dated 7th May, 1941, and passed in C. A. No. 16 of 1941 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Rayadrug in M.C. No. 1 of 1941.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Accused.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was alleged to have committed contempt of Court; and the Sub-Magistrate who was presiding over that Court took summary action under S. 480 of the Criminal Procedure Code and sentenced the petitioner to a fine of Rs.15. He preferred an appeal under S. 486 of the Criminal Procedure Code. In the first instance, he preferred it to the Sub-Divisional Magistrate. On an objection taken by the Prosecuting Sub-Inspector, the Sub-Divisional Magistrate held that he had no jurisdiction to hear the appeal. The petitioner then approached the District Magistrate, who held that the Sub-Divisional Magistrate had power. When the matter came back to the Sub-Divisional Magistrate, the Prosecuting Sub-Inspector again raised the objection, but the Sub-Divisional Magistrate felt that his hands had been tied by the District Magistrate and so overruled the objection. The Prosecuting Sub-Inspector then went again to the District Magistrate, who passed an order which is not on the record, but which presuma-

*(Crl. R. C. No. 741 of 1941).
(Crl. R. P. No. 696 of 1941.) 15th October, 1941.

D.K. Reddy, *In re.*

bly was to the effect that the Sub-Divisional Magistrate had power to hear the appeal. The short point that arises here is whether the Sub-Divisional Magistrate had jurisdiction or no.

An appeal lies against a sentence imposed under S. 480 only under S. 486 (1); for S. 407, which is the general section granting a right of appeal from Second Class Magistrates, applies only to persons convicted on *a trial* held by a Magistrate. As the petitioner was not convicted on a trial, he would have had no right of appeal at all were it not for S. 486 (1). The appeal against the sentence under S. 480 lies—in the words of S. 486 (1)—"to the Court to which decrees or orders made in such Court are ordinarily appealable." S. 407 (1) makes an appeal ordinarily lie to the District Magistrate; for he has to hear all appeals from Second or Third Class Magistrates if they are not transferred under S. 407 (2)—vide *Eroma Variar* v. *Emperor*[1], which was followed by Jackson, J., in *Sivaswami Palankondan* v. *Perumal Palaiyondan*[2].

The remaining question that has to be considered is whether the District Magistrate has a right to direct such an appeal to be heard by any Magistrate of the first class subordinate to him. It is argued by the learned Public Prosecutor that S. 486 (2) gives such a power; for that sub-section says:

> "The provisions of Chap. XXXI shall, so far as they are applicable, apply to appeals under this section . . . . . "

Most of the provisions of Chap. XXXI could properly be applied to appeals under S. 486; but this particular sub-S. (2) of S. 407 says that

> "The District Magistrate may direct that any appeal *under this section* . . . . . shall be heard by any Magistrate of the first class subordinate to him . . . . . "

so that the District Magistrate has power to direct the transfer from his file to that of the First Class Magistrate only appeals under S. 407 (1) *i.e.*, appeals from convictions on a trial. That sub-section could not therefore be properly applied to an appeal under S. 486 (1).

The Sub-Divisional Magistrate having acted without jurisdiction, this petition is allowed and the District Magistrate ordered to take the appeal on his file and to dispose of it according to law.

K.S. —— *Petition allowed.*

1. (1903) I.L.R. 26 Mad. 656 (F.B.). 2. 1931 M.W.N. (Crl.) 1194.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

T. V. Venkatarama Chetti ... *Petitioner* (Accused).*

Venkatarama Chetti, *In re.*

Criminal Procedure Code (V of 1898), Ss. 344 and 526 (8)—Appellant seeking Court's permission for moving High Court for transfer—Court's duty in the circumstances—Payment of day costs to prosecution not a proper order.

Where a party to a criminal proceeding is desirous of moving the High Court for transfer, all that he has to do is to intimate to the Court his intention to move the High Court for transfer. The Court's duty is to fix a day within which the applicant will have to move the High Court and also the security which the applicant will have to furnish. On the compliance of the applicant the Court has simply to grant an adjournment; but in doing so the adjournment is not granted under S. 344, Criminal Procedure Code, but under S. 526 (8) which leaves the Court no option. Therefore if the Court orders payment of costs of the day to the prosecution it is wrong and will have to be set aside.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898 praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Kollegal dated 17th February, 1941 and made in C.C. No. 1 of 1941.

S. Rajaraman and *K. K. Gangadhara Aiyar* for Accused.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner was desirous of moving this Court to transfer a case from the file of the Sub-Divisional Magistrate of Kollegal; and in compliance with the provisions of S. 526 (8) of the Criminal Procedure Code, he intimated the fact to the Court. The Sub-Divisional Magistrate thereupon passed an order under S. 526 (8) adjourning the case to the 3rd March, 1941, requiring the accused to execute a bond for Rs. 200, and fixing the 3rd of March, 1941, as the date within which the High Court should be moved for transfer. He further directed that the petitioner should pay Rs. 39-8-0 as the costs of the day to the prosecution; because the petitioner had from time to time procured unnecessary adjournments and had delayed the application for transfer. The question that arises for consideration in this petition is whether the Magistrate was competent to pass an order directing the petitioner to pay the costs of the day to the prosecution.

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* Cr. R. C. No. 685 of 1941
(Cr. R. P. No. 643 of 1941).

23rd October, 1941.

Venkatarama Chetti, *In re.*

Under S. 344 of the Criminal Procedure Code, the Court has power to grant an adjournment at the request of a party upon such terms as it thinks fit and "such terms" would, of course, include payment of costs to the other side. Where however a party to a proceeding is desirous of moving the High Court for transfer, it is not necessary for him to ask for an adjournment. All he has to do is to intimate to the Court that he intends moving the High Court for a transfer. The Court then has to fix a day within which the applicant has to move the High Court and the security which the applicant has to furnish. If he executes the bond, then the Court is bound to grant an adjournment. In doing so, he does not grant an adjournment under S. 344, which permits the imposing of terms, but under S. 526 (8), which leaves no option to the Court to adjourn when once it has been intimated to the Court that the applicant intends to move the High Court for a transfer. The Sub-Divisional Magistrate had therefore no power to order the petitioner to pay the costs of the day to the prosecution. That being so, the order passed by the Sub-Divisional Magistrate on 17th February, 1941, has to be set aside. The money paid by the petitioner will be refunded to him.

K.C. —— *Order set aside.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Velagala Sriramareddi. *v.* Karri Sriramareddi.

Velagala Sriramareddi and others ... *Petitioners* (Appellants —Respondents)*

v.

Karri Sriramareddi, being minor by certificated guardian, Mr. G. Bhima Rao. *Respondent (1st Respondent—Appellant).*

Madras Agriculturists' Relief Act (IV of 1938)—Scaling down debt which is the subject-matter of appeal—Application for, to be filed before judgment—Proper procedure for enquiry into application.

Where a debt is the subject-matter of an appeal, if an application for scaling it down is not made in the appellate Court before the judgment is delivered, the decree must be drawn up in accordance with the terms of the

* C. M. Ps. Nos. 4772, 4773, 4774 and 4775 of 1941. 16th September, 1941.

F.B.

Velagala Sriramareddi. *v.* Karri Sriramareddi.

judgment and no Subordinate Court has power to pass an order which will affect the decree. Where however, an application is made before the judgment is delivered, the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. *Somasundaram Chettiar* v. *Karuppan Chettiar*, (1940) 51 L.W. 606 not approved.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the scaling down under the provisions of Madras Act IV of 1938 of the debt under the decree which would be passed in accordance with the judgment of the High Court in A. S. Nos. 349 and 297 of 1938, preferred against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 61 of 1936 etc.

V. Govindarajachari and *P. Satyanarayana Raju* for Petitioners.

V. Viyyanna for Respondent.

These petitions coming on for hearing on 8th September, 1941 the Court (*Burn and King, JJ.*,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

After hearing arguments on these miscellaneous petitions we have found it necessary to refer to a Full Bench the question whether the case of *Somasundaram Chettiar* v. *Karuppan Chettiar*[1], has been correctly decided.

There is no doubt about the facts. The plaintiff (a minor in O. S. No. 61 of 1936 on the file of the Subordinate Judge of Ellore) sued to recover money due on a mortgage. The learned Subordinate Judge gave him a decree for part of the amount claimed. In A. S. No. 297 of 1938 the plaintiff appealed from this decree in so far as it disallowed part of his claim. In A. S. No. 349 of 1938 defendants 1 to 12 in the suit, who are members of the family of defendants 1 to 4, (the mortgagors), appealed against the decree claiming that the suit should have been entirely dismissed. On the 21st August, 1941 we allowed A. S. No. 297 with costs and dismissed A. S. No. 349 with costs. C. M. P. No. 4772 is an application by the appellants in A. S. No. 349 of 1938 in which they pray that this Court

"may be pleased to give appropriate directions for scaling down of the debt under the decree which would now be passed in accordance with the

1. (1940) 51 L.W. 606.

F.B.

Velagala Srirama-reddi *v.* Karri Sri-ramareddi.

judgment of this Hon'ble Court in the above appeal and A. S. No. 297 of 1938, under the provisions of the Madras Act IV of 1938 and pass such other order or orders as this Hon'ble Court may deem fit in the circumstances of the case".

C. M. P. No. 4773 is a similar application by the same parties, the first twelve respondents in A. S. No. 297. C. M. Ps. Nos. 4774 and 4775 are applications to stay the drafting of the decrees in A. S. Nos. 349 and 297 of 1938 pending disposal of the other two applications for scaling down the decree debt.

It may be noted, though it is not important for the purpose of these applications, that on the 19th August, 1941 the same parties (appellants in A. S. No. 349) filed an application to scale down the decree in O. S. No. 61 of 1936 on the file of the Sub-Court, Ellore, under the provisions of Ss. 8 and 19 of Madras Act IV of 1938. This petition we dismissed on the 21st August, 1941 the day on which we pronounced judgment in the appeals, on the ground that this Court has no jurisdiction to scale down the Sub-Court's decree.

When these applications came on for hearing on the 29th August, learned counsel for the petitioners contended that they are agriculturists entitled to the benefits of Madras Act IV of 1938 and that the decree to be passed by the High Court has to be scaled down in accordance with the provisions of Ss. 7 and 8 of that Act. Learned counsel for the respondent (minor plaintiff) contended that these applications filed after the judgment had been pronounced, and after the passing of Act IV of 1938, are not maintainable since S. 19 of Madras Act IV of 1938 applies only to decrees passed before the commencement of the Act. The respondent also did not admit that the applicants are agriculturists entitled to the benefits of Act IV of 1938. The objections of the respondent appeared to us to have considerable weight and we put to Mr. Govindarajachari on behalf of the applicants another point, namely, that the decrees to be issued in the appeals must follow the judgments. Mr. Govindarajachari then quoted to us the case of *Somasundaram Chettiar* v. *Karuppan Chettiar*[1]. So far as the facts appear from the report that case was in essence similar to this. The only difference is that in that case the plaintiff's suit was dismissed by the trial Court, and consequently there was no decree of any kind against the defendants. The plaintiff's appeal was allowed and then for the first time a decree had to be passed against the defendants. At that point, (apparently after the judgment in the appeal had been pronounced) an application was made on behalf of the 4th respondent under Ss. 7 and 8 of the

1. (1940) 51 L.W. 606.

F.B.

Velagala Sriramareddi. *v.* Karri Sriramareddi.

Madras Agriculturists' Relief Act to scale down the debt. The learned Judges held that the application was one which ought to be admitted and which must be enquired into. The order which they made was as follows:

> "In accordance with the usual practice, the application will be remitted to the Court below for disposal according to law after due enquiry, and the decree in the appeal will be subject to the final order thereon".

This decision was based upon the consideration of the fact that it was only after the judgment was pronounced in the appeal that any necessity could arise for making an application to scale down the debt. The learned Judges said it was not reasonable to expect a party to put in an application which might never be necessary and it could not, they thought, be said that the omission to make an application before the judgment was pronounced debarred the petitioner from making the application as early as possible after the judgment was pronounced, and before the decree was actually drawn up. They thought that it would be going against the spirit of the Act to dismiss applications for relief which the Legislature meant to give to debtors on such a purely technical ground as the fact that there was no particular provision made in the Act for making applications for scaling down under Ss. 7 and 8 of the Act.

It does not appear from the judgment that the learned Judges considered the provisions of S. 33 and O. 20, Civil Procedure Code. S. 33 says:

> "The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow".

O. 20, r. 6 provides that the decree shall agree with the judgment. R. 7 of O. 20 provides that the decree shall bear date the day on which the judgment was pronounced and r. 3 of O. 20 provides that the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review. These rules of O. 20 do not apply to this High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, but they do apply to this High Court in the exercise of its appellate jurisdiction. With all respect to the learned Judges who decided the case of *Somasundaram Chettiar v. Karuppan Chettiar*[1], it appears to us that in view of these provisions of the Code of Civil Procedure it is not permissible, after the High Court has pronounced judgment, to refer to a subordinate Court for disposal an application for the scaling down of the debt which is the subject of the High Court's judgment. It has

1. (1940) 51 L.W. 606.

F.B.

Velagala Srirama-reddi v. Karri Sri-ramareddi.

never been suggested that the rules of O. 20 which we have quoted are other than mandatory. We can see no escape from the conclusion that once the judgment of the High Court has been pronounced, the decree must be in accordance with the judgment, and if the judgment declares that a certain amount is due from the judgment-debtors, no Subordinate Court can be allowed to hold an enquiry and to say as a result of that enquiry that something less than the amount found due by the High Court in its judgment, shall be embodied in the decree as the amount due from the defendants. It is also, we think, with respect, contrary to all principle to allow that the decree of this Court shall be modified in accordance with the decision of a subordinate Court.

It is of course clear that the only decrees which can be scaled down under the provisions of Madras Act IV of 1938 are decrees passed prior to the commencement of the Act (vide S. 19). It has been expressly stated also in the decision in *Kotayya* v. *Venkata Punnayya*[1]. In that judgment it has been pointed out that any one who wishes to claim the benefits of Madras Act IV of 1938 in a suit which is pending, must put forth his claims before the decision is pronounced, and the learned Judges have expressed the view (with which we respectfully associate ourselves) that 'having regard to the ex-propriatory nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation beyond what its terms expressly warrant'. The plea on behalf of the applicants, is that while the decree of the lower Court was in force (that being a decree for a sum much less than was claimed by the plaintiff) they had no necessity to apply for the scaling down of the debt. That may very well be true, but it cannot affect r. 3 of O. 20 which says that the only way to get a judgment modified is by an application for review.

Our attention has been drawn to the decision in *Perianna Goundan* v. *Sellappa Goundan*[2]. The principal question there decided was that it was not the intention of the Legislature to limit the relief under Madras Act IV of 1938 to cases where a person was personally liable, and that a purchaser of the equity of redemption, if he himself was an agriculturist, could claim the benefits of the Act. It is not however clear from the report whether any question was reserved in the judgment with regard to the liability of the judgment-debtors, and the report does show that the terms of the decree to be finally passed were settled by the learned Judges of this Court, and were not left to the determination of a Subordinate Court. That case therefore gives no support to the

1. (1940) 2 M.L.J. 202. 2. I.L.R. (1939) Mad. 218.

F.B.

Velagala Srirama-reddi v. Karri Sri-ramareddi.

'practice' which is said to exist of sending down such applications as this to Subordinate Courts for disposal and of modifying this Court's decrees in accordance with the findings of such Subordinate Courts. Such a practice appears to us, with all respect, to be contrary to all principle and, if it exists, we are of opinion that it should be stopped. We may also refer to the case of *Kannabhiran Pillai* v. *Govindaswami Pillai*[1], where Wadsworth, J., held that an application made to a lower Court to scale down the appellate Court's decree was not maintainable. It appears in that case that the appellate Court in its judgment had made a reservation in the following words:

> "This judgment will not preclude the defendants from applying to the lower Court for scaling down the debt under the provisions of Madras Act IV of 1938 if they are entitled to have such relief."

Wadsworth, J., expressed the view that in that case the proper procedure was for the petitioner to apply to the appellate Court to have the decree brought in accordance with the judgment by embodying a direction to the trial Court to deal with the application for relief under Act IV of 1938 and amend the decree according to its decision. We have already stated our objections to the view that a Subordinate Court can be permitted to amend a decree of this Court.

With reference to the applications to stay the drafting of the decrees in the appeals we are of opinion that we have no power to order such stay. Judgment having been pronounced the decree must follow and as was observed by the learned Judges in *Kedar Nath Goenka* v. *Maharaja Chandra Mauleshwar Prashad Singh Bahadur*[2] after the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it.

Since we are clearly of opinion that the decision in *Somasundaram Chettiar* v. *Karuppan Chettiar*[3] requires consideration, we refer to a Full Bench the question whether it has been correctly decided.

V. Govindarajachari and *P. Satyanarayana Raju* for Petitioners.

V. Viyyanna for Respondent.

In pursuance of the above Order of Reference to a Full Bench the Court expressed the following

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1. (1940) 2 M.L.J. 473. 2. (1932) I.L.R. 11 Pat. 532.
3. (1940) 51 L.W. 606.

F.B.

Velagala Srirama-reddi. v. Karri Sri-ramareddi.

OPINION.*—The question which has been referred is whether *Somasundaram Chettiar* v. *Karuppan Chettiar*[1] was rightly decided by this Court. The judgment was pronounced by Pandrang Row and Krishnaswami Aiyangar. JJ., sitting as a Divisional Bench. After the judgment had been pronounced an application was made on behalf of the fourth respondent by his mother, who was his guardian for an order under Ss. 6, 7 and 8 of the Madras Agriculturists' Relief Act scaling down the debt. The Act had not been pleaded at any stage before the appeal was heard and decided. The reason was that when the suit was dismissed by the trial Court, the Act had not come into force, and the claim was allowed only when it came before this Court on appeal. On the footing that it would be contrary to the spirit of the Agriculturists' Relief Act not to give the judgment-debtor the benefit of the provisions of the Act the learned Judges passed this order:

"We are therefore of opinion that the application is one which ought to be admitted and which has to be enquired into. In accordance with the usual practice the application will be remitted to the Court below for disposal according to law after due enquiry, and the decree in the appeal will be subject to the final order thereon."

In making this reference Burn and King, JJ., have expressed strong dissent with regard to the propriety of this course. They have pointed out that once a judgment has been delivered the consequent decree must be drawn up in accordance with the terms of the judgment and no Subordinate Court has power to pass an order which will affect the decree. We consider that there is great force in the criticisms which the learned Judges have made with regard to the course adopted in *Somasundaram Chettiar* v. *Karuppan Chettiar*[1]. The learned Judges obviously had no power to make any order which affected the judgment which they had delivered unless passed on an application for review and there was no application for review. They added something to their judgment which is prohibited by the Code of Civil Procedure, and we have no hesitation in holding that the course adopted in that case is contrary to law.

If the mother of the fourth respondent in *Somasundaram Chettiar* v. *Karuppan Chettiar*[1], had raised the question before judgment was pronounced and signed, the position might perhaps have been different. It has been the practice of some learned Judges of this Court, where an application for scaling

* 16th September, 1941.

1. (1940) 51 L.W. 606.

F.B.

Velagala Srirama-reddi. v. Karri Sri-ramareddi.

down has been made before judgment has been delivered, to direct that an inquiry into the application should be conducted by the trial Court and the amount awarded in the judgment should be deemed to be subject to the finding on the application. It is not necessary to decide whether this practice is lawful or not, but to avoid any question arising in future, we consider that the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. If this procedure is followed the final decree of this Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists' Relief Act. But if the application is not made before the judgment is delivered, it will be too late for a judgment-debtor to raise the question. The judgment in such circumstances will be the final judgment and the decree must be drawn up in accordance therewith.

The costs of this reference will be costs in the matters which have occasioned it.

(After perusing the Opinion of the Full Bench the Court made the following Order†).

In view of the decision of the Full Bench on the reference made by us, these petitions must be dismissed with costs. (One set).

K. S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Saradambal ... *Appellant** (*3rd Respondent*)

v.

S. Subbarama Aiyar ... *Respondent* (*Petitioner*).

Saradambal v. Subbarama Aiyar.

Hindu Women's Rights to Property Act (XVIII of 1937)—Widow's interest in husband's joint family property—Right of husband's creditors to proceed against.

The widow under the Hindu Women's Rights to Property Act gets the same interest which her husband had in the joint family property and as his

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† 3rd October, 1941.

* A. A. A. O. No. 195 of 1940. 3rd October, 1941.

interest could be attached in execution for his debt in his life time, a creditor is entitled to the same remedy against the interest of the widow accrued under the Act in respect of non-agricultural land.

Appeal against the order of the District Court of Coimbatore dated 6th September, 1939 and made in A. S. No. 187 of 1939 preferred against the order of the Court of the District Munsif of Kollegal dated 27th February, 1939 and made in E. P. R. No. 352 of 1938 in O. S. No. 1138 of 1935 on the file of the Court of the District Munsif of Coimbatore.

V. Subramanyam for Appellant.

V. C. Veeraraghavan for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question relating to the construction of S. 3, Cl. (2) of the Hindu Women's Rights to Property Act, 1937. The relevant facts are few. On the 18th December, 1935, the plaintiff obtained a decree for money in O. S. No. 1138 of 1935 on the file of the District Munsif of Coimbatore against the first defendant. Subsequent to the date of the decree the first defendant died. His wife the third defendant was brought on record as his legal representative. The plaintiff sought to implead the brother and the brother's son of the first defendant besides the third defendant, but the Court allowed only the third defendant to be brought on record and dismissed the application against the brother and the brother's son. The order passed by the learned District Munsif is to the following effect:

"To implead the widow he relies upon the Act XVIII of 1937 by which a widow obtains the interest of her deceased husband. I do not think that the decree-holder can go both against the widow and against the brother and the brother's son. As the decree-holder is relying upon the Act XVIII of 1937 I must presume that the widow has taken the husband's property and his interest in the joint property. The widow will therefore be added as legal representative and the brother and the brother's son are struck off the record."

The third defendant filed a statement of objections objecting to the execution being issued against her. She stated that her husband before his death left a will in her favour in and by which he gave certain immoveable properties to her for her maintenance which included also the suit properties and therefore they were not liable to be attached. The learned District Munsif took the view that the fact that the properties were given to her for her maintenance would not exonerate her liability to pay her husband's debt and he therefore allowed the

Saradambal v. Subbarama Aiyar.

execution to issue. On appeal, the learned District Judge took the view that if the properties were self-acquired, the will must be regarded as operative; but if the properties were regarded as joint family properties the share of the husband which vested in the third defendant under the Hindu Women's Rights to Property Act was liable to be attached. He confirmed the decision of the learned District Munsif.

On appeal Mr. Vedantam Subramaniam on behalf of the third defendant contends that the view of the learned District Judge in regard to the Hindu Women's Rights to Property Act is not sound. His contention is that under the said Act the property would be taken by the third defendant free from the liability to pay her husband's debt and that it was not the intention of the Act to enlarge the rights of the creditors. The question is whether this contention is tenable. In view of the recent decision of the Federal Court, In the matter of *The Hindu Women's Rights to Property Act*[1], that the said Act does not regulate succession to agricultural lands in the Governor's Provinces, of the properties that were attached which comprise 23 items in the schedule to the execution petition, only two items, namely, items 22 and 23 will be governed by the Act. The provisions of the Act which are relevant for the present discussion are Cls. 2 and 3 of S. 3 which run thus:

"2. When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-S. (3), have in the property the same interest as he himself had.

3. Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

Under S. 3 (2) the interest taken by the widow is the same interest as the husband himself had, that is, the interest of an undivided member of a joint family in the joint family property. The said interest is capable of definition and so far as this presidency is concerned, it is liable to separation by partition and alienable *inter vivos* for valuable consideration and liable to be seized in execution of a decree for the personal debts of the member. Giving the language its plain meaning, the widow takes that interest subject to the rights and

1. (1941) 2 M.L.J. 12.

Saradambal *v.* Subbarama Aiyar.

obligations attached to that interest and subject to the restrictions placed on her powers by Cl. (3) of the Act. That clause leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest. What a Hindu woman's interest is, is well defined in Hindu law, that is, she is competent to alienate that interest only for purposes sanctioned by Hindu law and that interest is liable to be seized in execution of decrees for the payment of the debts of the last male owner. Taking both the clauses together the property taken by her is liable for the debts of her husband. The contention of Mr. Vedantam Subramaniam is that as the husband died undivided and the other creditor has not taken any steps during his life-time to attach the said property, his remedy is lost. It is true that if the Act had not been passed, as the husband died without leaving a male issue the property would have gone by survivorship to his undivided brother and his brother's son and the doctrine of survivorship would prevent the creditor from attaching that property. But the Act has taken away that rule of survivorship and allowed the property to descend to his wife. Once the rule of survivorship no longer operates, there is nothing to preclude a creditor from attaching the property. Though the interest she takes is a limited interest of a Hindu woman, she is conferred the same status as that of a male owner. Even in the case of a female who takes a Hindu woman's estate, the inheritance vests in her for the time being as fully as it vests in any male succeeding to the property but only with a restricted right of alienation. As pointed out by the Judicial Committee in *Moniram Kolita* v. *Keri Kolitani*[1]:

> "The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest".

If for instance an undivided member dies leaving a son and also his widow, the property would devolve upon both of them and though, so far as the widow is concerned, her interest is limited no such limitation can be placed upon the interest taken by the son. It cannot be said that the interest of the son is attachable but not that of the widow. The fact that a right of partition is conferred upon the widow goes to show that the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same inte-

1. (1880) L.R. 7 I.A. 115: I.L.R. 5 Cal. 776 at 789 (P.C.)

Saradambal *v.* Subbarama Aiyar.

rest that is conferred upon her. Therefore giving the language its plain meaning, the property taken by her must be held to be liable for the payment of her husband's debts and is liable to be attached by the plaintiff. The view taken by the learned District Judge is therefore correct. The learned District Munsif will issue execution in the light of the observations contained in the judgment. I direct each party to bear his own costs in this appeal.

Leave to appeal refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE SOMAYYA.

P. Venugopala Pillai .. *Appellant* (Plaintiff and Respondent)*

v.

Thirugnanavalli Ammal ... *Respondent (Defendant and Petitioner).*

Venugopala Pillai *v.* Thirugnanavalli Ammal.

Suit declaring lease to be fraudulent—Lessee continued in possession by order of Court pending suit and directed to administer—Payment by him of Government revenue while so in possession—Whether can be subsequently agitated against rightful owner of property not having claimed a set off against mesne profits.

Payment of Government revenue would stand on quite a different footing from other outgoings incurred by a person in possession of an estate without title and it would be open to such a person to maintain an action for the recovery of the amount paid. It may also be open to him to set off the amount in a suit for damages brought against him, and the fact that a set off was not claimed against a demand in a prior action would not preclude the claim being agitated in an independent action.

Where though there was no formal appointment of a Receiver, the lessee under a lease subsequently set aside as fraudulent, undertook in that suit to administer the property in dispute under the directions of the Court and was allowed to be in possession thereof in pursuance of the Court order, and while in such possession paid a sum of Rs. 2,155-8-3 as Government revenue,

Held, that he was entitled to recover the amount so paid, he having been in rightful possession of the property when making the payment by reason of the Court's order allowing him to remain in possession and the payment itself being for Government revenue to preserve the estate, which he was bound to pay according to his undertaking.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore dated 1st November, 1937 and made in O.

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* Appeal No. 192 of 1938 and C. M. P. No. 1447 of 1941. 6th August, 1941.

S. No. 13 of 1936 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to pass an order scaling down the amount that may be adjudged to the plaintiff in the event of the above appeal No. 192 of 1938 on the file of the High Court being allowed.

Venugopala Pillai *v.* Thirugnanavalli Ammal.

B. Sitarama Rao for *J. R. Gundappa Rao* for Appellant.

T. R. Venkatarama Sastri for *T. E. Ramabhadrachariar* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal from the judgment of the learned Subordinate Judge of Cuddalore dismissing the plaintiff's suit. It was brought for the recovery of a sum of Rs. 10,848-4-7 being the amount of kist paid by the plaintiff in respect of the properties mentioned in Schedule B to the plaint for faslis 1333 to 1335 (1924 to 1926). The plaint was filed on 1st April, 1936 and on 13th October, 1937, he withdrew his claim in respect of fasli 1333 on the ground that it had been adjusted in O. S. No. 4 of 1933 on the file of the same Court and confined his claim only to faslis 1334 to 1335. The circumstances under which the plaintiff had to pay the said kists are set out by him as follows. The properties belonged to one Thangasami Pillai who executed a will on 6th July, 1915, bequeathing them to his daughter the defendant who was then a minor and appointing Sundarathachi his mother and the grandmother of the defendant to be her guardian to manage the property during her minority; in the course of the said management, the said grandmother leased the property to the plaintiff for a term of three years at a fixed rent to be paid by him and one of the stipulations in the lease deed was that Sundarathachi should pay the kist on the property, but as she failed to pay the same, the plaintiff was obliged to pay the same in order to preserve the produce raised on it. The contention of the defendant was that the said lease was a fraudulent transaction brought about by Sundarathachi with a view to defeat the claim of the defendant, that the said payments were voluntary and not made *bona fide* and therefore not recoverable. It was further pleaded that the defendant filed O. S. No. 6 of 1927 on the file of the District Court of South Arcot against Sundarathachi and various alienees from her to set aside the several alienations including the lease in favour of the plaintiff who was the fourth defendant in

Venugopala Pillai *v.* Thirugnanavalli Ammal.

that suit, that the lease was set aside as a fraudulent transaction, that mesne profits for faslis 1334 and 1335 were decreed against him and that the plaintiff ought to have asked for the said payments being taken into account in assessing the mesne profits and as he failed to do so, he was debarred from claiming the said amount by an independent action and further the said payments must be deemed to have been taken into account and therefore the plaintiff was precluded from recovering them on the ground of *res judicata.* The learned Subordinate Judge on the evidence held that the plaintiff did make the payments of kist for fasli 1334 and 1335 but in view of the finding in the prior litigation, O.S. No. 6 of 1927, that the lease was a fraudulent transaction he held that the plaintiff could not be said to have made the payments *bona fide* and therefore could not claim the reimbursement of the kists paid as payments made on defendants' behalf either under S. 69 or S. 70 of the Contract Act. On the question of *res judicata* he held that the defendant's claim for kist was by way of a set off and that an independent suit was not therefore barred but held that the claim was adjudicated upon in the prior suit and therefore the suit was barred on the ground of *res judicata.* The learned Judge also held that if it be held that the plaintiff is entitled to the relief claimed, he would be entitled to a charge on the suit lands. On these findings the learned Judge dismissed the suit and it is against this decision this appeal has been preferred by the plaintiff.

Mr. Sitarama Rao on his behalf has canvassed all the findings of the lower Court. It seems to us that if the plaintiff's claim had merely rested on the fact of the lease in his favour, it may be that the decision of the lower Court would be correct. But the plaintiff's claim does not rest on the mere fact of his having been a lessee, at any rate in regard to a portion of his claim. The previous suit was filed in the Sub-Court of Cuddalore as O. S. No. 11 of 1925—this was subsequently transferred to the District Court of Cuddalore and registered as O. S. No. 6 of 1927—and on the same day an application for the appointment of a Receiver was made in the Sub-Court. On 19th March, 1925, the plaintiff who was the fourth defendant in that suit filed a counter affidavit opposing the application. There was apparently some sort of an informal understanding between the parties the result of which was that the present

Venugopala Pillai *v.* Thirugnanavalli Ammal.

plaintiff filed an affidavit undertaking that he would lease out the properties described in the lease deed by means of documents for cultivation during the faslis 1335 and file them in Court, that he would lease them out on a certain rate of rent, that if the leases were to be given for a rent lower than that rate, he would take the directions of the Court and abide by its orders and that he would submit a monthly return to the Court of the collections made by him and also the expenses incurred in respect thereof. On this the learned Judge passed the following order:

"In view of the undertaking contained in the affidavit of defendant 4 the appointment of a Receiver is not necessary. Defendant 4 will strictly act according to the terms of the undertaking."

It will thus be seen that though there was no formal appointment of a Receiver, the present plaintiff undertook to administer the property under the directions of the Court and he was permitted to be in possession in pursuance of the order made by the Court and he was thus in possession till he was actually divested of it in 1927. It is conceded before us that during the period he was in possession in pursuance of the undertaking given by him he paid Rs. 2,155-8-7. It was in respect of this amount that Mr. Sitarama Rao pressed the claim on behalf of the appellant. The question for decision is whether his claim in regard to this amount should not be sustained. It was frankly conceded by Mr. Venkatarama Sastri on behalf of the defendant that though the plaintiff might be considered as a trespasser by reason of the fact that the transaction of lease was set aside as fraudulent, he would have been entitled to the payments made by him towards the kist if he had set up his claim by way of reduction of damages in O. S. No. 6 of 1927 when the mesne profits in respect of fasli 1335 were assessed and decreed against him but he having omitted to do so, it is not open to him now to maintain an independent action. His contention is that in a claim for mesne profits it was incumbent upon the defendant to have set up this claim as and by way of reduction of damages and that that is the only course open to him. In support of his contention he relied upon the decision in *Tiluck Chand* v. *Soudamini Dasi*[1], and on a passage in Mayne at page 436 based on *Doe* v. *Hare*[2]. In *Tiluck Chand* v. *Soudamini Dasi*[1], a question arose between two rival purchasers in execution of different decrees against the same judgment-debtor as to whose sale should

1. (1878) I.L.R. 4 Cal. 566. 2. (1833) 2 C. & M. 145: 149 E.R. 709.

Venugopala Pillai v. Thirugnanavalli Ammal.

prevail. One of the purchasers instituted a suit for a declaration that his sale is valid and after getting the said declaration filed a suit for recovery of mesne profits for the period he was not able to get possession of from the other purchaser. That suit was not only dismissed, but a decree in favour of the defendant for the difference between the rents received and the revenue paid for the property during the three years was given. This decree was reversed on appeal by the High Court on the ground that though payments of revenue might be used to reduce the mesne profits, they could not be treated as a substantive set off. Then a suit was filed for recovery of the amount that was awarded in the other suit and the question was whether the action was maintainable. The learned Judges took the view that it was not. Garth, C. J., who delivered the judgment observed thus:

"In a suit for mesne profits, the plaintiff is only entitled to recover the actual loss which he has sustained by being kept out of possession; and, therefore, in ascertaining the amount of such loss, it is right to take into consideration the receipts on the one hand and the necessary payments on the other. But it does not follow from this that if a man has wrongfully taken possession of property, and held it adversely to the true owner, and has been a loser in consequence, he has right to recoup himself for his losses as against the true owner. He must be content in such case to bear the burden of his own wrong."

The correctness of these observations came into question in a case reported in *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[1], which went up to the Privy Council. The question there was whether a person who was in possession of an estate in pursuance of a decree of Court but ultimately reversed on appeal was entitled to recover the amount paid for Government revenues during the period he was in possession. The Subordinate Judge decreed the plaintiff's suit but on appeal the decree was reversed by the High Court and the learned Judges remarked as follows:

"A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from *Tiluck Chand* v. *Soudamini Dasi*[2]."

Lord Macnaghten pointed out that the possession of the purchaser in that case could not be held to be wrongful possession and that he was not prepared to give assent to the proposition as laid down in *Tiluck Chand* v. *Soudamini Dasi*[2]. He

1. (1893) L.R. 20 I.A. 160: I.L.R. 21 Cal. 142 (P.C.).
2. (1878) I.L.R. 4 Cal. 566.

Venugopala Pillai *v.* Thirugnanavalli Ammal.

remarked as follows:

"Even if the rule stated by the learned Judges admitted of no exception —a proposition which it would be difficult to maintain, having regard to the recent case of the *Peruvian Guano Co.* v. *Dreyfus Bros & Co*[1], in the House of Lords—it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the Highest Court in India."

He then pointed out that the Government revenue was a paramount charge on the land and that if default was made in payment, the estate would be sold in a summary way and later enunciated the principle applicable to the case thus:

"It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents."

He further observed that the claim was in the nature of salvage and that the law relating to sales for arrears of Government revenue recognised an equity to repayment in the case of a person who not being proprietor paid the Government revenue in good faith to protect a claim which afterwards turned out to be unfounded. It is clear from this judgment that the case of Government revenue would stand on quite a different footing from other outgoings incurred by a person in possession of an estate without title and that it would be open to such a person to maintain an action for the recovery of the amount paid. It may also be open to him to set off the amount in a suit for damages, and what could be set off could always be claimed in an independent action and the fact that a set off was not claimed against a demand in a prior action would not preclude the claim being agitated in an independent action. This proposition is not disputed by Mr. T. R. Venkatarama Sastri. In this case there can be no doubt that from the date of the order by which the plaintiff was allowed to be in possession in pursuance of the undertaking given to the Court he must be held to be in rightful possession of the estate and must be held entitled to recover any payments made by him for Government revenue to preserve the estate which he was bound to pay according to the terms of the undertaking. This claim would therefore be directly covered by the principle of the said Privy Council decision and we therefore hold that the suit is main-

1. (1892) App. Cases 166,

Venugopala Pillai *v.* Thirugnanavalli Ammal.

tainable. The cases relied on by Mr. Venkatarama Sastri, viz., *Kachar Ala Chela* v. *Sha Oghadbhai Thakarshi*[1], and *Rai Kiran Chandra Rai Bahadur* v. *Erfan Karikar*[2], are all cases where the claim was set up and reduction allowed but they did not decide that if the claim was set up the action was barred. So far as the amount of Rs. 2,155-8-7 paid since the date of the order is concerned, the plaintiff will be held entitled to recover. Mr. Sitarama Rao after some argument has confined his claim to this amount in view of the finding that his client was held not to be a *bona fide* lessee of the estate, a finding which he was unable to challenge; we therefore think it unnecessary to go into the exact scope of the decision in *Tiluck Chand* v. *Soudamini Dasi*[3], in regard to the earlier payments.

Another point was raised on behalf of the respondent that the claim must actually be deemed to have been negatived by the Court in the prior litigation in O. S. No. 6 of 1927. From the written statement in that case it is clear that the plaintiff did not plead that he was entitled to a deduction from the amount of mesne profits to be ascertained, the payments towards kist which he had made up to that date. No doubt in the evidence he stated that he paid certain amounts as receiver but his deposition was ultimately rejected on the ground that he did not submit himself to cross-examination and the learned District Judge who tried the case did not go into the said question at all. Though a memorandum of grounds was taken that there must be deduction on this head, it does not appear to have been considered by the High Court apparently because the claim was not pleaded. It could not be said that the Court had expressly or impliedly overruled the claim of the defendant in regard to the payment of kist. We therefore overrule the contention of the respondent on this point.

In the result we set aside the decree of the lower Court, and pass a decree for the said amount with interest at 6 per cent. per annum from the various dates of payment. So far as the rest of the claims are concerned, they are dismissed. Each party will bear his own costs in this appeal but so far as the lower Court is concerned, the plaintiff will get his costs on the amount allowed here. An application has been filed by the

1. (1892) I.L.R. 17 Bom. 35. 2. (1933) 38 C.W.N. 384.
3. (1878) I.L.R. 4 Cal. 566.

Venugopala Pillai v. Thirugnanavalli Ammal.

defendant-respondent under the Madras Act IV of 1938. This petition will be forwarded to the lower Court for adjudication on the merits. The decree passed herein will be subject to the relief the defendant might get in the said petition. The plaintiff will have leave to file a counter-affidavit.

This appeal having been set down to be mentioned this day the Court made the following

ORDER.—The plaintiff will have a charge for the amount decreed on the suit properties.

K. C. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Kayambu Pillai (died) and another. *Petitioners* (2nd Appellant and his L.R.).*

v.

The Court of Wards by the Collector of Trichinopoly District and others. *Respondents (Respondents).*

Kayambu Pillai v. The Court of Wards.

Limitation Act (IX of 1908), S. 5—Application for excusing delay—What is "sufficient cause"—Analogy of S. 14.

In applying S. 5 to cases where delay has been caused by prosecuting in good faith and with due diligence other proceeding or proceedings for substantially the same reliefs in another Court which was for defect of jurisdiction or for other causes of a like nature unable to entertain the same the analogy of S. 14 is an argument of considerable weight though S. 14 as such has no application to the case.

Though the excusing of the delay will affect the valuable right that has accrued to the respondent the question has to be approached from the point of view of the petitioner's conduct rather than with reference to the advantage gained by the respondent.

Petition praying that in the circumstances stated in the affidavit filed in S.R. No. 27375 of 1940 the High Court will be pleased to excuse the delay for the time taken in pursuing the legal remedies, that is, in filing Review Petition against the order of the Hon'ble Mr. Justice Venkatasubba Rao and the Hon'ble Mr. Justice Abdur Rahman, dated 4th March, 1938, and made in A. S. No. 343 of 1931 (O. S. No. 71 of 1928 Sub-Court, Trichinopoly) and the delay in filing the said petition.

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* C. M. P. No. 4426 of 1940. 13th August, 1941.

Kayambu Pillai *v.* The Court of Wards.

T. S. Venkatesa Aiyar and *S. Sundaresa Aiyar* for Petitioners.

K. Kuttikrishna Menon for Respondents.

The Court made the following

ORDER.—This is an application to excuse the delay in presenting a petition for review against the orders passed by Mr. Justice Venkatasubba Rao and myself in A. S. No. 343 of 1931 on the 4th March, 1938. I have not, up till now, decided to issue any notice in regard to the petition for review and nothing in this order shall be taken to refer to the application for review which I shall consider separately.

Since the existence of sufficient cause is a condition precedent without which the discretion given to a Court under this section cannot be exercised, the question whether the delay should be excused depends for its answer on the fact whether the petitioner has succeeded in making out the same. According to the well-known decision in *Krishna* v. *Chathappan*[1], cited by learned counsel for the appellant, the words 'sufficient cause' have to be liberally construed so as to advance substantial justice particularly when "no negligence, nor inaction nor want of *bona fides* is imputable to the appellant". In defining the general rules of guidance for the exercise of discretion, Lord Dunedin observed in *Brij Indar Singh* v. *Kanshi Ram*[2]:

> "We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal."

Learned counsel for the Court of Wards has, on the other hand, naturally laid great stress on the fact that once the time for making an application is past, a very valuable right has accrued to the successful party of which he should not be lightly deprived.

S. 14 of the Limitation Act provides that in computing the period of limitation for any suit or application, the time during which the applicant has been prosecuting in good faith and with due diligence another civil proceeding in another Court, which from defect of jurisdiction or other causes of a like nature, is unable to entertain it, shall be excluded. It has been contended by learned counsel for the appellant that in considering the words "sufficient cause" under S. 5 of the

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1. (1889) I.L.R. 13 Mad. 269.
2. (1917) 33 M.L.J. 486: L.R. 44 I.A. 218: I.L.R. 45 Cal. 94.

Kayambu Pillai v. The Court of Wards.

Limitation Act, the equities on which S. 14 of the Limitation Act is based may be taken into account, it being a common case of the parties that S. 14 as such has no application to the present case. The contention has in my opinion, considerable force. As observed by their Lordships of the Privy Council in *Kanwar Rajendra Bahadur Singh* v. *Rai Rajeshwar Bali*[1], that in applying S. 5 to cases where delay has been caused by taking a wrong proceeding, "analogy of S. 14 is an argument of considerable weight". The existence of circumstances mentioned in the section has been, therefore, regarded in decided cases as a sufficient ground for excusing the delay caused by wrong proceedings. In order to decide therefore, whether the plaintiff would be entitled to exemption, I must see whether he had been during the time that has elapsed in excess of what is allowed to him by law, prosecuting in good faith and with due diligence other proceeding or proceedings for substantially the same relief in another Court which was, for defect of jurisdiction or for other causes of a like nature unable to entertain the same and grant the relief to the petitioner.

There is no doubt, as a reference to the petitioner's affidavit would show, that he has been prosecuting certain Letters Patent Appeals and other Civil Miscellaneous Applications between the 17th March, 1938, and the 18th April, 1939. So far as the time spent for the disposal of these appeals and applications are concerned, there cannot be much of a doubt that these proceedings must be regarded as having been taken in good faith and prosecuted diligently. Had the time to pay court-fee and to give security been extended either by the Court on the 18th February, 1938, or had Letters Patent Appeals against those orders been allowed on the 18th April, 1939, the appeal would not have been dismissed on the 4th March, 1938, and even if dismissed, the order of dismissal would have had to be vacated. No reasons for the dismissal of these appeals have been given by the Division Bench disposing of them but it seems to be obvious that they were dismissed as the prayer to extend the time or to excuse the delay in the Letters Patent Appeal filed against the order in C. M. P. No. 5204 of 1934 which was five days beyond time had not been granted. The applicant cannot be regarded to

1. A.I.R. 1937 P.C. 276 at 278.

Kayambu Pillai v. The Court of Wards.

have been guilty of negligence or inaction or want of *bona fides* so far as this delay is concerned. This time must, therefore, be taken into account in his favour and he should get a credit for the same in computing the period of limitation. This is, however, not enough for the petitioner. He says that the Courts were closed on the 5th May, 1939, and re-opened on the 17th July, 1939, on which date applications were made on his behalf—S. R. No. 18426 of 1939 (C. M. P.) for accepting the court-fee and security and re-hearing the appeal and C.M.P. No. 3582 to excuse the delay in making this application. That these applications, if made on the 5th May, 1939, would have been taken into consideration in computing the period of limitation on the same basis as the proceedings under the Letters Patent Appeals, does not seem to be open to question. Nor is there any doubt that if these applications had been granted, the petitioner would have achieved his object and the present petition for review would have been unnecessary. The only question then is whether the time during which the Court was closed, when these applications could not have been presented, should be taken into consideration in calculating the period of limitation. If the words 'sufficient cause' have to be construed liberally and if the test to be kept in view, as laid down in *Krishna* v. *Chathappan*[1], is whether negligence, inaction or want of *bona fides* can be imputed to the plaintiff, my reply must be in his favour. It is true that this is to a certain extent detrimental to the respondent, although the application for review has not been taken up for consideration so far, and interferes with the valuable right that has accrued to the respondent, but this question has to be approached in my opinion, from the point of view of the petitioner's conduct rather than of the advantage gained by the respondent.

I would, for the above reasons, excuse the delay and ask the learned counsel for the petitioner to satisfy me whether any notice on the petition for review should be issued to the other side. No costs.

K. S. *Delay excused.*

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1. (1889) I.L.R. 13 Mad. 269.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Yella Venkatramayya ... *Appellant** (*Plaintiff*)

v.

Yella Seshayya and others. ... *Respondents* (*Defendants 1, 3 to 6 and 8*).

Hindu law—Conversion of Hindu parents and their minor son to Christianity—Subsequent reversion to Hinduism—Status between parties whether one of re-union—Father incurring debt and executing mortgage after reversion to Hinduism but during minority of son—Liability of son. Venkatramayya v. Seshayya.

Though as between a Hindu father and his minor son the former can by his unilateral declaration effect a division in status, it is doubtful if a Hindu father who first became a convert to Christianity and later on reverted to Hinduism can by an act of his own volition such as reconversion restore the co-parcenary relationship between himself and his son.

In the absence of subsequent acts or transactions pointing to a re-union with the son after he became a major, the mere fact of the parties having lived together cannot be relied upon to indicate a re-union.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 94 of 1937 preferred against the decree of the Court of the District Munsif of Guntur in O. S. No. 221 of 1935.

V. Rangachari for Appellant.

S. Sitaramayya and *K. Kotayya* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises questions of some importance as to the status of the members of a Hindu family, who having been converted to Christianity, are subsequently, reconverted to their old faith.

The appellant is the son of the first respondent and he sued for partition of his half share in the family properties, claiming that a mortgage executed by the first respondent in favour of the third respondent and a Court sale in favour of the fifth respondent in execution proceedings instituted against the first respondent are not binding on his share in the properties. The Court below has upheld both the transactions in their entirety and this appeal has been preferred challenging the correctness of that decision.

The facts material for the decision of this appeal may be briefly stated. The appellant was born on the 1st July, 1914. In 1917, the first respondent and his wife became converts to

* S. A. No. 906 of 1938. 3rd October, 1941.

Christianity and the appellant was also baptised in the same year. In 1930 while the appellant was still a minor, the first respondent executed the mortgage Ex. X which is one of the transactions now impeached in favour of the third respondent for Rs. 7,000 for discharging antecedent debts due to third parties. The mortgage was assigned to the fourth respondent in March, 1932 and it is admitted that only a sum of about Rs. 340 remains payable under it. The first respondent also borrowed Rs. 800 in November, 1930, from the local Co-operative Society, the second respondent herein, for discharging a debt due to another creditor. As this sum was not duly repaid the society brought claim No. 1793 of 1932 before the Registrar of Co-operative Societies and obtained an award which under the rules framed under the Co-operative Societies Act, 1912, was executable in the civil Courts as if it were a decree of the Court. In such execution proceedings items 1 to 7 and 9 of the plaint A schedule were brought to sale and purchased by the fifth respondent on the 21st January, 1935, for Rs. 2,000 subject to the mortgage already referred to which covered all the A schedule properties.

Now, the appellant's contention is that the conversion of his family resulted in a severance of the coparcenary status, that debts incurred by his father after such conversion could not bind the appellant or his share in the properties which were all admittedly ancestral and that neither the mortgage nor the Court sale referred to above could affect the appellant's interests in the properties. On the other hand, the alienees contended that the appellant's family had all along been behaving as if they were Hindus of the Kamma caste and were treated as such by other Hindus of the same community in the village, that in such circumstances even if the appellant and his father had at one time become Christians, they must be deemed to have been reconverted to Hinduism and that, in any case, the appellant having held himself out to be an undivided son of the first respondent and a member of a joint Hindu family, was estopped from pleading the contrary.

The trial Court held that notwithstanding their conversion to Christianity in 1917, the conduct of the parties showed that they must have forsaken their new religion and gone back to their old faith, and that even if they continued to be Christians throughout, they must be taken to have elected to abide by the

Venkatramayya v. Seshayya.

Hindu law notwithstanding their conversion to Christianity. In view of these findings, it upheld the validity of both the transactions applying the rules of Hindu law. In the lower appellate Court, it was urged for the appellant that it was not open to the trial Court to find that the appellant and his father had been reconverted to Hinduism as no specific issue was raised on the point, that on the footing that the parties remained Christians, no coparcenary as known to the Hindu law could exist between the appellant and his father as they were governed in matters of testamentary and intestate succession by the Indian Succession Act and that therefore the first respondent had no power to bind the interests of the appellant in the common properties by his borrowing or alienation. The learned Subordinate Judge was of opinion that the question of reconversion to Hinduism was immaterial as the trial Court had held that even if the parties continued to be Christians, they must be taken to have elected to be governed by the Hindu law and he agreed with that finding. He thought that there was nothing in the Indian Succession Act to preclude persons who have been converted to Christianity being still governed by the Hindu law. He accordingly dismissed the appeal subject to a small modification as to which no question now arises.

[After considering the evidence, His Lordship agreed with the lower Court on the question of fact that the appellant and his father were Hindus at all times material for the purpose of this case. Therefore it became unnecessary to consider the question as to what status the family would have if the family remained Christians but continued to be governed by rules and custom of Hindu law.]

* * * * *

The question next arises as to the legal effect of the reconversion as regards the status of the parties in relation to the properties held by them which were all admittedly ancestral. It was argued by Mr. Rangachari for the appellant that when the first defendant became a convert to Christianity, there was a dissolution of the family tie and a severance of the coparcenary according to the decision of the Privy Council in *Abraham* v. *Abraham*[1], and that this position was in no way altered by his reconversion to Hinduism. The coparcenary having once been severed could not, it was said, be revived except by a reunion,

1. (1863) 9 M.I.A. 195.

Venkatramayya v. Seshayya.

and as reunion could result only from an agreement amongst the parties and as the appellant was still a minor when the first respondent executed the mortgage and incurred the debt which ultimately led to the Court sale the first respondent, notwithstanding the reconversion, had no power to bind by his borrowing the appellant's share in the properties. Mr. Rangachari further pointed out that no case of re-union between the appellant and his father was put forward by the respondents in their written statements and no issue was framed raising the question. In these circumstances, it was urged that it was not open to the respondents now to rely upon any re-union as the basis of coparcenary relationship between the appellant and his father. Mr. Kotayya for the respondents, however, contended that no agreement to reunite was necessary to bring about a coparcenary between the first defendant and his son after the reconversion and that just as a Hindu father could by his unilateral act bring about a severance of the coparcenary between himself and his minor son, so could he by an act of his own volition such as reconversion restore the coparcenary relationship. This argument, however, overlooks the position of the first defendant at the time of the reconversion. It is no doubt true as between a Hindu father and his minor son, the former could by his unilateral act effect a division in status. But could a Hindu father by his own volition bring about a re-union between himself and his minor son? No case actually deciding this point has been brought to my notice. Mr. Kotayya referred to the decision of Venkatasubba Rao, J., in *Babu alias Govinddoss Krishnadoss* v. *Gokuldoss Goverdhandoss*[1], where that learned Judge has expressed the view that there is nothing inherently illogical in the father possessing the power of converting his son's status as a separated member into that of a reunited member. The case was one where there was no question of re-union between a father and his son, but the question was whether a father in reuniting with his brother could by his act carry his own undivided minor sons into the reunited family. In *Venkata Reddi* v. *Kuppa Reddi*[2], this Court held that there could be no question of re-union with minors. Assuming however, that a Hindu father has such a power, it can have no application here as the first defendant was not a Hindu when he reverted to his old religion. I am

1. (1928) 55 M.L.J. 132. 2. (1918) M.W.N. 680.

therefore unable to agree that the reconversion of the first respondent *ipso facto* brought about coparcenary relationship between himself and the appellant. No subsequent act or transaction pointing to a re-union with the appellant during the latter's minority was relied on.

Mr. Kotayya next contended that the appellant, should, at any rate, be deemed to have become reunited with his father after he attained majority in July, 1932, as shown by Exs. VI, III and I and that as the fifth respondent purchased the properties in January, 1935, after such re-union, the appellant's share in the properties must also be deemed to have passed under the sale. These documents already referred to in another connection no doubt refer to the appellant as the undivided son of the first respondent but they were executed so soon—Ex VI about three months and Ex. III and I about a year—after the appellant became a major, that it would, in my opinion, be unsafe to conclude from these documents alone that the appellant knowing that he was separate in status from his father, intended to agree to re-unite with him so as to form a joint family. On the other hand Ex. V executed on the next day after Ex. VI and Ex. II executed five days after Exs. III and I refer to the appellant merely as the son of the first defendant which rather shows that the parties did not attach much significance to these descriptions. It must also be remembered in this connection that no re-union between the appellant and his father was specifically pleaded and no issue was framed on the point; nor have the Courts below considered the question and expressed any opinion thereon. In these circumstances, I am not prepared to agree with Mr. Kotayya's contention that the appellant has been shown to have become re-united with the first defendant after he attained majority and before the properties were brought to sale in Court auction in January, 1935. It follows that the appellant's share of the properties sold cannot be held to be bound by the Court sale to the fifth respondent.

Mr. Kotayya next argued on the strength of the three documents referred to above that the appellant having held himself out to be an undivided son of the first defendant must be held to be estopped from now contending that he was not joint in status with his father and that his share was not bound by the Court sale. The principle of S. 41 of the Transfer of Property Act was invoked in support of this argument and the decision of this Court in *Naraprath Kummali* v. *Paramboli*

Venkat-ramayya v. Seshayya.

Kandi[1], was cited to show that it applies to Court sales also. I find it difficult to appreciate this argument. Assuming that S. 41 or the principle underlying it applies to Court sales (as to which however see *Vaman* v. *Tikaram*[2]), there is no question here of the appellant having placed any property belonging to him in the ostensible ownership of the first respondent. Nor is there any evidence to show that the fifth respondent when he purchased the properties in Court sale was aware that the appellant was represented to be an undivided son in Exs. VI, III and I and acted on the faith of such representation. No estoppel can arise when no representation is shown to have been made and acted upon.

The appellant also raised an alternative contention. The Court sale to the fifth respondent having taken place in pursuance of an award made by the Registrar of Co-operative Societies, the appellant's share in the properties could not be deemed to have been affected by such sale, as the appellant was not a member of the society which advanced the loan to the first respondent. It is not, however, disputed that an award made by the Registrar can be executed as if it was a decree passed by a civil Court and that in fact the properties in question were sold by a civil Court in execution of the award obtained by the second respondent. Whether a son's interest in family property also passes at a sale held in execution proceeding taken against the father alone depends not on whether such proceedings arise out of a decree of a civil Court but on considerations of Hindu law. I see no substance in this contention and I have no hesitation in rejecting it.

The appeal however succeeds on the other grounds indicated above and the preliminary decree passed by the Courts below will be modified by deleting the words "subject to the mortgage Ex. X" and including items 1 to 7 and 9 also of the A schedule among the properties of which partition has been decreed. The appellant will be entitled to mesne profits in respect of these properties from the date of suit and the amount due to the appellant will be ascertained and provided for by the trial Court. The appellant will get his costs in all the Courts from the respondents 2 to 5 who contested the appeal.

Leave granted.

K. C. —— *Appeal allowed.*

1. (1916) 34 I.C. 494. 2. (1927) 29 Bom.L.R. 471.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE SOMAYYA.

Rangaswami Aiyangar .. *Appellant** (*3rd Defendant*)

v.

Sivaprakasam Pillai and others. *Respondents.*

F.B.

Rangaswami Aiyangar *v.* Sivaprakasam Pillai.

Limitation Act (IX of 1908), Ss. 20 and 21—Promissory note executed by managing member of a Hindu family when the family was joint—Payment of interest after partition by a member of the family—If starts a fresh period of limitation against the other divided members of the family.

T the manager of a joint Hindu family and his youngest son *S* executed a promissory note for Rs. 2,384 on 12th March, 1925, when the family was joint. The debt was incurred for a family necessity. *T* having died on 25th March, 1925, payments towards interest were made subsequently by *S* on behalf of himself and his two brothers. On the 13th June, 1930, the brothers separated and it was agreed that *S* should be responsible for the repayment of the debt due on the promissory note. On 10th June, 1933, *S* paid a sum on account of interest due on the promissory note and made an endorsement recording the fact that he had made the payment. A suit was filed on the 24th July, 1935, against all the sons of *T* to recover the balance due on the promissory note. The suit was on the debt as well as on the instrument.

Held, although until the partition took place it would be legitimate to regard interest payments made by *S* as having been made under the authority of his eldest brother on whom devolved the managership of the family on the death of the father, after partition there is no manager and therefore no one who can extend the period of limitation in respect of a family debt so as to affect the erstwhile members. Accordingly the payment by *S* cannot start a fresh period of limitation against his brothers.

Case-law discussed.

Pangudaya v. *Uthandiya*, (1938) 2 M.L.J. 33: I.L.R. (1938) Mad. 968 approved and followed.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 36 of 1937 (A. S. No. 139 of 1935 District Court, Negapatam) presented against the decree of the Court of the District Munsif of Shiyali in O. S. No. 142 of 1935.

N. R. Sesha Aiyar for Appellant.

S. Sankara Aiyar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which falls for decision in this appeal is whether a payment made after partition by a member of a Hindu family of interest due on a promissory note which was executed by the managing member when the

* S. A. No. 993 of 1937. 19th September, 1941.

F.B.

Rangaswami Aiyangar *v.* Siva-prakasam Pillai.

Leach, C.J.

family was joint starts a fresh period of limitation against the other members of the family, the payment having been duly acknowledged by the person who made it. There are conflicting decisions of this Court and it is for this reason that this appeal has been placed before a Full Bench for decision.

The facts present no complication. On the 12th March, 1925, the appellant's father, one Thiruvenkatachariar, and his youngest son Srinivasachariar, executed a promissory note for Rs. 2,384 in favour of one Gnanambal Achi. Thiruvenkatachariar had three sons, and at the time of the execution of the promissory note the family was joint. It is common ground that the debt was incurred for a family necessity. On the 25th March, 1925, the father died. Payments towards interest were made subsequently by Srinivasachariar on behalf of himself and his brothers. On the 13th June, 1930, the brothers separated. It was then agreed between them that Srinivasachariar should be responsible for the repayment of the debt due on this promissory note. In deciding what properties should be taken by Srinivasachariar as his share due allowance was made for his obligation to discharge the debt. On the 10th June, 1933, Srinivasachariar paid a sum of Rs. 55 on account of interest due on the promissory note and made an endorsement on it recording the fact that he had made the payment. On the 24th July, 1935, the first respondent, who has died during the pendency of the appeal and is now represented by the second respondent, instituted in the Court of the District Munsif of Shiyali the present suit to recover the balance due on the promissory note, it having been bequeathed to him by his mother in her will. All the sons of Thiruvenkatachariar were made defendants. The District Munsif held that the payment made by Srinivasachariar operated to extend the period of limitation against his brothers as well as against himself. Accordingly he granted a personal decree against Srinivasachariar as an executant of the promissory note and a decree against his brothers, limited to their shares in the family properties. The appellant appealed to the Subordinate Judge of Mayavaram, who concurred in the judgment of the District Munsif and consequently dismissed the appeal. The present appeal is from the decree passed by the Subordinate Judge. The plaint has not been printed but it has been accepted for the purpose of the appeal that the plaintiff sued on the debt as well as on the instrument.

F.B.

Rangaswami Aiyangar v. Siva-prakasam Pillai.

Leach, C.J.

A payment of interest made by the person liable to pay the debt, or by his agent duly authorised in this behalf extends the period of limitation, provided that an acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making it. This is one of the provisions of S. 20 of the Limitation Act. Sub-S. (2) of S. 21 however says that nothing in S. 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by a payment made by one of them or his agent, and Cl. (*b*) of sub-S. 3 of S. 21 makes it clear that where a liability is incurred by, or on behalf of, a Hindu undivided family, only the manager of the family or his duly authorised agent can make a payment which will have the effect of extending the time against all the members of the family. This clause was inserted by the Indian Limitation (Amendment) Act, 1927. As long ago as 1882 this Court held that the manager of a Hindu family had the same authority to acknowledge as he had to create debts, but without special authority he could not revive a claim against the family already time-barred. See *Chinnaya* v. *Gurunatham*[1]. Some other High Courts did not share the opinion that the manager could acknowledge liability and the amendment was made in order to put an end to the controversy.

Now, it is manifest that in making the payment of Rs. 55 on the 10th June, 1933, Srinivasachariar was not acting as the agent of his brothers. They had divided and, as already indicated, in allocating the shares of the three members in the assets and the liabilities of the family it was stipulated that Srinivasachariar alone should be responsible for the payment of the debt in suit. The arrangement between the brothers could not, of course, affect the rights of the holder of the promissory note, but it makes it impossible to contend that Srinivasachariar was acting as the agent of his brothers when he paid the Rs. 55. Srinivasachariar was never the manager of the family, although until the partition took place it would be legitimate to regard interest payments made by him as having been made under the authority of his eldest brother on whom devolved the managership of the family on the death of the father. The provision of law embodied in S. 21 (3) (*b*) of the Limitation Act is an important factor in this case. While the family remains united only the manager or his duly

1. (1882) I.L.R. 5 Mad. 169 (F.B.)

F.B.

Rangaswami Aiyangar *v.* Siva-prakasam Pillai.

Leach, C.J.

authorized agent can extend the period of limitation against the family. After partition there is no manager and therefore no one who can extend the period of limitation in respect of a family debt so as to affect the erstwhile members.

Before proceeding to examine the reported decisions of this Court which have bearing on the question to be decided it will be useful to inquire into the nature of the liability of a Hindu son to pay his father's debts and of a member of a joint family in respect of a family debt. In *Narayanan Chettiar* v. *Veerappa Chettiar*[1], Ayling and Srinivasa Aiyangar, JJ., observed:

> "The liability of a Hindu son to pay the debts of his father not being illegal or immoral (Avyavaharika) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English Law; in fact it is difficult to bring it under any particular legal category of the English Law. In *Ramasami Nadan* v. *Ulaganatha Goundan*[2], which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. Bhashyam Aiyangar, in his interesting argument, repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case, *Periasami Mudaliar* v. *Seetharama Chettiar*[3], Bhashyam Aiyangar, J., treats it as settled law that the son could not be sued alone during his father's lifetime, for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action though judgment had been recovered against the father. These positions show clearly that a Hindu son is not jointly bound with his father".

With these observations we are in full agreement. The son's liability under the pious obligation rule in no sense arises out of contract. His liability arises solely from the fact that he is the son of his father and his personal law regards it as being right and proper that he should pay his father's debts. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship. The position is no different when he has brothers. Each is similarly, but separately liable. The position of a member of a joint family with regard to a debt binding on the family is very much the same. His liability arises from the fact that he is a member of the family, and the fact

1. (1916) 31 M.L.J. 386: I.L.R. 40 Mad. 581.
2. (1898) 8 M.L.J. 312: I.L.R. 22 Mad. 49 (F.B.)
3. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).

F.B.
Rangaswami Aiyangar v. Siva-prakasam Pillai.
Leach, C. J.

that it is limited to his individual share in the family properties emphasizes the personal nature of the liability. Therefore in deciding whether after partition one brother can extend the liability of his brothers in respect of a debt incurred by the family before partition, the law of joint liability as understood in England is of no help. Regard can only be had to Hindu conception of liability arising out of relationship.

Turning now to the reported decisions, the judgment on which the appellant most strongly relies is that delivered by Stodart, J., in *Pangudaya* v. *Uthandiya*[1], in which Madhavan Nair, J., concurred. There a joint Hindu family consisted of three brothers the eldest of whom as the manager of the family executed in 1919 a promissory note in favour of the plaintiff. In the following year the brothers separated. After the partition the eldest brother made four payments of interest the last of which was on the 5th March, 1930. All the payments were endorsed on the promissory note. The suit was filed in 1931. The Court held that even if the loan was contracted for the benefit of the family, the eldest brother could not after partition by making payments towards the loan and placing them on record as required by S. 20 of the Indian Limitation Act keep the debt alive against his brothers. The learned Judges were of the opinion that the brothers were not co-debtors in the sense that one member by making a part payment could keep the debt alive against the others. It was pointed out that if one brother could extend the period of limitation against the others, there would have been no necessity for the Legislature to enact S. 21 (3) (*b*).

For the respondent equal stress is laid on the decision of Burn and Lakshmana Rao, JJ., in *Edangapurandar* v. *Narasimhachariar*[2]. In that case the facts were these. A Hindu father executed a promissory note in 1918 which he kept alive by payments of interest. The last payment was made by him on the 6th August, 1921 and the fact of payment was endorsed on the promissory note. The father died in 1922, being survived by three sons. In February, 1924 one of the sons, the first defendant in the suit, was converted to Islam which meant the separation of the family. On the 5th August, 1924 one of his brothers, the second defendant, paid Rs. 25 towards

1. (1938) 2 M.L.J. 33: I.L.R. (1938) Mad. 968.
2. (1939) 1 M.L.J. 68; I.L.R. (1939) Mad. 140.

F.B.

Rangaswami Aiyangar v. Siva-prakasam Pillai.

Leach, C.J.

the debt and endorsed the fact of payment on the promissory note. On the 4th August, 1930 the suit was filed. The Court held that the payment of the 5th August, 1924 kept the note alive as against all the brothers. The basis of the decision was that all the sons were liable under the pious obligation rule. The Court distinguished the decision, *Pangudaya* v. *Uthandiya*[1], on the ground that in that case the pious obligation rule had no bearing, but the learned Judges overlooked the fact that the rule only creates a personal liability based on sonship. Whether a co-heir can bind his co-heirs may be another matter but in the present case the Court is not concerned with the position of co-heirs. It is only concerned with the position of divided brothers in respect of a debt which was created for family purposes before partition.

The appellant also relies on *Rama Vadhyar* v. *Manian Vadhyar*[2], and the respondent on *Lokanadha* v. *Lokhono*[3]. In the former case Beasley, C. J., sitting alone, held that where the manager of a joint Hindu family executes a promissory note for money required for a family necessity, a payment by the son who becomes the manager on his death does not save limitation against another son when the payment is made after partition. The learned Chief Justice pointed out that after a partition there is no undivided family and therefore no managing member of it, and unless there is authority to acknowledge the debt or make a part-payment the other members of the family will not be bound by the acknowledgment or part-payment of one member alone. In *Lokanadha* v. *Lokhono*[3], Curgenven, J., also sitting alone, held that payment of interest made by some of the descendants of a deceased mortgagor binds the other descendants even though they became divided from the family before the payment was made. The learned Judge considered that S. 21 (2) could not save them because it did not relate to "co-heirs" and other persons who are liable by reason of their personal law and not from direct contract with the promisee. This view of S. 21 (2) is obviously right, but it does not follow from this that after partition one member of a Hindu family can bind another member by what he does alone.

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1. (1938) 2 M.L.J. 33: I.L.R. (1938) Mad. 968.
2. (1937) 45 L.W. 767.
3. A.I.R. 1930 Mad. 738.

F.B.

Rangaswami Aiyangar *v.* Siva-prakasam Pillai.

Leach, C. J.

The learned advocate for the respondent also referred to the decision of Varadachariar and Burn, JJ., in *Lakshmi Naidu* v. *Gunnamma*[1], but that case has very little bearing here. The facts there were these. A joint family consisted of two brothers both of whom were parties to a deed of mortgage of immovable property belonging to the family. A part-payment of interest due on the mortgage was made by the brother who was the managing member of the family. The payment was acknowledged by an endorsement on the deed, but this was only signed by the managing member. The mortgagee brought a suit to enforce payment of the loan. The question was whether the part-payment of interest by the managing member would save limitation against the other brother. It was held that on the evidence it could be inferred that in making the payment the managing member was acting as the agent of his brother. The learned Judges did not consider it necessary in such circumstances to adjudicate on the contention which was raised that in the case of joint mortgagors payment by one cannot save limitation as against the co-mortgagors or their interests in the mortgaged property.

We consider that *Pangudaya* v. *Uthandiya*[2], was rightly decided, and should be followed here. In the present case the sons were not parties to the instrument and before the partition their liability in respect of the debt which it represented could only be extended by the managing member. *A fortiori* after partition when there was no managing member, a part-payment of principal or interest by one could not affect the others. From the beginning the liability of the sons was an individual liability, whether considered in connection with the pious obligation rule or in connection with membership of the family. It is not suggested, that the plaintiff could call in aid the pious obligation rule in order to make the appellant liable and partition prevented even the erstwhile managing member extending the period of limitation against his brothers. In these circumstances the payment made by Srinivasachariar on the 10th June, 1933 could only bind his brothers if he was acting as their authorised agent, which clearly he was not. Therefore his action left them unaffected.

For these reasons we allow the appeal with costs throughout.

K. S. — *Appeal allowed.*

1. (1934) 68 M.L.J. 470: I.L.R. 58 Mad. 418.
2. (1938) 2 M.L.J. 33: I.L.R. (1938) Mad. 968.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Commissioner of Income-tax, Madras .. *Petitioner**

v.

SM. AR. VR. Annamalai Chettiar, Devakottah. .. *Respondent.*

F.B.

Commissioner of Income-tax, Madras *v.* Annamalai Chettiar.

Income-tax Act (XI of 1922)—Subsequent losses in foreign business in same accounting year wiping out earlier profits—If changes the character of remittances out of available profits already made—Liability to assessment.

Where remittances have been made from Penang into British India out of profits available for remittance the incurring of losses in his foreign business by the assessee subsequently in the same accounting period which were sufficient to wipe out those profits cannot be deemed to have changed the character of the remittances so as to exclude them from assessment as profits.

Reference by the Commissioner of Income-tax under S. 66 (2) of the Indian Income-tax Act (XI of 1922).

K. V. Sesha Aiyangar for The Commissioner of Income-tax.

M. Subbaraya Aiyar for the Assessee.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee is a Nattukottai Chettiar who deals in stocks and shares at Devakottah and carries on a money-lending business in Penang. Between the 26th April, 1937 and the 20th November, 1937, the assessee remitted to British India the sum of Rs. 13,900 which represented profits which he had made in his money-lending business at Penang. These remittances have been included by the Income-tax authorities in the profits made by the assessee during the year of account 1937—1938. The assessee says that in the last quarter of the year of account he suffered heavy losses in Penang and that these losses were greater than the profits which he had made in the earlier year. On this basis he contends that the Income-tax authorities cannot in law treat the remittances as being remittances of profits. The Income-tax Officer refused to accept this contention, but on appeal the

* O. P. No. 52 of 1941. 15th September, 1941.

F.B.

Commissioner of Income-tax, Madras.
v.
Annamalai Chettiar.

Leach, C.J.

assessee persuaded the Assistant Commissioner to accept it. The Commissioner of Income-tax agreed with the Income-tax Officer and consequently restored his order of assessment. At the request of the assessee the Income-tax Commissioner has referred, under S. 66 (2), the following question to this Court for decision:

> "Whether in the circumstances of this case the Commissioner was justified in coming to the conclusion that the remittances between 26th April, 1937 and 20th November, 1937, came out of the profits of the next preceding year which were available when the remittances were actually made, although subsequently in the same accounting period, that is, between January and April, 1938, the petitioner incurred losses which were sufficient to wipe out those profits."

We consider that the Commissioner is right in the view which he takes. The remittances in fact came out of profits. This is not disputed. The fact that losses were incurred subsequently in the year would not change the character of the remittances. We are not dealing with a case where there has been a remittance in anticipation of profits. We are dealing with a case in which profits had actually been earned and more than sufficient in amount to cover the remittances. Therefore we cannot accept the assessee's contention that his subsequent losses must be deemed to have changed the character of his remittances.

The reference will be answered in favour of the Commissioner and he is entitled to his costs Rs. 250.

K. S. *Reference answered.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Commissioner of Income-tax, Madras
v.
Lakshmanier.

Commissioner of Income-tax, Madras .. *Petitioner**

v.

K. M. S. Lakshmanier, Madura .. *Respondent.*

Income-tax Act (XI of 1922), S. 16 (3) (a) (ii)—Applicability—Minor's property contributing to assets of the firm—If makes any difference.

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* O. P. No. 55 of 1941. 15th September, 1941.

F.B.

Commissioner of Income-tax, Madras. *v.* Lakshmanier.

After a Hindu family became divided, the father, the assessee and his children some of whom were minors were the partners in two firms into which the family business was converted. The father was being assessed as an individual on his total income including his share of the profits in those two firms. In respect of the year 1939-40 the Income-tax authorities relying on S. 16 (3) (*a*) (*ii*) (inserted by the Amending Act of 1937 which came into force on the 1st April, 1937), held that to the assessee's income should be added the partnership profits which were allocated in that year to his minor children. On a reference under S. 66 (2) of the Income-tax Act,

Held, that the provisions of S. 16 (3) (*a*) (*ii*) applied to the case. The partition put an end to the joint status and the family properties ceased to exist as family assets which devolved on the partnerships, to the benefits of which the minors were admitted. There is nothing in S. 16 (3) (*a*) (*ii*) of the Income-tax Act which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets of such partnership.

Reference by the Commissioner of Income-tax under S. 66 (2) of the Indian Income-tax Act (XI of 1922).

K. V. Sesha Aiyangar for Petitioner.

T. M. Krishnaswami Aiyar, M. Subbaraya Aiyar and *T. V. Viswanatha Aiyar* for the Assessee.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee is a partner in two firms trading under the styles of K. M. S. Lakshmanier & Sons and Lakshmanier Sons and Company respectively. In the former firm he possesses a one-fifth share, the remaining four fifths being owned by his sons, three of whom are minors. In the firm of Lakshmanier Sons and Company he possesses a one-twentieth share, the remaining nineteen-twentieths being owned by his sons and his daughters, who are also minors. The family became divided several years ago, since when the assessee has been assessed as an individual on his total income, including his share of the profits in these two firms. In respect of the year of account 1939-40 the Income-tax Officer held that to the assessee's income should be added the partnership profits which were allocated in that year to his children. In adopting this course the Income-tax Officer relied on the provisions of S. 16 (3) (*a*) (*ii*), this section having been inserted in the Act by the Amending Act of 1937 which came into force on the 1st April, 1937. The assessee contended that this course was contrary to the section and appealed to the Assistant Commissioner. The Assistant Commissioner having concurred in the order of the Income-tax Officer, the Commissioner of Income-

F.B.

Commissioner of Income-tax, Madras v. Lakshmanier.

Leach, C.J.

tax in response to a request by the assessee has referred to this Court under S. 66 (2) of the Act the following question:

"Whether on the facts of this case the Income-tax authorities are right in adding the minors' share of income to the petitioner's income under S. 16 (3) (*a*) and whether the section has been properly applied to this case".

We agree with the Commissioner of Income-tax that the statutory provision relied upon by the Income-tax Officer is conclusive against the assessee. S. 16 (3) (*a*) (*ii*) states that in computing the total income of an individual for the purpose of assessment shall be included so much of the income of a minor child of his as arises directly or indirectly from the admission of the minor to the benefits of partnership in a firm of which the individual is a partner. It is difficult to imagine words which would express the intention more clearly than the words used in this section. The assessee is a partner in two firms. He has minor sons who have been admitted to the benefits of those partnerships. Being minors they are not actual partners but the Partnership Act allows them to be admitted to partnership benefits. Profits have been earned and on these profits the assessee is liable to be taxed, not only in respect of what he has received, but what has been paid in respect of the shares of the minors.

Before the Commissioner the assessee contended that as the minors had antecedent rights and as no new right was created or conferred by the father when the family business became a partnership business it could not be said that the minors had been admitted to the benefits of partnership. On this basis it was said that S. 16 (3) (*a*) (*ii*) does not apply. The Commissioner has given the right answer in his statement of the case. The partition of the family put an end to the joint status and the family properties ceased to exist as family assets. The assets devolved on the partnerships and under S. 30 of the partnership Act the minors were admitted to the benefits of the Partnerships and it is such benefits which fall within the statutory provision referred to.

On behalf of the assessee it has also been contended that as the minors were not admitted gratis into the firm, but owe their membership to the fact that they contributed to the assets their shares in the joint family property, S. 16 (3) (*a*) (*ii*) can have no application. The suggestion is that unless the minors are admitted to the benefits of the partnership without any contri-

F.B.

Commissioner of Income-tax, Madras v. Lakshmanier.

Leach, C.J.

bution to the assets S. 16 (3) (*a*) (*ii*) has no application. This is really putting the first contention in another way. There is nothing in the section which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets. The section can only be construed in accordance with the words used in it and there is no foundation for this argument in view of what the section says. We agree with the Commissioner that S. 16 (3) (*a*) (*ii*) has been rightly applied in this case and we answer the reference accordingly.

The respondent will pay the Commissioner's costs Rs. 250.

K. S. *Reference answered.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORDS ATKIN, RUSSELL OF KILLOWEN AND ROMER; SIR GEORGE RANKIN AND LORD JUSTICE CLAUSON.

P. T. Krishnaswami Aiyangar .. *Appellant**

v.

Chevula Kamalamma and others .. *Respondents.*

P.C.

Krishnaswami Aiyangar v. Kamalamma.

Mortgage—Suit on a mortgage by deposit of title deeds impleading subsequent mortgagee of the property—Suit mortgage found to require registration and invalid for want of it—Plaintiff given a money decree only —Order for sale of property and adjudication as to subsequent mortgage—Propriety.

Where in a suit to enforce a mortgage by deposit of title deeds impleading the subsequent mortgagee of the property, it was found that the equitable mortgage required registration and was invalid for want of such registration, only a money decree ought to be passed in favour of the plaintiff; it is wrong to direct a sale of the property in suit or to make any pronouncement as to the validity or otherwise of the subsequent mortgage or to give the subsequent mortgagee any relief whatsoever in the suit.

Decision of the High Court in *Krishnaswami Aiyangar* v. *Gouriamma*, A.I.R. 1936 Mad. 256 reversed.

Appeal from a judgment and decree of the High Court, Madras (Ramesam, Offg. C. J., and Cornish, J.,) in its Civil Appellate Jurisdiction dated 26th July, 1935, from the Ordinary Original Civil Jurisdiction of the same Court dated 6th September, 1932.

The facts of the case appear sufficiently from the judgment.

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* P. C. Appeal No. 28 of 1939. 23rd June, 1941.

J. P. Eddy and *S. P. Khambatta* for Appellant.

J. M. Parikh and *P. V. Subba Row* for Respondents.

Their Lordships' Judgment was delivered by

P.C.
Krishnaswami Aiyangar *v.* Kamalamma.
Lord Romer.

LORD ROMER.—Chevula Venkatasubbaya Chetti, now deceased, was the owner of two houses in Madras. For the sake of brevity they may be referred to as Nos. 60 and 68 respectively, and their owner as the testator. On 2nd June, 1919, the testator executed a promissory note for Rs. 12,000 bearing interest at 9 per cent. per annum in favour of one Rangayya Chetti and deposited with him the title deeds of No. 60 as security. At the same time the testator executed a document headed "Collateral Security Bond" which recorded the fact of the deposit of the title deeds as collateral security in respect of the promissory note and then proceeded as follows:

I shall therefore pay you the principal and interest accruing due on the said promissory note from this date in full, and redeem the said title deeds. To this effect is the collateral security bond executed by me with consent:

This document was never registered. The testator died in the year 1920 having by his will appointed four executors of whom respondents 1 and 2 and one Chevula Subramanyam Chetti appear to be alone surviving. It should be mentioned that the will contained an express provision that the two houses should not be sold. Rangayya Chetti died in the year 1921, and on 13th October, 1930, his junior widow Gouriamma who was his sole legal personal representative instituted the present proceedings for the purpose of enforcing the equitable mortgage purporting to have been created in favour of Rangayya by the deposit of the title deeds of No. 60.

The first three defendants to the suit were the surviving executors of the testator. Defendant 4 was the present appellant. The reason for adding him as a party was this. On 26th June, 1924, the first three defendants and on 24th November of the same year the first two defendants as executors of the testator had executed mortgages in favour of the appellant of both the houses to secure various sums of money that they had borrowed from him or that he had paid at their request. He was, therefore, assuming these mortgages to have been valid, a necessary party to the proceedings. The relief that Gouriamma asked for by her plaint was the usual relief sought in a suit by a mortgagee to enforce his security. The first two defendants (being the present respondents 1 and 2) by their written statement impeached the validity of the

P.C.
Krishnaswami Aiyangar v. Kamalamma.
Lord Romer.

equitable mortgage in suit on the ground that it was created by the collateral security bond and that the document had never been registered. Defendant 3, Subramanyam neither filed a written statement nor took part in any of the subsequent proceedings in the suit. The appellant by his written statement put the plaintiff to proof of the equitable mortgage but did not in terms impeach its validity. In due course issues were directed to be tried of which the only ones now material were to the following effect:

2. Is the mortgage sued upon invalid? (5) Are the mortgages in favour of defendant 4 binding on the estate of the testator? (6) What is the amount due upon those mortgages?

On 6th September, 1932, the case came on for trial before Beasley, C. J. After a consideration of the relevant authorities he came to the conclusion that the collateral security bond did not require registration and that a valid equitable mortgage upon No. 60 had been created by the deposit of the title-deeds. He accordingly pronounced the usual mortgage decree in favour of the plaintiff. The appellant did not at the trial adduce any evidence to prove his mortgages. The learned Chief Justice in those circumstances made no findings upon issues 5 or 6. The decree merely provided that the appellant should be at liberty to enforce his claim as a second mortgagee of the suit property by a separate suit. With this decision upholding the validity of the plaintiff's mortgage defendants 1 and 2 appeared to be content. The appellant, however, took the matter to the appellate side of the High Court where it came on for hearing on 11th May, 1933, before Ramesam and Cornish, JJ. Those learned Judges took the view that unless the appellant's mortgages were valid and there was something remaining due upon them the appellant had no right to be heard on the appeal. They accordingly remanded the case to the Judge sitting on the original side to submit his findings upon issues 5 and 6. They ordered however that the costs entailed by the additional hearing, that is to say, the hearing fee and the fee payable to counsel should be paid by the appellant in any event.

The trial of these two issues took place before Anantakrishna Aiyar, J., in August, 1933, and on 25th of that month he gave judgment recording his findings upon them. It is unnecessary to deal with them in any detail. It is sufficient to

P.C.
Krishnaswami Aiyangar v. Kamalamma.
Lord Romer.

say that on issue 6 he found that, assuming the appellant's mortgages to be valid, there was a substantial sum due to him thereunder which would be properly payable out of the testator's estate. He made no finding upon issue 5 which raised a question of law rather than one of fact. It was the question whether in view of the provisions of S. 307, Succession Act, the executors had power to mortgage the houses of their testator. He thought that this question could not properly be answered until the question of the validity of the plaintiff's own mortgage had been settled.

The hearing of the appeal before Ramesam and Cornish, JJ., was resumed on 26th July, 1935. They evidently thought that the findings of Anantakrishna Aiyar, J., were sufficient to establish the right of the appellant to be heard upon the appeal, for they proceeded to consider the question of whether the collateral security bond of 2nd June, 1919, required registration. Differing from the Chief Justice upon the point they decided that it did, and that the plaintiff's suit so far as it sought to enforce a charge upon No. 60 was not maintainable. The plaintiff, however, was by virtue of the promissory note an unsecured creditor of the testator's estate for so much of the Rs. 12,000 as still remained owing together with arrears of interest and was entitled to a simple money decree against the executors for that amount. But the appellant was not a proper party to a suit for such a decree. The suit against him should therefore have been dismissed with costs. When once it had been decided that the plaintiff was merely an unsecured creditor of the testator, the question of the validity or otherwise of the appellant's mortgages could not by any possibility be an issue in the suit. It would only arise for determination if and when the plaintiff should seek to enforce her decree in execution against No. 60. (It should be mentioned here that No. 68 had long since been sold in proceedings instituted by a person who held a mortgage on that house granted by the testator.)

The learned Judges nevertheless proceeded to discuss the question at some length, and eventually arrived at the conclusion that the mortgages were beyond the competence of the executors and were accordingly invalid as between the appellant on the one hand and the plaintiff and the rest of the unsecured creditors of the testator on the other; but that the mortgages were valid as between the appellant and the executors, by which

P.C.
Krishnaswami Aiyangar v. Kamalamma.
Lord Romer.

the learned Judges meant, as will presently appear, that it was valid as between the appellant and the persons interested in the testator's estate other than the creditors. They also held that the appellant was entitled to stand in the shoes of the unsecured creditors whose debts had been paid off out of the moneys advanced by him on the security of his two mortgages. Having arrived at these conclusions and having ascertained that the amount remaining due to the appellant on the footing just mentioned was Rs. Y, and that of the total amount advanced by him under his mortgages there still remained due for principal and interest the sum of Rs. X, and that the sum due to the plaintiff on the promissory note for principal and interest was Rs. 18,985-6-4, the learned Judges gave effect to their several findings in a decree dated 26th July, 1935. Stated shortly it was to this effect: the appeal was allowed, the decree of 6th September, 1932, was set aside and declarations were made substantially as follows: (1) that the equitable mortgage of 2nd June, 1919, was not valid as a mortgage as between the plaintiff and the appellant as it was not registered; (2) that the mortgage by the executors of No. 60 in favour of the appellant was not valid as a mortgage as between the plaintiff and the appellant, and (3) that the plaintiff and the appellant were respectively entitled to money decrees for the debts due to them, namely, Rs. 18,985-6-4 to the plaintiff and Rs. X to the appellant. The decree then went on to order a sale of No. 60 and directed in effect that out of the net sale proceeds Rs. 18,985-6-4 should be paid to the plaintiff and Rs. Y to the appellant, but that if any balance should be left after making such payments it should be applied in payment to the appellant of Rs. X-Y. In case of deficiency the plaintiff and the appellant were to be at liberty to apply to the Court for payment of the same by the defendant executors. Finally, it was ordered that each party should pay his or their own costs of the appeal and in the Court below. From this decree the appellant now appeals to His Majesty in Council. It will be observed that the decree treats the plaintiff and the appellant as being the only creditors of the testator, the only creditors at any rate who were entitled to be paid out of the proceeds of sale of the property in suit. As to this Ramesam, J., made the following observations:

It is necessary to mention one matter. After the whole argument was closed it was represented to us that there are other creditors who up to

P.C.

Krishnaswami Aiyangar v. Kamalamma.

Lord Romer.

now have not taken any action. They are not parties to this suit. We do not think that we can adjourn this suit to enable them to be made parties at this stage. It is possible that the claims of some of them are barred. So far as the plaintiff and defendant 4 are concerned, the form of the relief we have given practically takes the form of relief in an administration action as between them only and as if there are no other creditors. But when there are other creditors, our adjudication does not bind them. They can take separate action impleading these parties and get appropriate relief.

If it had been necessary to consider the position of the other creditors at all, and it was not, their Lordships cannot think that this was a satisfactory way of dealing with them. Nor can their Lordships think that it was proper to qualify the declaration as to the invalidity of the plaintiff's mortgage by the insertion of the words "as between the plaintiff and defendant 4." If the mortgage security be invalid by reason of the failure to have it registered, it is invalid for all purposes. That it required registration must be taken to have been finally determined, there being no cross-appeal by respondents 3 to 6 who now represent the estate of Rangayya Chetti in lieu of the plaintiff who has died since the decree was pronounced. It necessarily follows that the only decree that could properly have been made after a declaration of the invalidity of the mortgage was a simple money decree against the executors in favour of the plaintiff for Rs. 18,985-6-4. With all respect to the learned Judges it was wrong to direct a sale of the property in suit, or to make any pronouncement as to the validity or otherwise of the appellant's mortgages, or to give the appellant any relief whether as against the property or as against the executors. Whether or not the appellant will eventually obtain anything better than was given him by the decree is a question upon which it is not for their Lordships to express any opinion. He is entitled to appeal from it if he thinks fit, and to have the decree put into the proper form.

In their Lordships' opinion the appeal should be allowed, and the decree of 26th July, 1935, should be varied as follows: there should be omitted from the first declaration the words "as between the plaintiff and defendant 4"; the whole of the decree subsequent to such declaration should be omitted with the exception of the order as to costs; and there should be substituted a simple money decree for payment to the plaintiff out of the property of the testator of Rs. 18,985-6-4 with interest at six per cent. per annum from 26th July, 1935; the order for costs should be varied by inserting after the words

P.C.
Krishnaswami Aiyangar v. Kamalamma.
Lord Romer.

"each party" the words "other than defendant 4" and by ordering the plaintiff to pay the costs of defendant 4 of the appeal and of the suit on the original side of the High Court other than the costs directed by the order of 11th May, 1933, to be paid by defendant 4 in any event, which order is to remain unaffected. Their Lordships will humbly advise His Majesty accordingly. Respondents 3 to 6 will pay to the appellant such costs of this appeal as he is entitled to having regard to the fact that he is appealing *in forma pauperis*.

Solicitors for Appellant: *Lambert & White*.

Solicitors for Respondents: *Harold Shephard*.

K. S. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Commissioner of Income-tax, Madras ... *Petitioner**

v.

P. Ramaswamy Chettiar ... *Respondent.*

F.B.
Commissioner of Income-tax, Madras v. Ramaswami Chettiar.

Income-tax Act (XI of 1922), S. 2 (6-A)—Bonus shares distributed by limited company in lieu of profits to shareholders—If "dividend".

Unless the distribution of bonus shares to shareholders amounts to a "release" of assets by the company to the shareholders, the value of such shares cannot be claimed to be a "dividend" within the meaning of the Income-tax Act. Though the company's profits have been taxed at the maximum rate a shareholder receiving such bonus shares is not entitled to claim a refund of the difference between the maximum rate and the appropriate rate for him.

Reference under S. 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

The question referred was:—

"Whether the distribution of Rs. 10,000 to the assessee by Lakshmi Mills Co., Ltd., in accordance with the resolution at the annual general meeting held on 11th July, 1939, is dividend income within the meaning of the Act or only capital receipt in the assessee's hands."

K. V. Sesha Aiyangar for The Commissioner of Income-tax.

M. Subbaraya Aiyar for the Assessee.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question referred must be answered against the assessee and in the manner indicated by the

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* O. P. No. 96 of 1941. 15th September, 1941.

F.B.

Commissioner of Income-tax, Madras v. Ramaswami Chettiar.

Leach, C.J.

Commissioner in his statement of the case. There is overwhelming authority for the opinion expressed by the Department.

The assessee is a shareholder in the Lakshmi Mills Company, Limited, which carries on a spinning business at Coimbatore. For the year of assessment (1940-1941) the assessee returned an income of Rs. 11,213-14-0 which included a sum of Rs. 10,000 said to be a dividend received from the Lakshmi Mills Company, Limited. The Income-tax Officer discovered that the Rs. 10,000 had not been paid to the assessee in cash, but represented the nominal value of certain bonus shares which had been allotted to the assessee in accordance with a resolution passed at a general meeting of the company held on the 11th July, 1939. During the year ending the 31st March, 1939, the company had made a profit of Rs. 4,51,946-8-1. In the previous year a profit of Rs. 5,320-8-11 had been earned, but had not been distributed. The directors proposed that these profits together with a sum of Rs. 1,42,732-15-0 taken from the general reserves of the company, making in all Rs. 6,00,000 should be capitalised in the form of bonus shares and distributed to the shareholders in proportion to their holdings. This resolution was passed and in due course the assessee received bonus shares of the value of Rs. 10,000, which represented the "dividend". The company had, of course, paid income-tax on its profits and was taxed at a higher rate than the assessee. Consequently he sought to recover from the Income-tax authorities the difference between the amount the company had paid on the Rs. 10,000 and what he would have paid if the tax had been levied according to the rate appropriate to his income. S. 2 (6-A) of the Income-tax Act says that the word "dividend" includes *inter alia* distribution by a company of accumulated profits, whether capitalised or not, if the distribution entails the release by the company to its shareholders of all or any part of the assets of the company. By reason of this section the Income-tax authorities refused to recognise the claim for a refund. They said that the delivery to the assessee of the bonus shares did not represent the payment of a dividend within the meaning of the Act. This is the question which forms the subject-matter of the reference.

Now it is manifest that, unless the distribution of bonus shares amounts to a "release" of assets by the company to the shareholders, the assessee cannot claim the Rs. 10,000 to be a

F.B.

Commissioner of Income-tax, Madras *v.* Ramaswami Chettiar.

Leach, C.J.

dividend within the meaning of the Act. The House of Lords in *Inland Revenue Commissioners* v. *Blott*: *Inland Revenue Commissioners* v. *Greenwood*[1] held that a distribution of bonus shares does not represent the payment of a dividend, and the reasoning there was applied by the Privy Council in *Commissioner of Income-tax, Bengal* v. *Mercantile Bank of India, Ltd.*[2] In the former case Lord Haldane said:

"For the reasons I have given I think that it is, as matter of principle within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place as in a winding up."

In the same case Viscount Finlay said:

"The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. To appreciate this point it is necessary to consider closely what it was that the shareholder got. Did he get anything in the nature of payment of income? It is obvious that he did not. He gave up any claim to the income. What might have been paid as income went to increase the capital of the company. The shareholder got his proportionate share in the business of the company as increased by the additional capital . . . . Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income? The case differs *toto coelo* from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities."

Coutts-Trotter, C.J., and Ramesam, J., applied the decision in *Inland Revenue Commissioners* v. *Blott*: *Inland Revenue Commissioners* v. *Greenwood*[1] in deciding *Commissioner of Income-tax, Madras* v. *Binny & Co.*[3], where it was sought to make the assessee liable to super-tax on the value of bonus shares. It was held that the Indian Income-tax Act contained no such

1. (1921) 2 A.C. 171.
2. (1936) 71 M.L.J. 525: L.R. 63 I.A. 457: I.L.R. (1937) 1 Cal. 180 (P.C.)
3. (1924) 47 M.L.J. 242: I.L.R. 47 Mad. 837 (S.B.).

F.B.

Commissioner of Income-tax, Madras *v.* Ramaswami Chettiar.

Leach, C.J.

power. After quoting from the judgment of Viscount Finlay in *Inland Revenue Commissioners* v. *Blott*: *Inland Revenue Commissioners* v. *Greenwood*[1], Coutts-Trotter, C.J., observed:

"You cannot say that there is a notional payment of a dividend to a shareholder when the position is that, if he sued for it, his action must be dismissed, that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance."

The shareholders of the Lakshmi Mills Company have received no portion of the profits which were made in the years ending the 31st March, 1938 and the 31st March, 1939. The money representing the profits remains with the company. All that the shareholders have got are share certificates representing the capitalisation of these profits and an additional sum taken from the reserve. Therefore there has been no release of assets of the company to the shareholders.

It has been said by Mr. Subbaraya Aiyar that the capitalisation of these moneys has not been lawfully carried out. He admits that the company has by reason of its memorandum and articles of association power to capitalise profits, but he says that the notice of the meeting contained no intimation that this would be part of the business before the meeting. In saying this the learned advocate overlooks the fact that with this notice the shareholders received a copy of the annual report in which the directors make the proposal to capitalise the sums making up the Rs. 6,00,000. The Court is only concerned with the question referred, but assuming that the resolution had not been validly passed, even assuming that the meeting had done something which by reason of the memorandum and articles of association it had no power to do, the assessee's position here would be in no way improved. The bonus shares received by him would still not represent dividend income, and he has received nothing but the bonus shares.

We answer the question referred in the negative; and the assessee will pay the Commissioner's costs Rs. 250.

K. S. *Reference answered.*

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1. (1921) 2 A.C. 171.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE SOMAYYA.

Sreemat Prativadhi Bhayankaram Venkata Narasimhacharyulu ... *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council, represented by the Collector of Kistna at Masulipatam and others. ... *Respondents* (*Defendants*).

F.B. — Venkata Narasimhacharyulu *v.* Secretary of State for India in Council.

Madras Revenue Recovery Act (II of 1864), S. 59—Period of six months for filing suit—Computation where application to Collector under Cl. 3 (3) of Madras Regulation VII of 1828 has been made.

Where an application had been preferred to the District Collector under Cl. 3 (3) of Madras Regulation VII of 1928 to set aside the order of a Deputy Collector confirming a revenue sale in exercise of his powers under S. 38 of the Madras Revenue Recovery Act, the period of six months within which the aggrieved party is allowed to apply to the civil Court for redress should be computed not from the date when the Deputy Collector confirmed the sale but from the date when the District Collector declined to interfere.

Chinnammal Achi v. *Saminatha Malavaroyan*, (1907) I.L.R. 30 Mad. 367, overruled.

Baijnath Sahai v. *Ramgut Singh*, (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 (P.C.), *Muthu Korakkai Chetti* v. *Madar Ammal*, (1919) 38 M.L.J. 1: I.L.R. 43 Mad. 185 (F.B.), relied on.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Venkataramana Rao dated 15th March, 1940, and passed in S. A. No. 196 of 1937, preferred to the High Court against the decree of the Court of the Subordinate Judge of Masulipatam in A.S. No. 71 of 1936 preferred against the decree of the Court of the District Munsif of Gudivada in O. S. No. 267 of 1933.

V. Rangachariar and *K. V. Rangachari* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—The substantial question in this appeal is whether *Chinnammal Achi* v. *Saminatha Malavaroyan*[1] was

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* L. P. A. No. 25 of 1940. 17th September, 1941.

1. (1907) I.L.R. 30 Mad. 367.

F. B.

Venkatanarasimhacharyulu v. Secretary of State for India in Council.

Leach, C. J.

rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh*[1] and therefore cannot be allowed to stand.

The appellant instituted a suit in the Court of the District Munsif of Gudivada for a decree setting aside a sale of immovable property which had taken place under the provisions of the Madras Revenue Recovery Act. The allegation was that the fourth defendant had by fraud secured the order for the sale of the property. The sale took place on the 18th July, 1932, and was confirmed by the Deputy Collector on the 28th September, 1932. The appellant discovered the fraud on the 15th November, 1932, and three days later applied to the Collector for an order setting aside the sale. By an order dated the 30th June, 1933, the Collector refused to interfere and consequently on the 18th July, 1933, the appellant filed the present suit.

S. 59 of the Act allows an aggrieved party to apply to the civil Court for redress, subject to the proviso that the suit is instituted within six months "from the time at which the cause of action arose." Cl. 3 (3) of Madras Regulation VII of 1828 gives full power to the Collector to confirm, modify or annul an order passed by a subordinate or assistant and to pass any further order in the case as he may see fit. Parts of the Regulation have been repealed, but this provision is still in force, and it is common ground that it conferred upon the Collector power to confirm or annul the order of sale which was passed by the Deputy Collector on the 18th July, 1932, in respect of the land in suit. The order of the Deputy Collector confirming the sale was passed in pursuance of the authority given to him by S. 38 of the Revenue Recovery Act, which directs confirmation on the expiration of thirty days from the date of the sale, if no application for an order setting aside the sale has been made. If such an application has been filed the question of confirmation of the sale remains in abeyance until the application has been decided. The fact that a Subordinate Collector has confirmed the sale does not, however, prevent an aggrieved party from taking advantage of Cl. 3 (3) of the Regulation of 1828 and in case of fraud he has thirty days from the discovery of the fraud in which to apply to the

1. (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 (P.C.).

F. B.

Venkatanarasimhacharyulu v. Secretary of State for India in Council.

Leach, C.J.

Collector for redress. S. 18 of the Limitation Act specifically provides that where a person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of his right or of the title on which it is founded, the time limited for instituting a suit or making an application shall be computed from the time when the fraud first became known to him.

The District Munsif held that the sale in question was not fraudulent and that the suit was barred by the law of limitation. On appeal the Subordinate Judge of Masulipatam held that fraud had been proved, but he agreed with the District Munsif that the suit was time-barred. The appellant then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who feeling himself bound by the decision in *Chinnammal Achi* v. *Saminatha Malavaroyan*[1], dismissed it, but granted a certificate under the provisions of Cl. 15 of the Letters Patent. In the course of his judgment the learned Judge clearly indicated that in his opinion *Chinnammal Achi* v. *Saminatha Malavaroyan*[1], conflicts with *Baijnath Sahai* v. *Ramgut Singh*[2], but as *Chinnammal Achi* v. *Saminatha Malavaroyan*[1], had been decided some years after the decision in *Baijnath Sahai* v. *Ramgut Singh*[2], he felt that he could not ignore it.

In *Chinnammal Achi* v. *Saminatha Malavaroyan*[1], certain lands were sold on the 10th July, 1901, under the provisions of the Madras Revenue Recovery Act for arrears of revenue. The sale was confirmed by the Head Assistant Collector on the 28th September, 1901. The plaintiffs petitioned the Collector under Regulation VII of 1828 without success, their petition being rejected by an order dated the 10th May, 1902. On the 9th July, 1902, they filed the suit out of which the appeal arose. The appeal was heard by Benson and Miller, JJ., who held that the period of six months allowed for a suit to set aside a sale under S. 59 of the Madras Revenue Recovery Act must be calculated from the date when the sale is confirmed and not from the date when the Collector on revision under Regulation VII of 1828 passes his final order. The learned Judge observed:

" In *Sabapathi Chetti* v. *Rangappa Naickan*[3], it was decided in effect that the sale is incomplete until confirmed, but that case gives no support to the

1. (1907) I.L.R. 30 Mad. 367.
2. (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 (P.C.).
3. (1902) 13 M.L.J. 225: I.L.R. 26 Mad. 495.

F.B.

Venkatanarasimhacharyulu
v.
Secretary of State for India in Council.

Leach, C.J.

contention that a sale is incomplete until the Collector decides whether or not to revise the order of the Officer confirming the sale."

They did not, however, make any reference to the judgment of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh*[1]. Presumably it was not brought to their notice.

The appeal in *Baijnath Sahai* v. *Ramgut Singh*[1], was from a judgment of the Calcutta High Court and had reference to the provisions of the Public Demands Recovery Act (Bengal Act VII of 1880). In 1882 the Collector sold for arrears of road cess and public work cess lands belonging to the plaintiffs. On the 25th January, 1884 the Commissioner confirmed the sale, but on the 12th August, 1884, the sale was set aside by the Board of Revenue at the instance of the plaintiffs. In 1886 the Board of Revenue had occasion to review its order of the 12th August, 1884 and by an order dated the 21st August, 1886, confirmed the sale. In July, 1887, the plaintiffs instituted their suit and the question was whether it had been filed in time. The Judicial Committee held that it was in time as the cause of action did not arise until the Board of Revenue passed its order of the 21st August, 1886, confirming the sale. Lord Davey in delivering the judgment of the Board said:

"Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January, 1884, became definitive and operative by the final judgment of the Board of Revenue on the 21st August, 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date.

* * * *

In fact, their Lordships are of opinion that there was not during the period which had elapsed between the date of the sale and the 21st of August, 1886, any sale to set aside which a suit could have been brought by the present appellant and respondents. Therefore their Lordships are of opinion that the confirmation dates only from August, 1886, and that the law of limitation is not a defence to this action."

Their Lordships here indicate in words which leave no room for doubt that until the final order has been passed no suit lies, which means that time only begins to run from the date of the passing of the final order.

The decision in *Chinnammal Achi* v. *Saminatha Malavaroyan*[2], undoubtedly conflicts with the judgment of the Judicial Committee in the case just referred to and therefore cannot be

1. (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 (P.C.).
2. (1907) I.L.R. 30 Mad. 367.

F.B.

Venkatanarasimhacharyulu v. Secretary of State for India in Council.

Leach, C.J.

allowed to stand. It is also in conflict with the decision of this Court in *Muthu Korakkai Chetty* v. *Madar Ammal*[1], which was decided by a Full Bench of five Judges. There a Court sale was confirmed without opposition on the 26th April, 1913, but on the 3rd January, 1914, an application for an order setting aside the sale was filed, fraud being alleged. The sale was set aside on the 25th June, 1915, as to part of the properties sold. On the 17th February, 1917, the auction purchaser applied for delivery of the remaining properties. The Full Bench held that the application was not barred under Art. 180 of the Limitation Act as time should be computed from the date of the order disallowing the petition asking for the setting aside of the sale and not from the date of the first order of confirmation. Art. 180 fixes the period of limitation for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession at three years from the date when the sale becomes absolute, and it was held that the sale did not become absolute until the application for an order setting it aside had been dismissed.

We consider that the present case is governed by the decision of the Privy Council in *Baijnath Sahai* v. *Ramgut Singh*[2]. The appellant filed his application to the Collector under Cl. 3 of Regulation VII of 1828 in time and until that application had been decided the sale was not finally confirmed. The result is that the appeal will be allowed and the appellant's suit decreed with costs throughout.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Travancore National Bank Subsidiary Co., Ltd. v. Venkataraman.

The Travancore National Bank Subsidiary Co., Ltd., in liquidation through its Official Liquidator, R. Narasimhachari ... *Petitioner** (*Plaintiff*)

v.

M. S. Venkataraman and others ... *Respondents* (*Defendants*).

Contract Act (IX of 1872), S. 50—Chit fund—Subscriber depositing money towards future instalments of subscription in a special savings bank

1. (1919) 38 M.L.J. 1: I.L.R. 43 Mad. 185 (F.B.)
2. (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 (P.C.).

* C. R. P. No. 99 of 1941. 8th September, 1941.

Travancore National Bank Subsidiary Co., Ltd. *v.* Venkataraman.

account as sanctioned by the company conducting the chit—Liquidation of bank—Company to take the risk.

Where the promisor, the subscriber to a chit fund conducted by a company, deposited a certain amount in the manner sanctioned by such company (that is, in a Special Savings Bank account in a Bank) for the performance of the promise (namely, payment of future instalments of subscriptions to the chit fund) the performance is good under S. 50 of the Contract Act and if the Bank goes into liquidation the promisee company has to take the risk.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Madura dated 18th November, 1940 and made in S. C. S. No. 187 of 1940.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Petitioner.

R. Gopalaswamy Aiyangar and *K. Vythinatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The amount in dispute was payable to the Travancore National Bank Subsidiary Co., Ltd., towards future instalments in respect of chits held by the first respondent, the prize winner, and it was deposited in a Chit Savings Bank account in the name of the first respondent in the Travancore National Bank Ltd., in accordance with r. 18 (*b*) of the Chit Fund Rules. R. 4 of the Rules of the Chit Savings Bank account provides that the amount deposited shall not be available for withdrawal for purposes other than for payment of chit instalments till the termination of the particular chit in respect of which the account is opened and under r. 5 the chit fund subscriptions due every month are to be appropriated and adjusted from the Chit Savings Bank account as and when they fall due. R. 6 provides that the Chit Savings Bank account is to be treated as an ordinary Savings Bank account only after the termination of the chit, and there was in effect an assignment to the petitioner of the moneys standing to the credit of the account. The amount was deposited in the manner sanctioned by the petitioner, the promisee, for the performance of the promise and under S. 50 of the Indian Contract Act the performance is good. In the circumstances the promisee has to take the risk and the decision of the lower Court is correct. The revision petition therefore fails and is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

In the matter of the Indian Companies Act, VII of 1913, and *In the matter of* the South Indian General Assurance Co., Ltd., (in liquidation).

K. N. Ramakrishna Aiyar .. *Applicant**

v.

The Official Liquidator .. *Respondent.*

Ramakrishna Aiyar *v.* Official Liquidator.

Company—Insurance company—Policy of insurance—Lapse of, on non-payment of premia for two years—Assignee of policy after lapse—Application by assignee to revive policy—Company agreeing to revive on payment of arrears and production of medical certificate by assignee—Arrears paid—Liquidation of company before production of certificate—If assignee can claim return of amount as a preferential creditor—Company if trustee for the amount.

An assignee of a policy of insurance issued by a company, which had lapsed on default by the assured to pay the premia for two years, applied for revival of the policy and the company agreed to revive it on the assignee paying the arrears of premia amounting to Rs. 140 and production of a medical certificate in respect of the assured. The assignee thereupon sent Rs. 140 to the company which the company acknowledged but stated that it will be kept in a suspense account pending receipt of the medical certificate, though it was actually put into an account called "advance premium receipt account". Shortly thereafter the company went into liquidation and the assignee claimed to be treated as a preferential creditor with regard to this sum of Rs. 140 on the ground that it was held by the company in trust.

Held, that the payment to the insurance company was for a specific purpose which did not involve any payment by the company to any third person nor was it agreed that the money should be returned to the applicant upon the happening of any specified event. At the time the applicant paid the Rs. 140 it cannot be said that the company received it in any fiduciary capacity. That being so no question of trust arose and the applicant cannot rank as a preferential creditor.

Prayers in Judge's Summons to show cause:—

1. Why the applicant should not be paid in full the sum of Rs. 140 in priority to other creditors;

2. Why such further or other orders should not be passed.

A. K. Sreeraman for applicant.

The Court made the following

ORDER.—The applicant is a creditor of the company which is being wound up. The Official Liquidator refused to place him in the list of preferential creditors and the object of this appli-

* O. P. No. 206 of 1940.
Application No. 1576 of 1941. 22nd August, 1941.

cation is to obtain an order that he should be treated as such preferential creditor.

Rama-krishna Aiyar v. Official Liquidator.

The ground upon which preference is claimed is that a sum of Rs. 140 was paid by the applicant to the company in circumstances which created a trust, the company being the trustee and the applicant the *cestui que trust.*

The applicant was the assignee of a policy of insurance issued by the company in respect of which about two years premia were in arrears and the policy had lapsed. After correspondence passing between the applicant and the company, Exs. P. 1 to P. 5, in which the company stated that upon payment of the amount of the premia in arrear amounting to Rs. 140 and a medical certificate being supplied in respect of the person insured by the policy, this would be revived. On the 20th June, 1940, the applicant sent a cheque for Rs. 140 to the company to meet the amount of the premia unpaid. The company acknowledged payment on the 16th July, 1940, stating that the medical certificate had not been forthcoming, but upon its receipt, it would consider revival of the policy and meanwhile, the sum of Rs. 140 was placed in the suspense account involving no risk to the company. In fact, the company did not place it in any account named "suspense", but in an account called "advance premium receipt account". Within a few days of payment, the liquidation of the company commenced and no further step was taken in regard to the policy or its revival.

Learned counsel for the applicant contends that this sum of Rs. 140 was paid for a specific purpose, namely, in order to obtain a revival of the policy and this purpose not having been fulfilled, the company then must have occupied a fiduciary position and it was their duty to return the money in full to the applicant, a trust having been created of which the company was the trustee and the applicant *cestui que trust.* In support of this argument, a number of authorities decided both in England and in India were cited: *Edwards* v. *Glyn*[1], *Farley* v. *Turner*[2], *Official Assignee of Madras* v. *Natesam Pillai*[3], and *Gopalakrishna* v. *The Official Liquidators, T. N. & Q. Bank*[4]. In these four cases, it was held that a trust existed, the circumstances in each being either money was paid to the payee,

1. (1859) 2 E.L. & E.L. 29: 121 E.R. 12. 2. (1857) 26 L.J. Ch. 710.
3. (1940) 1 M.L.J. 254. 4. (1939) 1 M.L.J. 209.

Ramakrishna Aiyar *v.* Official Liquidator.

usually a banker, with instructions for the money to be paid to a specified third party or money was received by the payee upon the terms that it was to be repaid by the payee subject to certain conditions, the latter case being the amount of the security deposit paid by an employee to an employer in respect of his services and to be returned at the termination of the employment subject to any claim which the employer might have against the employee.

Whenever money is paid by one person to another it can be said that it is remitted for a specific purpose. The buyer pays to a seller of goods or a hirer for the hire of an article but because money is so paid that does not *ipso facto* make the recipient the trustee. If the goods are not delivered or the article hired is not supplied, as the case may be, there is failure of consideration and the one making the payment is entitled to recover the amount from the payee on an implied contract for the return of money, the consideration for which has wholly failed. In the *Official Assignee of Madras* v. *G. Smith*[1], it was held that a trust would exist when a banker is to collect and remit but not when he is to use and repay. In the four authorities to which learned counsel for the applicant referred, it was contemplated at the time of payment that the payee received the money in a fiduciary capacity. The payment to the Insurance company of a sum of Rs. 140 was for a specific purpose which did not involve any payment by the company to any third person nor was it agreed that the money should be returned to the applicant upon the happening of any specified event. The object for which the payment was made and which was the consideration for the payment has failed inasmuch as the policy has not been revived since liquidation of the company took place before it could be effected. I cannot find that when the applicant paid to the company Rs. 140 the company received this money in any fiduciary capacity. That being so, no question of trust arose.

The sole basis upon which the claim is made for the applicant to be treated as a preferential creditor is that he was the *cestui que trust* and the company was the trustee of the sum of Rs. 140. In my view, that is not the position. Consequently, this application fails and is dismissed. No order as to costs.

S.V.V. ——— *Application dismissed.*

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1. (1908) I.L.R. 32 Mad. 68.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Thayyanayaki Ammal by agent Viswalingam Chettiar ... *Appellant** (*Plaintiff*)

v.

Minor Sundarappa *alias* Apath Sahaya Kandiar, by his mother and guardian Alamelu Ammal (dead) and others. ... *Respondents* (*Defendants 1 to 8*).

Limitation Act (*IX of 1908*), *S. 20—Part payment by mortgagor who has parted with the mortgaged property—If saves right of suit against the purchaser of the equity of redemption.*

Thayyanayaki Ammal *v.* Sundarappa.

In *Pavayi* v. *Palanivelu,* (1940) 1 M. L. J. 766: I.L.R. (1940) Mad. 872 (F.B.), the real question was whether for purposes of S. 19 which requires that an acknowledgment of liability in respect of any property or right must in order to be effective, be given by "the party against whom such property or right is claimed by some person through whom he derives title or liability", the derivation of title or liability should take place after the acknowledgment has been given, and it was held that it should. But no such question can arise on the language of S. 20 which unlike S. 19 does not require that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability. S. 20 simply enacts that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. Payment stands on a different footing from acknowledgment as regards its effect in saving rights of action. Accordingly part payment by a mortgagor under his personal liability after he has parted with the mortgaged properties saves the right of suit against the purchaser of the equity of redemption from the bar of limitation.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 65 of 1937.

K. V. Krishnaswami Aiyar for Appellant.

C. A. Seshagiri Sastri, M. Krishna Bharathi, V. Natesan, S. Swaminathan, P. R. Srinivasan, K. Srinivasan and *M. S. Venkatarama Aiyar* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This appeal has been preferred by the plaintiff from a decree of the Subordinate Judge, Kumbakonam, dismissing a suit brought to enforce a mortgage executed by one Rajagopala Kandiyar on 4th June, 1913. Plaintiff claims title to the mortgage under the will of her father Sabapathi Chetti who was the son of the mortgagee and died in December, 1934. The first defendant is the son of the mortgagor and the

* Appeal No. 436 of 1938. 5th September, 1941.

Thayya-nayaki Ammal *v.* Sundarappa.

Patanjali Sastri, J.

sixth defendant is the Official Receiver of Tanjore in whom the estate of the mortgagor has become vested on his adjudication as insolvent. The other defendants claim interest as purchasers in different items of properties comprised in the mortgage. The suit was filed in 1937 and certain part payments alleged to have been made from time to time and endorsed on the bond by the mortgagor were relied on as extending the period of limitation. The Court below held that some of these alleged payments and endorsements were not genuine and dismissed the suit as barred by limitation, and the main question argued in the appeal is whether this finding is correct.

There are five endorsements on the mortgage bond (Ex. A) and these have been marked as Exs. A-1 to A-5. Of these, the first three endorsements evidencing payments of Rs. 521-11-6, Rs. 100 and Rs. 10 made respectively on 11th December, 1914, 9th April, 1916 and 6th April, 1922, are admitted to be genuine, and the dispute relates to the last two (Exs. A-4 and A-5), dated respectively 23rd February, 1928 and 13th November, 1932. (After discussing the evidence His Lordship concluded:)

* * * * *

We are therefore unable to agree with the Subordinate Judge's conclusion that the endorsements Exs. A-4 and A-5 were fabricated in order to save the suit from the bar of limitation.

It was next argued on behalf of the second defendant the alienee of the tenth item, that even if the disputed payments and endorsements were genuine, they could not operate to save the right of suit against this defendant, as he had purchased the property in 1917 long before these payments and endorsements were made by the mortgagor. Reliance was placed in support of this contention on the recent Full Bench decision of this Court in *Pavayi* v. *Palanivelu*[1], of which the head-note runs thus:

"A mortgagor who has lost all interest in the mortgaged property cannot bind by an acknowledgment under S. 19 or by a payment of principal or interest under S. 20 of the Indian Limitation Act, 1908, the person on whom his interest has devolved, whether the devolution is of the whole of the mortgaged properties or only of a part thereof. In order to be binding on the assignee, the acknowledgment or payment must be made before the

1. I.L.R. (1940) Mad. 872 (F.B.).

Thayyanayaki Ammal v. Sundarappa.

Patanjali Sastri, J.

person making it has parted with his interest in the property to the assignee."

This would seem, no doubt, to support the contention, but it appears from the facts stated by the Full Bench who were dealing with a case placed before them and not answering a question of law referred to them that when the mortgagor made the payment there was no subsisting liability to pay as the enforcement of the personal covenant had become barred and the mortgaged property had been alienated before the date of such payment. In view of this fact, it could hardly have been maintained that there was a payment by the debtor or the person liable to pay within the meaning of S. 20 of the Act, and no question could therefore arise with reference to that provision. This was pointed out at page 886 where it was observed:

"A payment of interest to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorised in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt."

It is thus clear that the Full Bench were not concerned on the facts before them with the question whether a part payment by a mortgagor who has parted with the mortgaged property but is personally liable to pay on his covenant saves the right of suit against the purchaser of the equity of redemption. It will be seen that the payment there in question was towards interest and was endorsed on the bond, the endorsement being signed by the mortgagor. It was therefore argued that the payment so endorsed could be considered to be a valid acknowledgment under S. 19 as it fulfilled the requirements of that provision and the question arose—this was the point which the Full Bench had really to determine—whether for purposes of S. 19 which requires that an acknowledgment of liability in respect of any property or right must, in order to be effective, be given by "the party against whom such property or right is claimed or by some person through whom he derives title or liability," the derivation of title or liability should take place after the acknowledgment has been given. It was held that it should, following certain English and Indian decisions. But no such question can arise on the language of S. 20, which so far as it is material here runs thus:

"Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by

Thayyanayaki Ammal *v.* Sundarappa.

Patanjali Sastri, J.

the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made."

It will be observed that this section does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. A fresh period of limitation for what suit? Evidently for such suit as the creditor might have brought before the expiration of the prescribed period. That is to say, the right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period. This difference in language is the more remarkable as S. 20 follows immediately on S. 19 which has made an acknowledgment binding only on the party making it or some person in privity with him. The following observations of the Privy Council in *Lewin* v. *Wilson*[1] are here pertinent:

"It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane*[2], be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas, payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights, but not so if he only receives acknowledgment. If, therefore, we find that the legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it".

The view we have expressed is in accord with the decision of the Calcutta High Court in *Dom Lal Sahu* v. *Roshan Dobay*[3], the principle of which has also been followed in *Roshan Lal* v. *Kanhaiya Lal*[4] and *Badri Das* v. *Pasupati Banarji*[5].

We may here observe that even under the English Statutes of Limitation it has been recognised that payment stands on a different footing from an acknowledgment as regards its effect in saving rights of action. After reviewing the various statutory provisions and the decisions bearing upon them, Light-

1. (1886) 11 A.C. 639. 2. (1863) 1 De G. J. & S. 122: 46 E.R. 47.
3. (1906) I.L.R. 33 Cal. 1278. 4. (1918) I.L.R. 41 All. 111.
5. (1932) I.L.R. 12 Pat. 93.

Thayyanayaki Ammal v. Sundarappa.

Patanjali Sastri, J.

wood observes:

"The statutory provisions although varying slightly in their language are all subject to the same rule; the payment if so made as to be effectual at all is effectual to keep alive the creditor's remedies generally. Thus a payment by a person entitled to make it will keep alive the remedy on a mortgage or charge against the land although the person making it is not in possession of the land or in possession of a limited interest only; it will keep alive the personal remedy on a covenant although the remedy is to be enforced against another than the person paying; and after the death of a mortgagor or specialty debtor a payment by any one person interested in the estate will keep alive the liability of all other persons interested". (The Time Limit on Actions, page 365).

It was further contended for the second defendant that the property purchased by him, that is, item 10 of the plaint schedule, should be directed to be sold last as he purchased it in 1917 paying full consideration to the mortgagee. Similarly, the learned advocate for the fifth defendant urged that the properties in which he is interested, namely, items 1 to 5 should be sold after items 6 to 8 purchased by the seventh defendant from the Official Receiver and transferred to the eighth defendant. It was pointed out that the fifth defendant purchased all the properties comprised in the mortgage as well as some other properties in Court auction in execution of a money decree against the mortgagor in December, 1925 and that he subsequently sold the properties so purchased other than items 1 to 5 back to the mortgagor by a sale deed dated 16th June, 1928 reserving the bulk of the consideration with the mortgagor for discharging this mortgage, which, however, the mortgagor failed to do. It was, therefore, urged that items 6 to 9 which were among the items thus sold to the mortgagor and which have subsequently passed by transfer to the eighth and the ninth defendants should be sold before items 1 to 5. We consider that the equity claimed by the second and fifth defendants should prevail and we accordingly direct that items 6 to 8 held by the eighth defendant and item 9 purchased by the third defendant should be sold before items 1 to 5 in the hands of the fifth defendant and item 10 in the hands of the second defendant are brought to sale.

It only remains to deal with the claim of the defendants 2, 4, 5 and 8 to relief under the Madras Agriculturists' Relief Act. The Court below has held that inasmuch as the debt was incurred originally by an agriculturist, these defendants are entitled to the benefits of the Act as transferees from him, whether they are themselves agriculturists or not. This view

Thayyanayaki Ammal *v.* Sundarappa. —— Patanjali Sastri, J.

is not correct as we have held that a person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in S. 3 (*ii*). As the issues relating to this matter have not been determined by the Court below, they must now be investigated and if these defendants are proved to be agriculturists, the debt will have to be scaled down so far as they are concerned.

In the result, the decree dismissing the suit is set aside and a preliminary mortgage decree will be passed by the Court below in the light of this judgment after determining issues 5 and 8. The appellant will have her costs here and below. The court-fee paid by the appellant will be refunded to her. As against defendants 2, 4, 5 and 8, the appellant will be entitled only to proportionate costs in the trial Court and here.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

K. Sambasiva Aiyar and others .. *Appellants* (Respondents 1 to 4 and 6)*

v.

The Official Receiver, West Tanjore, at Tanjore ... *Respondent (Petitioner).*

Sambasiva Aiyar *v.* Official Receiver, West Tanjore.

Provincial Insolvency Act (V of 1920), S. 51—Admission of petition—Crucial date—Date of acceptance of petition—Assets, realisation of—Sale of several lots under one proclamation—Sale not one and indivisible—'Benefit of execution'—Meaning of—Official Receiver—Right to interest.

If the Court accepts an insolvency petition as having been validly presented, it means that the insolvency petition is admitted on that day for the purposes of the Act.

If by a sale proclamation more than one lot of property is sold, it is impossible to regard such a sale as one and indivisible, in connection with the determination of the date or dates of the realisation of assets.

Ramanathan Chettiar v. *Subramania Sastrial,* (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179, not followed.

Girindra Nath Ray v. *Kedar Nath Bidyanta,* (1924) 29 C.W.N. 575, relied on.

The expression 'benefit of execution' means the sum realised less any expenses incurred in realising it.

Decision of Wadsworth, J., in C. M. A. No. 175 of 1937 followed.

The Official Receiver is entitled to interest upon any amount due to him in the course of administration of the estate.

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* A. A. A. O. Nos. 127 and 136 of 1939. 24th September, 1940.

Sambasiva Aiyar *v.* Official Receiver, West Tanjore.

Appeals against the order of the District Court of West Tanjore, Tanjore, dated 27th July, 1939, in C. M. A. No. 53 of 1939 preferred against the order of the Court of the Subordinate Judge of Tanjore, dated 3rd September, 1938, in I. A. No. 276 of 1936 in I. P. No. 15 of 1933.

R. Sundaralingam and *A. V. Visvanatha Sastri* for Appellants.

T. K. Subramania Pillai for Respondent.

The Court delivered the following

JUDGMENT.—These are appeals by five persons who were in 1933 some of the creditors of one Kasinatha Aiyar. One of the appellants in C. M. S. A. No. 136 (respondent 6 in the Courts below) was pursuing execution against Kasinatha Aiyar and on 30th June, 1933, three lots of Kasinatha Aiyar's property were sold in Court auction. Two lots in Annakudi village were sold for Rs. 7,500, which amount was paid in full there and then. The third lot in Manikandi village was sold for Rs. 4,520. One quarter of this amount was deposited on 30th June as required by O. 21, r. 84, and the remaining three-quarters on 4th July. The sum of Rs. 12,020 was treated as assets realised and rateably distributed amongst the appellants and another creditor who has not appealed. On 3rd July, an insolvency petition was presented against Kasinatha Aiyar which resulted in his adjudication. The Official Receiver in administering his estate applied to the Court for an order directing the appellants to pay to him the sums which had thus been distributed to them, with interest: and such an order has been passed in appeal by the learned District Judge of West Tanjore under the provisions of S. 51 of the Provincial Insolvency Act. Whether that order is right or wrong is the issue in these appeals.

S. 51 (1) of the Provincial Insolvency Act runs as follows:—

"Where execution of a decree has issued against the property of a debtor no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

There are four points for determination in these appeals:

(*i*) What is the date of the admission of the insolvency petition?

Sambasiva Aiyar v. Official Receiver, West Tanjore.

(*ii*) What is the date (or, are the dates) of the realisation of the assets?

(*iii*) If the Receiver is found entitled to all or any of these assets what is the precise meaning of benefit of the execution? and

(*iv*) Is the Receiver entitled to interest on any sum awarded to him?

On the first point the District Judge has held that the insolvency petition was admitted on 3rd July. I have already mentioned that it was presented on that date. On its presentation the Court ordered 'check and file emergently'. It was checked and was filed, and on the same day the Court further ordered that publication charges should be deposited by 7th July. On 7th July, notice and publication were ordered. It is now argued for the appellants that the insolvency petition was not 'admitted' until 7th July, and I am referred to a ruling in *Narasimha Pattamahadevi* v. *Annan Naidu*[1] as an authority for the position that the order to issue notice constitutes the act of admission. In many cases this may well be so but it cannot be a universal rule of law. In the present case it cannot be disputed that the Court on 3rd July accepted the insolvency petition as having been validly presented, and that, in my opinion, means that the insolvency petition was admitted on that day. I hold accordingly and it will now follow that any assets realised after 3rd July must go to the Official Receiver.

I come accordingly to the second point, and here repeat that two sums, Rs. 7,500 and Rs. 1,130 respectively, were paid into Court on 30th June and that Rs. 3,390 was paid in on 4th July. Clearly then the Official Receiver is entitled to at least Rs. 3,390. He is also entitled to the sum of Rs. 1,130. It has been held by a Bench of this Court (see *Ramanathan Chettiar* v. *Subramania Chettiar*[2]) that in a case of this kind assets are realised only when the full amount of the bid is deposited. There remains the principal item of Rs. 7,500. This sum too has been held by the learned District Judge to have been realised only on 4th July, on the authority of *Ramanathan Chettiar* v. *Subramania Sastrial*[3]. That is the decision of a single learned Judge Sir Arnold White, then Chief Justice of Madras, from which I must most respectfully express my dissent. I do so for

1. (1940) 1 M.L.J. 350.
2. (1924) 47 M.L.J. 759: I.L.R. 48 Mad. 656.
3. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.

Sambasiva Aiyar v. Official Receiver, West Tanjore.

the following reasons: In the first place it seems contrary to plain language and to common sense to say that Rs. 7,500 which was actually realised on 30th June was not realised until 4th July. The learned Chief Justice gives no reasons for his view. It seems to me upon a critical examination of the position that the assets can be deemed not to have been realised on 30th June only if they are held insecurely and may prove, on the happening of some subsequent event, not to be assets after all, but only a temporary deposit. That is clearly the reason why the 25 per cent. deposit of Rs. 1,000 in this case was not assets, until the remaining 75 per cent. had been paid. If the 75 per cent. were not paid, immediate re-sale of the property is obligatory (*see* O. 21, r. 86). There is therefore no sale and no assets can have been realised.

Now the subsequent event which the learned District Judge here holds converts the Rs. 7,500 paid on 30th June into assets realised on 4th July is the payment of the remaining Rs. 3,390 upon the third lot. I ask myself in vain why it should have this effect. The two transactions are quite distinct. If the Rs. 3,390 were not paid and a re-sale were necessary under O. 21, r. 86 it is conceded that the re-sale would be confined to the third lot. How then can the nature of the payment made on 30th June be in any way affected by the payment or non-payment on 4th July, of money due on different property? It is also clear law that when a sale is set aside under O. 21, r. 90 it can be set aside in respect of one lot only. (See *Ramachandra Aiyar* v. *Parvathi Ammal*[1] and *Narasimhamurthy* v. *Official Receiver, West Godavari*[2].) It seems to me therefore very evident that the sale of three lots of property—though originating from a single proclamation of sale—is really equivalent to three sales. It is impossible to regard such a sale as one and indivisible on which basis alone, I think, can there be any logical principle for following *Ramanathan Chettiar* v. *Subramania Sastrial*[3].

I have been referred to only two other decisions on this matter. In *Barendra* v. *Martin & Co.*[4], (a judgment delivered in 1920) a Bench of the Calcutta High Court follows *Ramanathan Chettiar* v. *Subramania Sastrial*[3] without any discussion.

1. (1910) M.W.N. 834. 2. (1935) I L.R. 59 Mad. 438.
3. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
4. (1920) 33 C.L J. 7.

Sambasiva Aiyar *v.* Official Receiver, West Tanjore.

In *Girindra Nath Ray* v. *Kedar Nath Bidyanta*[1], (a judgment delivered in 1924) another Bench of the same High Court takes the opposite view, though without reference to *Ramanathan Chettiar* v. *Subramania Sastrial*[2]. It sets out the essence of what is in my opinion a very simple matter in these simple words:

"The properties were sold separately, their sale proceeds were realised separately, and the sale of each lot was completed when the whole of the balance of the purchase money was deposited in Court."

I accordingly hold that the sum of Rs. 7,500 represents assets realised on 30th June, and that the Official Receiver's claim in respect of this sum must be dismissed.

As I have held that the appellants have no title to retain the sum of Rs. 4,520 realised for the third lot the question next arises whether they must refund that sum in full, or whether the 'benefit of execution' means that sum less any expenses incurred in realising it, and if so, what is the measure of those expenses. Three different views have been taken by three learned Judges of this Court, all sitting singly. These cases in chronological order are:

(*i*) *Swaminatha Aiyar* v. *Official Receiver, South Malabar*[3], where it was held that the benefit of execution meant the amount realised less both expenses of the execution petition and expenses of the suit in which the decree was obtained;

(*ii*) *Balarami Reddi* v. *Official Receiver, Nellore*[4], in which the benefit was held to be the gross sum realised without any deductions; and

(*iii*) an unreported decision of Wadsworth, J., in C. M. A. No. 175 of 1937 in which the benefit is held to mean the sum realised less the costs of execution.

I do not think I am called upon to discuss these points of view in detail. I need only say that I agree entirely with the view expressed by Wadsworth, J., in the latest case, and following it, direct that the appellants here be permitted to deduct such costs of the execution petition as were necessary to realise the Rs. 4,520 payable to the Official Receiver.

The final question is whether on the sum so calculated the Official Receiver is entitled to interest. The District Judge

1. (1924) 29 C.W.N. 575.
2. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
3. (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330.
4. (1939) 1 M.L.J. 205: I.L.R. (1939) Mad. 343.

Sambasiva Aiyar v. Official Receiver, West Tanjore.

holds that he is so entitled, as this is a matter analogous to restitution. The appellant's learned advocate attempts to distinguish this case by arguing that, unlike persons whose decrees have been reversed, the appellants had a 'right' to receive the money. But as S. 51 denies them any such right they cannot be said to have possessed it. The parallel with restitution is I think complete, and interest must be allowed. The parties will pay and receive proportionate costs throughout.

Leave granted.

K.C. *Appeals partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE CHANDRASEKHARA AYYAR.

Paramanand Doss Chota Doss and Sons, a firm of Merchants at Madras and others ... *Appellants** (*Defendants*)

v.

Nannulal Kanji and others ... *Respondents* (*Plaintiffs*).

Paramanand Doss Chota Doss & Sons v. Nannulal Kanji.

Transfer of Property Act (IV of 1882), S. 69—Applicability—Mortgagee's power of sale without intervention of Court—If can be conferred by a mortgagor who is the manager of a joint Hindu family—Power of sale—If can be conferred on second mortgagee when first mortgagee was not given such power.

S. 69 of the Transfer of Property Act applies to Hindus and the manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property belonging to the family in Madras City may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. There is nothing in S. 69 of the Transfer of Property Act to prevent a mortgagor giving to a second mortgagee, a power of sale, even when he has not given a similar right to the first mortgagee.

On appeals from the judgment and decree of the Hon'ble Mr. Justice Somayya, dated 30th January, 1940 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 125 of 1936 (Pauper).

V. V. Srinivasa Aiyangar, M. S. Venkatarama Aiyar, L. Krishnadas, K. Rajah Aiyar and *V. Seshadri* for Appellants.

K. Bhashyam Aiyangar S. P. Duraiswami, S. Ramanujachari, K. P. Bhat and *M. Sundaram Aiyar* for Respondents.

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* O. S. A. Nos. 18 and 31 of 1940. 25th September, 1941.

Paramanand Doss Chota Doss & Sons v. Nannulal Kanji.

Leach, C.J.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—These two appeals which arise out of the same judgment raise an important question of law and questions of fact. The question of law is whether a manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property in Madras may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. The appeals have been heard together and can be dealt with conveniently in one judgment.

The suit was filed on the Original Side of this Court by respondents 1 to 7, all of whom are minors. The first and second respondents are the sons of the first defendant in the suit. The third respondent is the son of Mulji Lala, the brother of the first and second defendants. Mulji Lala died before the institution of the suit. Respondents 4 to 7 are the sons of the second defendant. The first and second defendants and Mulji Lala constituted an undivided Hindu family and the family remained joint after Mulji Lala's death, which occurred in 1928. The first defendant has, at all times material to the issues, been the manager of the family. The family is a business family and during the period with which this suit is concerned its activities were confined to building contracts entered into with Railways. The family owned immovable properties in Madras, in the Native State of Sachin and in the District of Surat. The Madras properties consisted of land and premises known as Nos. 34 and 35, Gollavar Agraharam, Tondiarpet, and land and premises known as Nos. 9 and 10, Hunters Road, Vepery. For the sake of convenience I shall refer to the former property as "the Tondiarpet property" and the latter as "the Vepery property."

On the 23rd October, 1931, the first defendant, as manager of the family, mortgaged the Tondiarpet property with the firm of Paramanand Doss Chota Doss and Sons, the third defendant, to secure a loan of Rs. 15,000. The mortgage deed contained a power of sale. On the 27th March, 1935, the first and second defendants created a second mortgage on the Tondiarpet property in favour of the seventh defendant for a sum of Rs. 1,000 and on the 15th April, 1935, a third mortgage in his favour for a like amount. On the 16th November, 1935, the third defendant exercised the power of sale under

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C.J.

the mortgage and the property was purchased by the eighth defendant for the sum of Rs. 16,300. On the 13th October, 1932, the first and second defendants deposited with the fifth defendant by way of equitable mortgage to secure a loan of Rs. 20,000, the title deeds of the Vepery property. The deposit was evidenced by a memorandum executed on the same day. On the 12th May, 1933, the first defendant created a second mortgage in favour of the fourth defendant to secure a loan of Rs. 5,000. This deed also contained a power of sale, which was exercised on the 9th April, 1935, when the property was purchased by the sixth defendant for Rs. 28,500. The plaintiffs allege that all these mortgages are invalid so far as their respective interests in the properties are concerned. It is denied that the monies were required for the business of the family or for any family purpose. They allege that the first and second defendants are addicted to drink, profligacy and gambling and that the moneys raised on the mortgages were spent on vice. They aver that the manager of an undivided Hindu family cannot, even when mortgaging family property for a family necessity, confer upon the mortgagee a power of sale.

The suit was tried by Somayya, J., who held that S. 69 of the Transfer of Property Act does not extend to the manager of a Hindu family when mortgaging family property. On the evidence he found that the mortgage of the Tondiarpet property to the third defendant was binding on the family to the extent of Rs. 6,000, that of the Rs. 15,000 advanced by the third defendant Rs. 10,000 had been repaid, that the first mortgage to the fifth defendant of the Vepery property was valid so far as the family was concerned to the extent of Rs. 10,000 (half the amount of the loan) and that the second mortgage of the Vepery property in favour of the fourth defendant was not binding on the family at all. The seventh defendant in whose favour the second and third mortgages of the Tondiarpet property had been created led no evidence in support of his mortgages and in these circumstances the learned Judge held that they were not binding on the plaintiffs. In the end the learned Judge declared that the plaintiffs were entitled to their shares in the Tondiarpet and Vepery properties, and, as I read his judgment, free from all liability. Appeal No. 18 of 1940 has been filed by the third and eighth defendants

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C.J.

and Appeal No. 31 of 1940 has been filed by the fourth defendant. The fifth and the sixth defendants have filed memoranda of cross-objections in Appeal No. 31 of 1940.

It is manifest that the persons who are responsible for this suit are the first and second defendants. The first defendant has gone so far as to give evidence in support of his sons' allegation against him of immorality and he allowed his motor car driver to be called to give the names of women with whom it is said he had had immoral relations. It is a regrettable fact that the Courts of this Province are not infrequently called upon to decide cases in which Hindu fathers have set their sons up to plead parental immorality in order to defeat alienees of family properties, but until this case came into Court I had never met with a case where a father had gone to the length of supporting by his own evidence a plea of immorality made against him by his son. When the Vepery property was sold on the 9th April, 1935, the first and second defendants wrote to the purchaser offering to buy back the property from him for Rs. 500 more than he had agreed to pay for it. There was no suggestion in the letter that the power of sale had been unlawfully exercised. The notice which preceded the exercise of the power of sale was dated the 30th November, 1934, and no reply was sent. On the 2nd August, 1935, the sixth defendant, the purchaser of the Vepery property, filed a suit against the first and second defendants to recover possession of it, and on the 30th November, 1935, he obtained a decree. On the 17th February, 1936, the present suit was filed and there can be no doubt that its immediate object was to defeat the sixth defendant. The fact that the institution of the present suit had been instigated by the two fathers does not, of course, prevent the plaintiffs from being granted the reliefs to which they are entitled in law, but it is important to bear in mind that the fathers are behind this suit when it comes to consider the evidence relating to the issues of fact.

It will be convenient now to decide the question whether the manager of a Hindu family may lawfully create a mortgage which confers upon the mortgagee a power of sale when the money is required for a family necessity. Somayya, J., is emphatic in his opinion that the manager of a Hindu family is outside the scope of S. 69 of the Transfer of Property Act.

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C. J.

Obviously the learned Judge was greatly impressed by the fact that a power of sale embodied in a mortgage created by the manager of a Hindu family might mean, that the other members of the family would not have recourse to the property should the mortgage prove to be invalid and they would have to be content with a money decree, which might not be enforceable. The learned Judge's reasons for holding that the manager of a Hindu family is outside the scope of S. 69 are that the section was passed in the interests of the commercial community, that it does not profess to affect or modify the rules of Hindu law and that there is no authority in the manager of the family to delegate his powers. Accepting all this to be true, it does not follow that the manager of a Hindu family cannot avail himself of S. 69 when he has occasion to mortgage family property for a family necessity.

The section applies to Hindus and the manager of an undivided Hindu family is himself always a Hindu. The wording of the section is free from ambiguity. It says that notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, a mortgagee or any other person acting on his behalf, shall subject to the provisions of the section have power to sell or concur in selling the mortgaged property or any part of it, in default of payment of the mortgage money, without the intervention of the Court in certain specified cases. One of the cases specified is where a power of sale without the intervention of Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part of it was on the date of the execution of the mortgage deed situate within certain towns, of which Madras is one of those named. The section goes on to provide that the power shall not be exercised until (*a*) notice in writing requiring payment of the principal money has been served on the mortgagor or on one of several mortgagors and default has been made in payment of the principal money or part of it for three months after the service of the notice or (*b*) some interest under the mortgage amounting at least to Rs. 500 is in arrear and unpaid for three months after becoming due. In passing it may be mentioned that it is not suggested that the notices which were served by the third and fourth defendants were in any way defective. There is nothing in the section itself or in any part of the Act which indicates that it does not

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C. J.

apply to a mortgage created by a managing member of a Hindu family and this being the case the Court is bound to give effect to it, even if there is a manifest hardship in its application. I do not suggest that the section works any hardship in this case, but supposing that it did the Court could not take the hardship into consideration. The case must be decided on what the section says. Of course there must be a power to mortgage. Unless money is required for the purposes of the family the manager has no power to mortgage, and if a mortgage is itself invalid the deed cannot confer a power to sell. This has been freely conceded by the appellants.

But the matter can be carried further. A power to mortgage in itself implies a power to give the mortgagee a right of sale, if the conditions in the mortgage with regard to repayment are not fulfilled. The power can undoubtedly be taken away by statute, but in the case of a mortgage of property by deed in one of the specified towns the right to give such a power has in fact been recognised by the inclusion of S. 69 in the Transfer of Property Act. In *Russell* v. *Plaice*[1], Romilly, M. R., said:

> "The power of sale given to a mortgagee must, I think, be considered, not as the delegation of a power entrusted to the executor, which is a power to sell for the benefit of his *cestui que trust*, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage."

In that case the question was whether an executor could give a power of sale when mortgaging property of the estate. It was contended that he could not, but this contention was emphatically overruled and the opinion expressed by Romilly, M.R., has been accepted as a correct statement of the law. In *Bridges* v. *Longman*[2] Romilly, M.R., had occasion to refer again to this question. In that case he observed:

> "I think that no objection can be taken before me that the power of mortgaging was executed by means of a mortgage, which contained a power of sale, because I think that such a power is incident to the power to mortgage unless expressly excluded."

In *Niamat Rai* v. *Din Dayal*[3], the Privy Council held that it was for the manager to decide whether he should mortgage or

1. (1854) 52 E.R. 9. 2. (1857) 53 E.R. 267.
3. (1927) 52 M.L.J. 729: L.R. 54 I.A. 211: I.L.R. 8 Lah. 597 (P.C.)

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C. J.

sell. In delivering the judgment of the Board, Sir John Wallis said:

"The learned Judges of the High Court were of opinion that, as in this case the business had recently resulted in loss, the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of by sale. As regards the latter question, it is not clear that borrowing, probably at a high rate of interest, would have been more beneficial than sale. In any case, this was a question for the manager to decide".

As the manager of an undivided Hindu family may sell or mortgage as he deems fit for the purpose of raising money for a family necessity it follows that, apart from any statutory provision to the contrary, he has the right to confer upon a mortgagee a power of sale. Of course where the Transfer of Property Act is in force the mortgage must be one of those specified in S. 69. In *Kanhayalal* v. *The National Bank of India, Ltd*[1], the Privy Council held that a power of sale embodied in a mortgage of property situate in a part of India where the Transfer of Property Act did not apply was a lawful provision.

Therefore, we have these factors in favour of the contention of the appellants: (1) S. 69 applies to Hindus and there is no indication in the Act that the Legislature intended to exclude a mortgage created by the managing member of an undivided Hindu family, (2) the power to mortgage in itself implies a power in the mortgagor to confer upon the mortgagee a right to sell the mortgaged property without the intervention of the Court, and (3) the manager of an undivided Hindu family has the power to sell as well as to mortgage. This being the position it seems to me that the considerations which weighed with Somayya, J., must be ignored. It follows that I consider that the learned Judge misread S. 69. Should it be found that the section results in hardship to members of joint Hindu families, the remedy lies with the Legislature but it must be remembered that the section does not apply to moffussil mortgages, and comparatively speaking there is little scope for the misuse of it.

The plaintiffs contend that even if the mortgagee of the Vepery property was entitled to exercise the power of sale mentioned in the deed there could in law be no sale of the mortgaged property without the intervention of the Court. This contention is based on the fact that the power of sale was

1. (1923) 45 M.L.J. 497: L.R. 50 I.A. 162: I.L.R. 4 Lah. 284 (P.C.).

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C.J.

only conferred on the second mortgagee. The first mortgagee admittedly concurred in the exercise of the power by the second mortgagee, of course, on the understanding that he was paid first. The plaintiffs say that the first mortgagee had no right to concur in the sale by the second mortgagee, but here again the provisions of S. 69 of the Transfer of Property Act are overlooked. There is nothing in the section to prevent a mortgagor giving to a second mortgagee, if he likes to do so, a power of sale, even when he has not given one to the first mortgagee. Sub-section (1) of the section says that a mortgagee or a person acting on his behalf shall, subject to the provisions of the section have power to sell or concur in selling the mortgaged property. There can be nothing plainer than this and the first mortgagee in this case did in fact concur. Therefore if the second mortgage was lawfully created the sale of the Vepery property to the sixth defendant cannot be disturbed.

I now come to the findings of fact and I will commence with the findings of the learned Judge with regard to the mortgage of the Tondiarpet property. As already mentioned, the appellants here are the third and the eighth defendants. Mr. V. V. Srinivasa Aiyangar on their behalf has given no reason for challenging the finding of the learned Judge that only Rs. 6,000 out of the Rs. 15,000 advanced by the third defendant on this mortgage can be regarded as binding on the family. In fact he has made no attempt whatever to dispute the correctness of the learned Judge's conclusion. Therefore the finding must be accepted. It is equally clear that the learned Judge was right in holding that there remains only Rs. 5,000 of the principal sum advanced on this mortgage. On the 2nd November, 1938, Rs. 10,000 of the Rs. 15,000 was repaid. It is not disputed that the Rs. 10,000 came out of moneys belonging to the family and this being the case the family liability of Rs. 6,000 was discharged. But as the property has been lawfully sold the plaintiffs have lost their interests in it. Their rights are now restricted to the proceeds of the sale. Sub-S. (4) of S. 69 says that the money which is received by the mortgagee arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under S. 57 of a sum to meet a prior incumbrance, shall, in the absence of a contract to the contrary

Paramanand Doss Chota Doss & Sons *v.* Nannulal Kanji.

Leach, C.J.

be held by him in trust to be applied, first in payment of all costs, charges and expenses incurred in connection with the sale; and secondly, in discharge of the mortgage money and costs and any other money due under the mortgage; and the residue shall be paid to the person entitled to the mortgage property. Consequently the plaintiffs are merely entitled to payment of their shares in the balance of the Rs. 16,300 which was realised by the sale of the property, after the expenses of the sale have been met and the mortgagee has received all which he is entitled to in law as against the plaintiffs.

(His Lordship then dealt with the findings and concluded.)

* * * *

The result is that the decree passed by the learned Judge will be set aside and the suit remanded to the Original Side for the taking of an account of what the plaintiffs are entitled to receive out of the proceeds of the sales of the properties. During the arguments the Court indicated that this course might be adopted should it consider that the learned Judge had misread S. 69 of the Transfer of Property Act and find that the mortgages are binding, either in whole or in part, on the family. No objection was raised to this course being adopted and the parties accepted the position that if the plaintiffs have lost all interest in the properties themselves they are entitled to have recourse to the sale proceeds in this suit. The account will be taken in the light of this judgment and regard will be had to considerations arising out of the personal law of the minors, such as their liability under the pious obligation rule. When the account has been taken the trial Court will pass a fresh decree.

The appellants in each appeal are entitled to their costs against respondents 1 to 9 and I consider that the fifth defendant should have his cost on Rs. 4,556-11-11 in respect of his cross-objections but that no costs should be awarded on the memorandum of objections filed by the sixth defendant. The plaintiffs have sued *in forma pauperis.* The question of the court-fee will be decided by the learned Judge when he is giving directions for the drawing up of the new decree. He will also decide the question of the costs to be awarded in the trial Court.

Chandrasekhara Ayyar, J.

Chandrasekhara Ayyar, J.—I agree and have nothing to add.

K. S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

K. V. Narayanaswami Aiyar .. *Appellant** (*Respondent*)

v.

Sevadappa Goundar .. *Respondent* (*Appellant*).

Narayanaswami Aiyar *v.* Sevadappa Goundar.

Civil Procedure Code (V of 1908), S.11—Scope—Mortgagor adjudged insolvent—Suit by mortgagee to enforce his mortgage making Special Receiver a party—Application by Receiver in insolvency for setting aside mortgage as one without consideration—Both suit and application heard together—Suit decreed and application dismissed—Appeal only against order dismissing Receiver's application—Decree in the suit if operates as res judicata.

A mortgagee instituted a suit to enforce his mortgage on the 23rd June, 1931 and impleaded as a party the Special Receiver in the insolvency of the mortgagor who had been adjudicated an insolvent on the 25th October, 1930, in the same Court. On the 20th August, 1931, the Special Receiver applied in the insolvency proceedings for an order setting aside the mortgage under the provisions of Ss. 4 and 53 of the Provincial Insolvency Act. The suit and the application were heard together and the mortgage was held to be valid. The consequence was that the Court granted the mortgagee a preliminary decree and dismissed the Receiver's application. The Receiver filed an appeal against the order dismissing his application but filed no appeal against the preliminary decree.

Held, that the unappealed decree did not operate as *res judicata* in the appeal against the order.

Panchanada Velan v. *Vaithinatha Sastrial*, (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.) followed.

Decision in (1940) 1 M.L.J. 647 reversed.

Appeal under Clause 15 of the Letters Patent against the order and judgment of the Hon'ble Mr. Justice King dated 5th January, 1940 and passed in A. A. A. O. No. 84 of 1938, [(1940) 1 M.L.J. 647], preferred against the order of the District Court of Coimbatore dated 18th October, 1937 and passed in C. M. A. No. 55 of 1935 preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 9th October, 1934 and passed in I. A. No. 816 of 1931 in I. P. No. 17 of 1930.

K. Bhashyam Aiyangar, C. V. Subramania Aiyar and *T. R. Srinivasan* for Appellant.

K. V. Krishnaswami Aiyar and *M. Krishna Bharathi* for Respondent.

The Judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—The question in this appeal is whether the case falls within the Full Bench decision of this Court in

*L. P. A. No. 9 of 1940. 25th November, 1940.

Narayanaswami Aiyar *v.* Sevadappa Goundar.

Leach, C.J.

Panchanada Velan v. *Vaithinatha Sastrial*[1]. The appeal is under Clause 15 of the Letters Patent from a judgment of King, J. The learned Judge considered that the case did not fall within that decision, but gave a certificate permitting the filing of this appeal. After a careful consideration of the facts and the judgment in *Panchanada Velan* v. *Vaithinatha Sastrial*[1], we are of the opinion that this appeal should be allowed.

The facts are these. On the 25th October, 1930, one Sengoda Mudaliar was adjudicated an insolvent in the Court of the Subordinate Judge of Coimbatore. On the 9th December, 1927 the insolvent mortgaged certain immoveable property belonging to him to the respondent to secure a sum of Rs. 7,000. On the 23rd June, 1931, the mortgagee instituted a suit in the same Court to enforce the mortgage and made the appellant who is the Special Receiver in the insolvency a party. On the 20th August, 1931 the appellant applied to the Subordinate Judge in the insolvency proceedings for an order setting aside the mortgage under the provisions of Ss. 4 and 53 of the Provincial Insolvency Act. The respondent's suit and the appellant's application were heard together and by a judgment dated the 9th October, 1934, the Subordinate Judge held that the mortgage was valid. The consequence was, he granted the respondent a preliminary decree and dismissed the appellant's application under Ss. 4 and 53 of the Provincial Insolvency Act. The appellant appealed to the District Judge of Coimbatore against the order dismissing his application, but filed no appeal against the preliminary decree. The District Judge reversed the decision of the Subordinate Judge and this resulted in the respondent appealing to this Court. His contention was that inasmuch as the appellant had not appealed against the mortgage decree the judgment of the Subordinate Judge in the suit operated as *res judicata* and King, J., held that it did.

In *Panchanada Velan* v. *Vaithinatha Sastrial*[1], the facts were as follows: A tenant filed a suit under the Madras Rent Recovery Act to compel the tender of a patta by the land-holder. The land-holder filed a cross-suit to compel the tenant to accept the patta offered by him. The suits were tried

1. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B)

Narayanaswami Aiyar *v.* Sevadappa Goundar., —— Leach, C.J.

together and were disposed of in the same judgment. The result was that the tenant's suit was dismissed and the land-holder's suit decreed. The tenant then filed an appeal in his suit, but not in the land-holder's suit and the question was whether the decision in the land-holder's suit operated as *res judicata* and prevented the tenant proceeding with his appeal. This Court was of the opinion that the case did not fall within the contemplation of S. 13 of the Code of 1882, which corresponds to S. 11 of the present Code. The Court said that it would lead to startling results if it were to hold that an appellate tribunal was precluded from dealing with a question which comes before it because an inferior Court on the same facts in a case other than that under appeal had given a decision which had not been appealed against at the same time as the decision under appeal.

This principle was followed in *Ramasami Chetty* v. *Karuppan Chetty*[1], and in *Lakshmi Ammal* v. *The Official Receiver, Tinnevelly*[2]. The latter case is on all fours with the present case. There was a suit and an original petition in insolvency proceedings in which the same question arose for decision between the same parties. Both matters came up for hearing before the Additional Subordinate Judge of Tinnevelly and were heard together. A creditor who was affected by the decision appealed, but only against the order on the petition, not against the decree. Beasley, C.J., had no hesitation in holding that the case fell within the four corners of *Panchanada Velan* v. *Vaithinatha Sastrial*[3].

In the present case King, J., has held that the decision in *Panchanada Velan* v. *Vaithinatha Sastrial*[3], does not apply because the appeal in the mortgage suit was directly to the High Court and in the insolvency proceedings to the District Judge in the first instance. That is shortly the effect of his decision. We fail to see what difference this makes. There was an appeal to this Court in both the cases. We are not called upon to say whether *Panchanada Velan* v. *Vaithinatha Sastrial*[3], was rightly decided. That decision is binding upon us and the reasons for holding that the doctrine of *res judicata*

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1. (1915) 29 M.L.J. 551. 2. (1934) 67 M.L.J. 364.
3. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.)

Narayanaswami Aiyar *v.* Sevadappa Goundar.

Leach, C.J.

did not operate in that case apply equally in the present case, and the appeal must be allowed.

The learned Judge did not decide a second objection taken by the respondent to the decision of the District Judge. The respondent's second contention was that the Insolvency Court had no jurisdiction to set aside the mortgage because it did not fall within S. 53 of the Provincial Insolvency Act and the Special Receiver could not in such an application call in aid S. 53 of the Transfer of Property Act. The respondent's objections in this connection are set out in paragraphs 6, 7, 8 and 9 of his memorandum of appeal. This question remains open and the case will be remanded to King, J., to decide it.

The appellant having succeeded in this Court, he is entitled to his costs.

K. S. *Appeal allowed.*

THE PARSI CHIEF MATRIMONIAL COURT AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

In the matter of The Parsi Marriage and Divorce Act III of 1936.

Kikishru Nadershaw Chinoy ... *Applicant*

v.

Nargesh Kikishru Chinoy *nee* Nargesh Dorabji Tarapore ... *Respondent.*

Nadershaw Chinoy *v.* Nargesh Chinoy.

Parsi Marriage and Divorce Act (III of 1936), Ss. 29 (3) and 47 (b)—Wife obtaining leave to sue in the Parsi Chief Matrimonial Court in Madras (High Court)—Application by husband under O. 13, r. 14 (a) of the Original Side Rules for revocation of leave—Remedy by way of appeal under the Act—Inapplicability of Original Side Rules.

An application under O. 13, r. 14 (*a*) of the Original Side Rules of the Madras High Court, for revocation of leave granted to a Parsi wife under S. 29 (3) of the Parsi Marriage and Divorce Act, 1936, to present her proceedings in the Parsi Chief Matrimonial Court in Madras (High Court), would be incompetent as the remedy could be sought only by way of an appeal under S. 47 (*b*) of the Act from the order granting leave.

Application for revocation of the order dated 6th February, 1941, in Application No. 65 of 1941 granting leave to the petitioner to file the above suit in this Court against the

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* Application No. 1360 of 1941 in O. M. S. No. 3 of 1941. 25th July, 1941.

Nadershaw Chinoy v. Nargesh Chinoy.

respondent and for directions to the respondent in this Application to pay the applicant's costs in this application.

The order was as follows:—

1. That this application do stand dismissed out of this Court, and,

2. That the applicant herein do pay to the respondent a sum of Rupees seventeen and annas eight (Rs. 17-8-0) as and for her costs of this application.

S. V. B. Row, for Applicant.

C. R. Pattabhi Raman, for Respondent.

The Court made the following

ORDER.—This is an application by the respondent in a petition presented pursuant to the Parsi Marriage and Divorce Act, III of 1936. In the application the applicant seeks to obtain revocation of the order giving leave to the petitioner to present her proceedings in this Court, the grounds being that the balance of convenience will be met by the proceeding being presented in a Court nearer to the Punjab where the respondent says he is residing.

This Court is not the High Court sitting in its Original Jurisdiction. It is the Parsi Chief Matrimonial Court which is constituted under the provisions of Ss. 18 and 19 of the Parsi Marriage and Divorce Act, 1936. The application on the face of it purports to have been issued under O. 13, r. 14 (*f*) of the Rules of the Original Side of the High Court. This rule provides that the Judge sitting on the Original Side of the High Court shall deal with applications for revocation of orders granting leave to sue.

The petitioner applied to the Parsi Chief Matrimonial Court under S. 29, sub-S. (3) of the Act for leave to present her proceedings in the Matrimonial Court in Madras and on the 6th February, 1941, this Court granted the leave which the petitioner sought. Learned counsel on behalf of the respondent, the applicant in the application before me, has with great frankness, conceded that his client was served with the proceedings in the suit brought against him by his wife by the end of February, 1941. Early in the month of March this Court fixed the date to hear the suit between the petitioner and the respondent to take place on the 5th August, 1941, and again learned counsel on behalf of the respondent has

Nadershaw Chinoy v. Nargesh Chinoy.

conceded that his client was aware of the date of trial by end of March, 1941. No step was taken by him until the 7th May, 1941, when the present application was issued to revoke the leave granted to the petitioning wife to bring her proceedings in Madras. This application was not served until on or about the 20th July.

Learned counsel on behalf of the wife takes the preliminary objection that the wrong procedure has been adopted and he relies upon the provisions of S. 47 of the Parsi Marriage and Divorce Act which, so far as is material, provides as follows:—

"An appeal shall lie to the High Court from ...... (*b*) the granting of leave by any such Court under Sub-S. (3) of S. 29 provided that such appeal shall be instituted within three calendar months after the decision appealed from shall have been pronounced."

The words above "such Court" clearly refer to the Chief Parsi Matrimonial Court within the jurisdiction of the High Court. It is contended that the husband should have presented an appeal to the High Court from the decision of the Matrimonial Court granting leave to sue and the machinery which has been adopted pursuant to the provisions of the Original Side Rules of the High Court is wrong and consequently, this application must fail.

Prior to 1936 the statutory enactment in force was the Parsi Marriage and Divorce Act of 1865 which contains some similar provisions to the Act of 1936 but by S. 51 of the earlier Act the High Court of the area in which the Parsi Matrimonial Court is established was empowered to make such rules and regulations concerning the practice and procedure in the Matrimonial Court as it might consider expedient. Under the provision of the section, to which I just referred, the High Court provided in O. 35, r. 18, of its Original Side Rules that the Rules of the High Court should apply to all suits under the Parsi Marriage and Divorce Act of 1865. Counsel on behalf of the husband thereupon contends that the Original Side Rules are still applicable to the Parsi Matrimonial Court and he is entitled to present this application.

S. 53 of the Act of 1936 repealed the whole of the Act of 1865. It has therefore repealed S. 51 to which I have referred. By the Repealing and Amending Act of 1937, S. 53 of the 1936 Act was itself repealed. S. 24 of the General Clauses Act provides that:

"Where any Act ....is........... repealed and re-enacted with or

Nadershaw Chinoy *v.* Nargesh Chinoy.

without modification, then, unless it is otherwise expressly provided, any order, scheme, rule, form or by-law, made or issued under the repealed Act ...... shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted."

The important words to emphasise are "so far as it is not inconsistent with the provisions re-enacted." Under the Act of 1865 there was no provision by which the potential petitioner in a Matrimonial suit in a Parsi Court could obtain leave to present the proceedings and there was no comparable provision in the earlier Act to that contained in S. 29 (3) of the 1936 Act. The appellate provision in S. 47 (*b*) of the 1936 Act is also a new provision which expressly gives a remedy by appeal in regard to the grant by the Court of leave to present proceedings under S. 29 (3). This provision is in conflict with the provision in O. 13, r. 14 (*a*) of the Original Side Rules of the High Court which provides a remedy for revocation of leave to sue by means of an application to the Judge and which is therefore inconsistent with the statutory provision in S. 47 (*b*) of the Act of 1936.

It is not necessary for me to decide whether or not all the Original Side Rules of the High Court still have application to the Matrimonial Court for this reason, assuming that they do, then, the provision by which an application can be made to the Judge to revoke the leave to sue is inconsistent with the statutory provision and in consequence the statutory provision must prevail.

It is quite clear that the remedy open to the respondent-husband in the proceedings was to have availed himself of the appellate provisions of S. 47 (*b*) of the Act of 1936. He has not done so but has taken proceedings under a rule of the Original Side of the High Court which, in my view, has no application to the Matrimonial Court. The consequence is that the present application cannot be entertained and must be dismissed with costs.

Learned counsel on behalf of the husband (respondent) applied for an extension of time to be given to his client for filing the written statement and he stated the reason why it had not already been filed or prepared was because of the pendency of the present application. The respondent took no steps at all until more than two months had elapsed after he was informed of the filing of the suit in this Court and not until

Nadershaw Chinoy *v.* Nargesh Chinoy.

about six weeks following his being apprised of the date of trial and although the application was issued on the 7th May, 1941, service was not effected on the wife's learned advocate until about the 20th July. True it is that the vacation of this Court was then taking place, but I see nothing to have prevented initiation of the proceedings long before the present application was filed. I see no ground to extend the time. I refuse to do so.

K.C. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Sayed Abdul Huq Sahib ... *Appellant* (Plaintiff)*

v.

Usman Khan Sahib Kabuli (died) and others. ... *Respondents (Defendants and Nil).*

Abdul Huq *v.* Usman Khan.

Limitation Act (IX of 1908), Art. 132—Vendee executing a promissory note for balance of unpaid purchase money—Payments towards the note and endorsements of payments—Suit for enforcement of vendor's lien for unpaid balance twelve years after sale—Property in the meantime purchased by third person in execution of mortgage decree against vendee—Whether suit barred by limitation—Whether acknowledgments on the note could keep it alive.

In a case where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also.

Where the vendee of certain immoveable properties executed a promissory note in favour of the vendor, for a portion of the purchase money, and certain payments towards the note were made which were duly endorsed on the note and in 1927 only a small amount remained unpaid to enforce which a suit was filed in 1936 claiming the vendor's lien on the property against the purchaser of the same in execution of a mortgage decree got by another person against the vendee on the question of limitation,

Held, that the suit was barred by limitation under Art. 132 as the acknowledgments of liability evidenced by the endorsements on the promissory note could not be treated as acknowledgments of liability in respect of the vendor's lien.

Raman v. *Vairavan*, (1883) I.L.R. 7 Mad. 392, *Chokkalingam Chetty* v. *Annamalai Chetty*, (1915) 34 I.C. 417 and *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*, (1898) L.R. 25 I.A. 95: I.L.R. 25 Cal. 844 (P.C.), distinguished.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 346 of 1937 preferred against the

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* S. A. No. 236 of 1939. 18th August, 1941.

Abdul Huq *v.* Usman Khan.

decree of the Court of the District Munsif of Trichinopoly in O. S. No. 341 of 1936.

K. V. Sesha Aiyangar for Appellant.

K. S. Narayana Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—A point of limitation arises in this second appeal preferred by the plaintiffs. The facts are these. The plaintiff sold certain immovable property to one Mohamed Ghouse on 15th January, 1920, for a sum of Rs. 1,750. A sum of Rs. 600 out of the sale price was not paid by Mohamed Ghouse who therefore executed a promissory note in favour of the plaintiff for the said amount on the same date. Payments were made towards the amount due under the promissory note and endorsements were made on the note evidencing those payments. On 15th August, 1927, a sum of Rs. 187-7-0 remained due to the plaintiff under the note and he obtained a decree for the said amount in O. S. No. 302 of 1927. The present suit to enforce the vendor's lien was filed by the plaintiff against the defendant who purchased the properties in execution of a mortgage decree for sale obtained by a Fund against the owner, Ghouse Sahib, for the recovery of the balance due to him; and plaintiff's case is that he was not aware of the mortgage in favour of the Fund and that the defendant purchased the properties with notice of his charge or lien.

As the suit was filed by the plaintiff on 4th July, 1936, that is, more than 12 years after the date of the sale to Ghouse Sahib, both the lower Courts held that it was barred by limitation under Art. 132. The plaintiff tried to save himself from the bar of limitation by relying on the endorsements on the promissory note, contending that they amounted to an acknowledgment of liability not merely in respect of the promissory note, but as regards the statutory charge as well.

The same argument is now advanced for the appellant in the second appeal by Mr. K. V. Sesha Aiyangar. He contended that the original debt was one and the same and that acknowledgments of liability on the promissory note enured to keep the debt alive and that the statutory charge was consequently not barred. He also pointed out that the decision relied on by the lower Courts reported in *Authinarayana Aiyar* v. *Krishnaswami*

Abdul Huq
v.
Usman
Khan.

Aiyar[1], was reversed in L. P. A. No. 150 of 1924. The decision of Mr. Justice Devadoss in the Weekly Notes Case has little to do with the point now under consideration. His Lordship took the extreme view that as the charge was a statutory one, the time limited for its enforcement by statute could never be extended by agreement of parties and that even though the sale deed gave a particular period for payment of the price, still the charge would be extinguished on the expiry of 12 years from the date of the sale deed. This view was over-ruled as incorrect by Wallace and Madhavan Nair, JJ., in the Letters Patent Appeal.

We have to consider whether acknowledgments of liability evidenced by endorsements on the promissory note can be treated as acknowledgments of liability in respect of the vendor's lien. Three cases were cited in support of this position, namely, *Raman* v. *Vairavan*[2], *Chokkalingam Chetty* v. *Annamalai Chetty*[3], *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*[4]. But in all the three cases, not merely was the debt the same but the remedies were identical also. In *Raman* v. *Vairavan*[2], the point was whether the acknowledgment of liability in respect of a hundi on Penang in favour of the plaintiff's agent for a debt due by the defendant to the plaintiff, requesting the drawee of the hundi to pay the amount to the plaintiff still due on the hundi constituted a sufficient acknowledgment of the debt due in respect of which the hundi was drawn. In *Chokkalingam Chetty* alias *Peria Karuppan Chetty* v. *Annamalai Chetti*[3], Coutts Trotter and Srinivasa Aiyangar, JJ., had to consider a payment endorsed on a chit and purporting to be for the chit. The chit was inadmissible as a promissory note and their Lordships held that the acknowledgments on the chit were nevertheless available as an acknowledgment of the liability of the original debt. In *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*[4], the Privy Council held that a petition by three co-owners giving direction to the manager to pay the surplus income towards the payment of certain debts due by them specified in the petition amounted not merely to an acknowledgment of joint liability in favour of the creditor who had obtained decrees for arrears of rent, but also amounted to an acknowledgment of

1. 1924 M.W.N. 755.
2. (1883) I.L.R. 7 Mad. 392.
3. (1915) 34 I.C. 417.
4. (1898) L.R. 25 I.A. 95: I.L.R. 25 Cal. 844 (P.C.).

Abdul Huq v. Usman Khan.

liability *inter se* as between the co-owners themselves for any claim or contribution that might arise. Their Lordships say at page 851 that it was not necessary that the defendants should admit liability to the plaintiff nor promise to pay him anything. They observe:

"It is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution."

The case before us is in my opinion different from the cases cited for the appellant. Though the debt is identical, two distinct remedies became available for its recovery, one by way of enforcement of the personal liability under the promissory note, and the second by way of enforcement of the statutory charge by sale of immoveable properties. Where the note is executed by the vendee to the vendor, as in this case, there is no extinguishment of the lien or the charge; but there may be cases where such extinguishment takes place and some of them have been dealt with in *Swaminatha Odayar* v. *Subbarama Ayyar*[1], by Ramesam and Reilly, JJ. The remedies in respect of the statutory charge and the promissory note are certainly not similar or co-extensive. In the one, we are concerned with the immoveable properties and in the other with the personal liability of the executor of the note. The periods of limitation are different for the two causes of action.

If the promissory note had been taken in the name of a third party instead of by the plaintiff it could not at all be said that payments made by the vendee towards the amount due under the note can be treated as acknowledgments of liability in respect of the statutory charge. A similar difficulty would arise in the case of negotiation of the promissory note by the payee under the Law Merchant. Could it be contended that an acknowledgment of liability on the promissory note would serve as a good acknowledgment to extend the period of limitation for the enforcement of the charge, when the charge-holder had assigned it to a third party?

These considerations show that in the case where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the reme-

1. (1926) 51 M.L.J. 856: I.L.R. 50 Mad. 548.

dies are separate and distinct in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. As has already been pointed out, the three cases cited for the appellant are all cases of a single debt and a single remedy for the debt.

Holding for the reasons given above that the lower Courts have taken the correct view on the point as to limitation, I dismiss this second appeal with costs.

As the question involved is of some importance I grant leave to prefer an appeal.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Valliappa Chettiar and others ... *Appellants** (*Plaintiffs*)

v.

Muthu Koundan and others ... *Respondents* (*Defendants* *1 to 8, 10 and 9*).

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 72—*Court auction-sale of property—Decree-holder purchasing through a benamidar—Subsequent conveyance to decree-holder—Suit by latter for recovery of possession—Suit competent—Purchase voidable only and not void.*

Where a Court auction purchaser of a property was only a benamidar for the decree-holder and after the issue of the sale certificate and the delivery proceedings, conveyed the property to such decree-holder, a suit by the latter for recovery of possession of the property will be competent; for, though the decree-holder had played a fraud upon the Court by purchasing the property through another who was a benamidar, still the sale would be only voidable and not void.

Radhakrishna v. *Bisheshar Sahay,* (1922) 44 M.L.J. 718: L.R. 49 I. A. 312: I.L.R. 1 Pat. 733 (P.C.), followed.

Chinnakannu v. *Paramasiva,* A.I.R. 1927 Mad. 1135 and *Thathu Naick* v. *Kondu Reddi,* (1908) I.L.R. 32 Mad. 242 (F.B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 85 of 1937 preferred against the decree of the Court of the District Munsif, Sankaridrug at Salem in O. S. No. 1079 of 1935.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellants.

T. K. Rangaswami Aiyangar and *T. C. K. Kurup* for Respondents.

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* S. A. No. 1048 of 1938. 31st July, 1941.

Valliappa Chettiar v. Muthu Koundan.

The Court delivered the following

JUDGMENT.—The plaintiffs sued for possession of the properties claiming title from the ninth defendant who in turn purchased them in Court auction in execution of a money decree against the first defendant herein in S. C. S. No. 1668 of 1915 on the file of the District Munsif's Court, Salem. The lands in question were then situated within the jurisdiction of the Namakkal District Munsif's Court and the decree was transferred to that Court for execution. The properties were brought to sale by that Court and were purchased by the ninth defendant. The ninth defendant subsequently conveyed the property to the plaintiffs and the suit is based upon the purchase by the ninth defendant in Court auction as the root of their title. This purchase was attacked by defendants 5 to 8 on the ground that the ninth defendant, who was the Court auction purchaser, was the benamidar for the plaintiffs decree-holders. Under O. 21, r. 72, Civil Procedure Code, a decree-holder cannot purchase the property in a Court auction except with the leave of the Court. Cl. 3 of that rule provides that

> "Where a decree-holder purchases, by himself or through another person,"

without the permission of the Court

> "the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale by order, set aside the sale."

In the present case no application was made to set aside the sale on the ground that the ninth defendant who was the Court auction purchaser was really a benamidar for the decree-holders. The sale certificate was issued and delivery proceedings were gone through. The present suit was filed in 1935 for recovery of possession in the District Munsif's Court of Sankaridrug at Salem. It is true, as held by both the lower Courts, that the plaintiffs who were the decree-holders in the prior suit, played a fraud upon the Court by purchasing the property through the ninth defendant after getting him to file an affidavit that he was purchasing the property for his own benefit and not on behalf of his master. But the question is whether the sale does not entitle the plaintiffs to maintain this action.

It was held by the Judicial Committee in the case, *Rai Radhakrishna* v. *Bisheshar Sahay*[1], that a Court auction-sale

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1. (1922) 44 M.L.J. 718: L.R. 49 I.A. 312: I.L.R. 1 Pat. 733 (P.C.).

Valliappa Chettiar *v.* Muthu Koundan.

at which the decree-holder purchased the property without leave of the Court is not void, but voidable. After setting out the section of the old Civil Procedure Code which corresponded to O. 21, r. 72, of the present Code, the Judicial Committee say this:

"Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money, could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown."

Then they refer to the fact that the decree-holder had applied for permission and had been refused. As in the present case, the properties were purchased in the name of a third party who was alleged to be the benamidar for the decree-holders. Dealing with this contention the Judicial Committee say that the conduct of the decree-holder in having made an application for permission which was refused and in still purchasing the property in the name of a third party does not make any difference. They say:

"He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it matters not that the decree-holder bought without permission or that he had applied and been refused."

This decision appears to me to be exactly in point. The purchaser was held not to be a benamidar for the decree-holder; but nevertheless the Judicial Committee proceeded to consider the question on the footing that the purchase was *benami* for the decree-holder and made the observations I have set out. That being the considered judgment on the alternative footing, this Court is bound to follow it. Following this decision of the Judicial Committee, Sundaram Chetty, J., in *Chinnakannu* v. *Paramasiva*[1], held that a purchase by the decree-holder without the Court's permission is only voidable and that a suit to set aside the sale must be brought within one year of

1. A.I.R. 1927 Mad. 1135.

Valliappa Chettiar v. Muthu Koundan.

the sale. Here it is true that the defendants are in possession and therefore there is no question of their suing for possession. But the question is whether they ought not to have the sale set aside by a proper application under O. 21, r. 72 (3), Civil Procedure Code within the time limited by law. The answer must be that they must have filed such an application and in the absence of such an application we must take it that at present there is a sale which is valid until it is set aside. The sale not having been set aside, the plaintiffs are entitled to realise their rights under that sale. The procedure followed in the decision in *Thathu Naick* v. *Kondu Reddi*[1], namely of treating the pleading in the suit as an application under O. 21, r. 72, might be followed; but, unfortunately, the Court which has tried the present suit is different from the Court which executed the decree and held the sale; and an application under O. 21, r. 72, lies only to that Court and there is further the question of limitation.

The lower appellate Court observes that the present case is one of deliberate fraud upon the Court and that therefore the case is not covered by the decision of the Judicial Committee referred to above. In every case where, in violation of the provisions of O. 21, r, 72, a purchase is made by the decree-holder, one might say that it is a fraud upon the Court. It will be observed that in the case before the Judicial Committee an application for leave to bid was made and refused and then the purchase was made through another person who, for the purpose of this part of the judgment, was taken to be a benamidar for the plaintiff. That was a case of a deliberate fraud and yet it was held that the sale was only voidable, that is, that the sale was valid until set aside by an application made by the judgment debtor.

I reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court.

Leave to appeal is refused.

K. C. *Appeal allowed.*

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1. (1908) I.L.R. 32 Mad. 242 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Uppala Apparina Sastri *alias* Annappa Sastri. ... *Appellant** (*Plaintiff*)

v.

Sree Raja Sobhanadri Appa Rao Bahadur Zamindar Garu, Zamindar of Elamarru Estate, Nuzvid. ... *Respondent* (*Defendant*).

Appanna Sastri *v.* Raja Sobhanadri

Madras Estates Land Act (*I of* 1908), *S.* 117—*Personal notice on defaulter of sale in execution of rent decree—If essential—S.* 125 (*before* 1934 *amendment*) *and S.* 127—*Scope.*

There is no necessity under S. 117 of the Madras Estates Land Act to give personal notice of a sale in execution of a rent decree to the defaulter.

The effect of the amendment to S. 125 by Act VIII of 1934 is merely to clarify the existing law. Under S. 125 as it stood before the amendment read in the light of S. 127, the sale of a holding in execution of a decree for rent must be deemed to put an end to the landlord's charge over that holding in respect of the arrears and interest thereon which have accrued due since the decree at the time of the sale.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada dated 27th August, 1937 and made in A. S. No. 40 of 1936 preferred against the decree of the Court of the District Munsif of Bezwada dated 31st December, 1935 and made in O. S. No. 644 of 1934.

P. Sivaramakrishnayya for Appellant.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant here brought a suit for a declaration that a sale in execution of a decree obtained in S. S. No. 287 of 1924 was not binding upon him. The suit in question was brought against one Gangulu, who was the original pattadar of land situated in an estate under the Madras Estates Land Act. We are concerned throughout this appeal with the Act prior to the amendment of 1934. Gangulu fell into arrears and two decrees were obtained against him. The first was in S. S. No. 373 of 1922 and the second was in S. S. No. 287 of 1924. The earlier decree was executed in 1926 after the second decree had been obtained and in the execution proceedings the land put up for sale was purchased by the present appellant on 5th May, 1926. I am informed that this land was only a portion of the holding of

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* S. A. No. 118 of 1938. 23rd January, 1941.

Appanna Sastri v. Raja Sobhanadri.

Gangulu. After the purchase the appellant does not appear to have produced the sale certificate before the landholder, as he should have done under S. 146 (1) of the Act; but he paid the rent and got a receipt showing that he had paid the rent on his own account. In subsequent years rent was paid by his agent and the receipts wrongly indicate that it was paid on account of the registered pattadar Gangulu. In 1933 the landholder proceeded to execute the second decree obtained in 1924 and in the course of execution without notice to the appellant he brought the holding to sale and purchased it himself. Subsequently the landholder ejected the appellant and it was his dispossession which gave rise to the suit.

Two contentions have been urged in appeal. One is that the second sale is bad for want of notice to the appellant who must be deemed to be the defaulter in the light of the Full Bench ruling in *Lakshmana Aiyar* v. *Ayyaswami Chettiar*[1], as interpreted by a later Full Bench ruling in *Peria Muniswami Mudali* v. *Sena Narasappa Mudali*, S. A. No. 820 of 1936[2]. The second is that, whether the sale is bad for want of notice or not, it is bad because the charge in respect of the arrears which had accrued due after the first decree at the time of the first sale must be deemed to have been wiped out by that sale so far as the liability of the portion of the holding sold is concerned. It seems to me that the appellant must fail on the first contention, for there appears to be no necessity under S. 117 of the Estates Land Act to give personal notice of a sale in execution of a rent decree to the defaulter. The kind of notice contemplated is by beat of drum in the village and by an affixture in a conspicuous place in the village. It is therefore not necessary to go into the question whether there has been such recognition of the appellant by the landholder as would enable him to claim rights as a defaulter even though he has not complied with the formalities required by S. 146.

The second contention seems to me to be more substantial. It is true that under S. 5 of the Act a first charge is created on the holding in respect of the arrears due thereon, so that the arrears due under the second decree would be a charge on the holding just as much as the arrears due under the first decree; and it is also true that S. 118 read with S. 126 contemplates only the sale of so much of the holding as is necessary, to satisfy

1. (1941) 1 M.L.J. 1: I.L.R. (1941) Mad. 356: 1941 M.W.N. 35 (F.B.).
2. (1941) 2 M.L.J. 79.

Appanna Sastri v. Raja Sobhanadri.

the particular demand which in the present case must be the amount due under the first decree. It is argued that the provisions of S. 125 whereby the sale is free of incumbrances other than those specified will not extend to statutory incumbrances such as are created by S. 5 and it must therefore be held that when the sale was held in execution of the first decree, though the proclamation did not recite the existence of the second decree and no notice was taken to the purchaser at the time of the subsequent sale, the sale under the first decree must be deemed to be a sale subject to the charge for rent in respect of the second decree which was not being worked out by that particular sale. This argument would be a forcible argument were it not for the provisions of S. 127. By sub-section (*c*) of that section, if a sale results in a surplus after paying the costs and the amount of the arrears in respect of which the sale was held, the landholder has a right to appropriate from and out of the surplus any rent which may have fallen due to him in respect of the holding between the date of the suit and the sale. The effect of this provision seems to be to make the sale a sale in liquidation not only of the charge for the arrears in respect of which a sale was expressly held but also in liquidation of the charge for any subsequent arrears due on the same holding. To hold otherwise would involve the anomalous consequence that the landholder would be entitled to liquidate a portion of the charge in respect of the latter arrears from and out of the proceeds of that sale and to treat that charge as still subsisting for any balance and bring the same property to sale again. The original defaulter would get a price which was determined by the value of the land less the amount of arrears including any subsequent arrears and the purchaser would pay a price which would take into consideration the amount of subsequent arrears. But the landholder would have a right to deduct those arrears from the price so paid and also would retain the right to claim those arrears over again to the extent to which they had not been satisfied from the purchaser of the land. The same question came up before the Calcutta High Court in a case under the Bengal Tenancy Act the provisions of which are in this respect essentially similar to those of the Estates Land Act: vide *Faez Rahaman* v. *Ramsukh Bajpai*[1]. The learned Judges point out that the view similar to that which has been put

1. (1893) I.L.R. 21 Cal. 169.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Official Receiver, East Godavari at Rajamundry. *Appellant** (*Respondent*)

v.

Tadi Veereddi and another ... *Respondents* (*Petitioners*).

Official Receiver, East Godavari *v.* Veereddi.

Hindu law—Father's debts—Minor's share brought to sale by Official Receiver in insolvency—Pendency of partition suit by the minor—Whether sale of the minor's share proper—Undue delay in selling—How far in the circumstances excusable.

The balance of authority in Madras, as to the effect of the filing of a suit for partition on behalf of a minor co-parcener is that the latter remains a co-parcener until the Court gives a finding that the proposed partition is beneficial to him and when that has been done, a severance of status takes place which dates back at any rate to the date of the plaint.

Where on behalf of a minor plaintiff a guardian seeks to restrain the sale of the minor's share in the family properties by the Official Receiver in satisfaction of the debts of the father, pending a partition suit filed by the minor through his guardian on the eve of his father's insolvency,

Held, that the proper course will be to postpone the sale until the Court gives a finding whether the partition will or will not be beneficial to the minor, but to expedite the proceedings so that a finding may be given as early as possible.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 14th October, 1940 and made in I. A. No. 1488 of 1940 in O. S. No. 58 of 1940.

K. Kameswara Rao and *B. V. Subramanyam* for Appellant.

K. Bhimasankaran for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is preferred against an order granting a temporary injunction against the Official Receiver acting in the insolvency of defendants 1 and 2, restraining him from selling the interest of the minor plaintiffs in the family property in discharge of the debts incurred by their father, the first defendant.

The history of this litigation is an illustration of the deplorable results flowing from dilatory procedure. The first defendant is the father of the second defendant and also of the 2 minor plaintiffs. On the eve of the insolvency of the first and second defendants in 1931, the second defendant filed a suit for partition and after

* A. A. O. No. 6 of 1941. 17th February, 1941.

Official Receiver, East Godavari *v.* Veereddi

the adjudication of the first and second defendants in November, 1931, the minor sons were transposed as plaintiffs and continued the suit with their mother as guardian. Some three years later the mother was replaced by an uncle. The Official Receiver asked that the creditors, some ninety in number, should be impleaded so that any decree might be binding upon them all so far as the minor's share was concerned, as well as to the extent of the shares of the insolvents. The business of impleading these creditors spread over a period no less than of eight years, at the end of which the suit ended by the return of the plaint for want of jurisdiction. Why, if the Court had no jurisdiction, it had not discovered the fact eight years earlier, is a matter on which I have no information. There was an appeal against this decision which was dismissed in 1940. After this appeal was dismissed, yet another next friend of the minor plaintiffs filed a fresh suit, O. S. No. 58 of 1940, without reference to the previous suit, praying for a partition and in this suit a petition was filed for an injunction restraining the Official Receiver from selling the family properties. The lower Court has restrained him from selling the plaintiffs' share in the family properties pending the decision of the suit.

It would appear that the observations of the learned Subordinate Judge about the delay of the Official Receiver in taking action for the sale of the properties are based on a misunderstanding, as for the major portion of the period the Official Receiver was bound by the injunction in another litigation. The learned Subordinate Judge comments adversely upon the character of this litigation and the way in which it has been conducted and regrets that he is obliged by the decision of the Full Bench in *Balusami Aiyar,* In re[1], (though the corresponding reference in an unauthorised report is given) to hold that the filing of the suit by the minors creates a division in status and that thereafter the Official Receiver has no power to exercise the father's authority to sell his son's share in joint property. It is a curious thing that though the decision of the Full Bench quoted arose clearly from a case in which the plaintiffs were minors, the learned Judges do not refer to the question whether the filing of a suit on

1. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.)

Official Receiver, East Godavari *v.* Veereddi.

behalf of a minor co-parcener for partition effects automatically a division in status; as it certainly does in the case of a major co-parcener. There is an earlier Full Bench decision in *Soundararajan* v. *Arunachalam Chetti*[1], which merely purports to decide that a co-parcener becomes separated by the mere fact of suing for partition, with reference to which decision it has also been remarked in later rulings that this was a case of a minor plaintiff, though the fact is not adverted to in the judgment. Now, these two Full Bench decisions by implication, though not by express words, would appear to decide that the filing of a suit by a minor co-parcener, just like the filing of a suit by a major co-parcener, must be regarded as an unambiguous declaration of an intention to divide, creating a division in status. There is, however, a long and well-established line of authority, showing that this is not the case. In *Chelimi Chetti* v. *Subbamma*[2], a Bench held that the filing of a suit by a minor for partition will not effect a severance of status because it is for the Court to determine whether a partition is or is not beneficial to the minor and there is no positive right of the minor's next friend to claim a partition on his behalf regardless of the finding of the Court on the question of benefit. This Bench refers to the Full Bench decision in *Soundararajan* v. *Arunachalam Chetti*[1], and expresses the opinion that the fact of minority must have been overlooked in that case. The decision in *Chelimi Chetti* v. *Subbamma*[2], has been considered in a number of subsequent cases and its authority has been shaken on the question of the effect of the death of a minor plaintiff pending a suit for partition. There has also been some development of authoritative opinion on the question of the effect of the filing of a suit for partition by a minor when a decree for partition or a finding that the partition is necessary follows. In *Krishnaswami Thevan* v. *Pulukaruppa Thevan*[3], the Bench accepts the view that the filing of a partition suit on behalf of a minor does not automatically effect a complete severance of status, but the learned Judges point out that if the minor's suit results in a decree, the status of the minor becomes divided and the view is taken that such a severance of status will date back to the filing of the plaint. This view has been followed by two subsequent

1. (1915) 29 M.L.J. 793 and 816: I.L.R. 39 Mad. 159 (F.B.).
2. (1917) 34 M.L.J. 213: I.L.R. 41 Mad. 442.
3. (1924) 48 M.L.J. 354: I.L.R. 48 Mad. 465.

Official Receiver, East Godavari *v.* Veereddi.

Benches, *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*[1], and *Rama Rao* v. *Hanumantha Rao*[2]. The matter came up for consideration by the Full Bench which decided *Rangasayi* v. *Nagarathnamma*[3] The learned Judges hold that the decision in *Chelimi Chetti* v. *Subbamma*[4] was wrong to the extent that a partition suit by a minor would not abate by the death of the minor, but they accept the position that the filing of a suit for partition by the minor does not automatically create a final severance of status between the minor and his family. Ramesam, J., seems inclined to the view that the filing of the suit by the minor effects a sort of conditional severance of status which would become final on the Court giving a finding that a partition would be for the benefit of the minor. The other two learned Judges incline to the view that on the Court finding a partition to be for the benefit of the minor a severance of status is created with retrospective effect from the date of suit or perhaps from the date of notice of suit. The judgments in this case do not contain any reference to the Full Bench decision *Balusami Aiyar, In re*[5], on which the Court below has relied. In this state of rulings it seems to me that the balance of authority so far as this High Court is concerned favours the view that when a guardian of a minor files a suit for partition, he remains a co-parcener until the Court gives a finding that the proposed partition is beneficial to the minor and when that has been done, a severance of status takes place which dates back at any rate to the date of the plaint.

That being the law as I understand it, it remains to consider what is the proper order to make when on behalf of the minor plaintiff an application is made to restrain the sale of the minor's share in the family properties in satisfaction of the debts of the father pending the partition suit. The minor being still a co-parcener, though liable retrospectively to cease to be a co-parcener, the position appears to be that the father's right to sell the minor's property in discharge of his debts which are not illegal or immoral still subsists until the Court finds whether a partition is or is not beneficial to the minor. But

1. (1927) 53 M.L.J. 189: I.L.R. 50 Mad. 866.
2. (1929) 57 M L.J. 720: I.L.R. 52 Mad. 856.
3. (1933) 65 M.L.J. 630: I.L.R. 57 Mad. 95 (F.B.).
4. (1917) 34 M.L.J. 213: I.L.R. 41 Mad. 442.
5. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F. B.)

Official Receiver East Godavari *v.* Veereddi.

in the case of an affirmative finding any sale of the minor's share during the pendency of the suit will become void. Until that finding is given no one can say whether the sale by the father (or in the present case by his representative, the Official Receiver) will or will not confer any title in the minor's property. In such circumstances it seems to me most undesirable that a sale of the minor's share should be held before it is established that there is anything to sell and it seems to me equally undesirable that the sale should be postponed by a long delay in coming to a finding on this fairly simple question of benefit to the minor. After all, it is not in the interests of the creditors that the minor's share should be sold for less than its true value if the suit is eventually to be dismissed. Nor is it desirable to hold a speculative sale, that which is sold being the chance of the minor's failure in the suit. The proper course therefore seems to be to postpone the sale until the Court gives the necessary finding, but to expedite the proceedings so that a finding may be given in the course of the next few months. In this case the same process of impleading ninety and odd creditors is, I understand, in contemplation and though it is to be hoped that the process will not take as long as it did on the former occasion, it will necessarily involve some time. It is however quite unnecessary that all the creditors should be on the record for the purpose of this preliminary finding. They are, so far as the debts of the father are concerned, represented by the Official Receiver who is quite competent to put forward on behalf of the creditors any evidence or any contentions which may be available against the view that this partition is for the benefit of the minors.

In the result therefore the order of the lower Court is confirmed, but the lower Court is directed to proceed forthwith to take evidence and record a finding on the preliminary question whether the partition is benefical to the minors and for the purposes of recording this finding it is not necessary to await the impleading of all the creditors. If the finding is adverse to the plaintiffs, the suit will presumably be dismissed and no question of restraining the sale by the Official Receiver will arise. If the Court finds that the partition is for the benefit of the minors, then quite clearly the injunction restraining the Official Receiver from selling the minors' share will have to stand. In the view that I take, I think it fitting that each party should

Official Receiver, East Godavari v. Veereddi.

bear his costs in this appeal. The Official Receiver may take his costs from the estate.

K. C. *Order modified.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE HAPPELL.

The Cannanore Bank, Limited .. *Appellant* (1st Defendant)*

v.

Pattarkandy Arayanveettil Madhavi and others. *Respondents (Plaintiffs 1 to 5 and Respondents 2 to 11).*

F.B.

Cannanore Bank, Ltd., v. Madhavi.

Civil Procedure Code (V of 1908), O. 21, r. 63—Claim petition objecting to attachment 'not pressed and dismissed'—Subsequent suit for declaration—Limitation.

Where a claim petition falling within the purview of O. 21, r. 58, objecting to an attachment is dismissed as not pressed, the order is one "against" the claimant even though there has been no investigation of the claim and an adjudication on the merits. It is necessary for such a claimant to file a suit within one year of such order as provided under O. 21, r. 63 if he wishes to reopen the matter.

Venkataratnam v. *Ranganayakamma*, (1918) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F.B.) relied on.

Kumara Goundan v. *Thevaraya Reddi*, (1924) 48 M.L.J. 616; *Lakshminarasamma* v. *Nevugotla Pydanna*, A.I.R. 1925 Mad. 265; *Lingama Naidu* v. *The Official Receiver, Madura*, (1928) 110 I. C. 511 and *President, Co-operative Credit Society, Kaikaran* v. *Sanam Narasimha Rao*, (1940) 2 M. L.J. 402, overruled.

P. R. Ayya Pattar v. *Attupurath Mankkal Karnavan*, (1919) M.W.N. 805; *Abdul Khadir* v. *Somasundaram*, (1922) 48 M.L.J. 467: I L.R. 45 Mad. 827; *Karri Seetaramayya* v. *Pappu Subrahmanyam* (1934) 68 M. L. J. 518: I.L.R. 58 Mad. 936 and *Lakshmi Ammal* v. *Kadiresan Chettiar*, (1921) 41 M. L.J. 198, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in O. S. No. 27 of 1936.

This Appeal came on for hearing on 23rd April, 1941. The Court (*The Chief Justice* and *Venkataramana Rao, J.*) made the following Order of Reference to a Full Bench.

The Chief Justice.—This appeal arises out of a suit filed by respondents 1 to 5 in the Court of the Subordinate Judge of Telli-

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* Appeal No. 112 of 1938. 3rd October, 1941.

F.B.

Cannanore Bank, Ltd., v. Madhavi.

cherry for the following reliefs: (1) a declaration that certain immovable property was tarwad property and therefore could not be brought to sale as the result of an attachment in execution proceedings instituted by the appellant bank in respect of a decree obtained against defendants 2 to 4, and (2) the setting aside of an order passed on a claim petition. Defendants 2 to 4, who are respondents 6 to 8, borrowed money from the appellant bank and, as the loan was not repaid, the bank sued for its recovery and obtained the decree which led to the attachment of the property in execution proceedings. On the 12th of July, 1932, the plaintiffs-respondents applied for the removal of the attachment, but did not press their application. The result was that on the 12th of July, 1932, the following order was passed by consent in respect of their application for removal of the attachment:

"Petition not pressed. It is dismissed."

Notwithstanding this order the plaintiffs-respondents on the 5th of September, 1935, filed another application for the removal of the attachment. This was dismissed on the 14th of the following month. On the 12th of October, 1936, that is, two days short of twelve months, the plaintiffs-respondents filed the suit out of which this appeal arises. The appellant bank contended that it was barred by the law of limitation and that in any event the suit could not be maintained because the property attached was in fact the private property of the judgment-debtors. The Subordinate Judge held that the suit was in time and that the property was tarwad property. Both these questions are raised in the appeal.

The first question involves the consideration of authorities which are in conflict and we propose to refer the question to a Full Bench, but before making the reference we will deal with the appellant bank's objection to the finding of the Subordinate Judge that the property was tarwad property.

It is common ground that the property was bought by the mother and her five sons and daughters, all of whom were majors. The mother and the eldest son having died, the surviving sons, Kunhunni and Kunhiraman, and their sister, Mathu, conveyed the property to their sister Parvathi who has married the fourth defendant. The deed of conveyance set out the circumstances under which the property was purchased and that it was purchased as their joint property. The mother and her sons and daughters constituted a tavazhi and the father had given the money for the purchase. There can be no doubt that the Subordinate Judge was fully justified in holding that the property belonged to the tarwad.

The question which we refer to a Full Bench is this:

"When an order is passed on a claim petition in these words 'Petition

F B.
Cannanore Bank, Ltd., v. Madhavi.

not pressed. It is dismissed', does the order require the petitioner to file a suit under O. 21, r. 63 within a year from the date of the order if he wishes to re-open the matter?"

We do not propose to discuss the authorities which have been referred to us in the course of the argument. It is sufficient to say that they appear to disclose a need for an authoritative decision of this Court on the question.

[This appeal came on for hearing in pursuance of the aforesaid Order of Reference before the Full Bench.]

M. C. Sridharan for Appellant.

K. Kuttikrishna Menon and *D. A. Krishna Wariar* for Respondents.

The Opinion of the Court was expressed by

Leach, C.J.

The Chief Justice.—In order to give an answer to the question referred it is necessary to decide what is meant by an adverse order under O. 21, r. 63 of the Code of Civil Procedure. That rule states that where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of a suit the order shall be conclusive. The order referred to in the rule is an order passed on an application which falls within the purview of r. 58. That rule provides that where a claim is preferred to, or an objection is made to the attachment of property attached in execution of a decree on the ground that it is not liable to attachment, the Court shall proceed to investigate the claim or objection, provided that it may refuse to investigate when it considers that the claim or objection was designedly or unnecessarily delayed.

In *Venkataratnam* v. *Ranganayakamma*[1], Wallis, C.J., and Oldfield and Seshagiri Aiyar JJ., held that an order refusing to investigate a claim to attached property on the ground that there was delay in the filing of it was an order passed against the claimant within the meaning of r. 63 and by reason of Art. 11 of the Limitation Act the order became final unless a suit was filed within twelve months to set it aside. In that case an application for the removal of an attachment was made, but it was filed at a late stage and the District Munsif refused to enter into an investigation. His order was couched in these words:

"As this petition was filed late, this claim is ordered to be notified to the intending bidders."

1. (1918) 35 M.L.J 335: I.L.R. 41 Mad. 985 (F.B.).

F.B.
Cannanore Bank Ltd., *v.* Madhavi.
Leach, C.J.

This did not satisfy the petitioner and a fresh application was filed for the removal of the attachment. The order on this occasion was:

> "The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months".

The Full Bench held that this order amounted to a rejection of the claim on the ground that it had been filed too late and therefore was an adverse order within r. 63, though there was no investigation and consequently no decision on the merits.

It is admitted that the judgments in that case have received the approval of all the High Courts in India, but there are numerous decisions of this Court where a distinction has been drawn, in some cases, wrongly. The test is whether the order is "against" the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Even an order of dismissal for default will fall within the rule; so long as it remains in force it is obviously adverse to the claimant. But if the person objecting to the attachment does not ask for his claim to be investigated and the order on the petition is merely that it be recorded, it cannot be said that this is an order "against" him. In such a case the application will not fall within r. 58. See *P. R. Ayya Pattar* v. *Attupurath Mankkal Karnavan*[1]. Again the petition may contain a prayer not contemplated by r. 58, or it may have been presented after the Court has sold the attached property and therefore the Court has no longer jurisdiction to entertain it. The dismissal of such a petition can scarcely be regarded as an adverse order. See *Abdul Kadir Sahib* v. *Somasundaram Chettiar*[2]. The position is not different, if the claim is for an inquiry which is not contemplated by the rule, or the Court while dismissing a petition expressly states that the rights of the petitioner are not prejudiced by the order. See *Karri Seetaramayya* v. *Pappu Subrahmanyam*[3]. It is not an adverse order if the petition is dismissed because the power to investigate is in another Court. See *Lakshmi Ammal* v. *Kadiresan*

1. 1919 M.W.N. 805.
2. (1922) 43 M.L.J. 467: I.L.R. 45 Mad. 827.
3. (1934) 68 M.L.J. 518: I.L.R. 58 Mad. 936.

F.B.

Cannanore Bank, Ltd., v. Madhavi.

Leach, C.J.

Chettiar[1]. But the position is very different where the application clearly falls under r. 58, the Court has jurisdiction and it passes an order dismissing the petition.

We will now refer to the cases which in our opinion have been wrongly decided. The first is that in *Kumara Goundan* v. *Thevaraya Reddi*[2], where the order passed on the claim petition was in these words:

"The contest is practically between the two claimants and the suit is inevitable. On the ground that the claims have been preferred too late and the delay is not satisfactorily explained, I disallow the claim".

Ramesam and Venkatasubba Rao, JJ., held that this was not an order falling within r. 63, but we consider that they erred in so doing. This case clearly fell within the decision in *Venkataratanam* v. *Ranganayakamma*[3].

In *Lakshminarasamma* v. *Nevugotla Pydanna*[4], Coutts Trotter, C.J., and Ramesam, J., held that where the order on a claim petition was, "Not pressed, dismissed", it was not an order against the claimant within the meaning of r. 63. The basis of this decision was apparently the assumption that the claimant wished to abandon his claim and to have it treated as if it never had been made. If the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course, it might very well be that the order would not be an adverse order within the meaning of the rule, but we do not agree that because a claimant says to the Court that he does not press the petition and consents to an order of dismissal it is not an adverse order. In such circumstances it would in our opinion clearly be an order against him within the meaning of r. 63, provided, of course, that the application was one which fell within r. 58. Coutts Trotter, C.J., stated that he had always been of the opinion that in the case of the withdrawal of a petition it was a mistake for the Judge to endorse on it "dismissed", and that it was quite sufficient to record on it "withdrawn." With great respect, the Code of Civil Procedure does not contemplate such an order. It only contemplates the allowing or the refusal of a petition, and strictly speaking the order should be one of dismissal. Where the petitioner informs the Court that he wishes to withdraw his petition the Court may allow him to do so and

1 (1921) 41 M.L.J. 198. 2. (1924) 48 M.L.J. 616.
3. (1918) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F.B).
4. A.I.R. 1925 Mad. 265.

F. B.

Cannanore Bank, Ltd., *v.* Madhavi.

Leach, C.J.

by the use of appropriate language in the dismissal order make it quite clear that it is not intended to be an adverse order. We can see no reason why the claim petition should not be withdrawn if the claimant wishes to withdraw it, but the order passed in such circumstances, should be worded so as not to attract the operation of Art. 11 of the Limitation Act.

In *Lingama Naidu* v. *The Official Receiver, Madura*, A. A. O. No. 85 of 1927,[1] a claim petition had been filed by the appellant who subsequently applied to be allowed to withdraw it, stating that he would file a regular suit. Thereupon the District Munsif passed an order dismissing the petition. Kumaraswami Sastriar and Devadoss, JJ., held that this order did not fall within r. 63 and they expressed the opinion that the decision of the Full Bench in *Venkataratnam* v. *Ranganayakamma*[2],

> " should be confined to cases where the disposal has been either on investigation or refusal to investigate on the ground that the claim is filed too late."

We consider that this opinion of the effect of the decision of the Full Bench is erroneous. Moreover the views expressed by the learned Judges are in conflict with the wording of the rule. The rule applies to all orders which are "against" claims preferred under r. 58.

The last case to which our attention has been drawn is that of the *President, Co-operative Credit Society, Kaikaran* v. *Sanam Narasimha Rao*[3], which was decided by a Division Bench consisting of my learned brother Krishnaswami Aiyangar and myself. Although the principle underlying r. 63 was correctly stated on further consideration my learned brother and I are of the opinion that the order passed thereon is open to objection and our learned brother Happell shares this opinion. A mortgagee presented a petition asking that properties which had been attached should be sold subject to his mortgage. According to the petition it was filed under r. 58. The order passed on it was this:

> " The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on 27th February, 1933."

The decision was that this order did not fall within r. 63, but in the light of the further arguments which we have heard to-day we consider that the case fell within *Venkataratnam* v.

1. (1928) 110 I. C. 511.
2. (1918) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F. B.).
3. (1940) 2 M.L.J. 402.

F.B.

Cannanore Bank, Ltd., v. Madhavi.

Leach, C.J.

Ranganayakammal and therefore was wrongly decided. The order amounted in effect to a refusal of the claim, as the petitioner's prayer which was in terms of r. 62 was not granted.

The order which has given rise to this reference is in these words:

"Petition not pressed. It is dismissed."

If the petition is a petition which falls within r. 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights it is obviously an order which is against him. The Court is not, however, able to answer the question because the facts are not before it. But assuming that the facts are that the petitioner personally or through his advocate merely stated that he did not press the petition the order dismissing it would be an adverse order, and we answer the question referred in this sense.

The costs of the reference will be made costs in the appeal.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Syed Dewan Khaja Moideen Saheb .. *Petitioner** (*Defendant*)

v.

D. M. Abdul Gaffoor Sahib .. *Respondent* (*Plaintiff*).

Moideen Saheb v. Gaffoor Sahib.

Court-Fees Act (VII of 1870), S. 7 (iv) (f)—*Art 17-B, Sch. II—Administration suit—Court-fee to be paid on market value of property—Jurisdiction of Court should be gone into—Revision proper to correct error at early stage.*

In a suit for the administration of the estate of a Muhammadan lady, for accounts and for division of the assets among the heirs under the Muhammadan Law, on the question whether the provisions of S. 7 (*iv*) (*f*) or Art. 17-B of Sch. II of the Court-Fees Act applied to the case,

Held, that as an administration suit is not merely a suit for accounts and ought not to be so regarded for any purpose relating to court-fee, especially where the suit is not one by a creditor for the administration of the assets of a deceased but one where a division of properties may have to be made, it should be valued under Art. 17-B of Sch. II of the Court-Fees Act.

Judgment of Wadsworth, J., in C. M. A. No. 235 of 1938, followed.

Held, further, that in such a case the jurisdiction is to be determined by the market value of the property. Where the lower Court had erred in holding that it had jurisdiction the High Court can interfere in revision to correct such error when the suit was still in its earlier stages though if the suit had been decreed in favour of the plaintiff the defendant would have been entitled to raise the question of jurisdiction in appeal.

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1. (1918) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F. B.).

* C. R. P. No. 1699 of 1940. 13th October, 1941.

Moideen Saheb *v.* Gaffoor Sahib.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Udumalpet dated 17th September, 1940 and made in O. S. No. 46 of 1940.

K. V. Ramaseshan and *C. D. Venkataraman* for Petitioner.

The Government Pleader (K. Kuttikrishna Menon) and *K. V. Ramachandra Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This petition has been filed against the finding of the District Munsif of Udumalpet in O. S. No. 46 of 1940 that he has jurisdiction to try the suit.

The suit was one for the administration of the estate of one Kairunnissa Bibi, for accounts and for division of the assets amongst the heirs under the Muhammadan Law. The short point that arises in this petition is whether the provisions of S. 7 (*iv*) (*f*) of the Court-Fees Act or Art. 17-B of Sch. II apply. At first sight, there is a very formidable array of authority in support of the contention of Mr. Ramachandra Aiyar for the respondent that an administration suit should be treated as a suit for accounts and that, therefore, S. 7 (*iv*) (*f*) is applicable. He has cited *Khatija* v. *Shekh Adam Husenally*[1], *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[2], *Saraju Bala Dasi* v. *Jogemaya Dasi*[3], *Shivaprasad Singh* v. *Prayagkumari Debee*[4], *San Paw* v. *Ma Yin*[5] and *Ma Thin On* v. *Ma Ngwe Hmon*[6], in most of which cases it was held that S. 7 (*iv*) (*f*) was the proper provision of the Court-Fees Act to apply. Of these cases, however, only one, namely, *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[2], discusses this question fully and directly. That was a case where there was a trust for sale created by a debtor for the benefit of his creditors. The history in the English Courts of administrative actions was discussed; but the whole of the reasoning, the discussion, and the conclusions were confined to that particular kind of administration suit in which a creditor seeks to have administered the estate of a deceased debtor for the benefit of the creditors. If this suit had been one for the administration

1. (1915) I.L.R. 39 Bom. 545.
2. (1916) I.L.R. 44 Cal. 890.
3. (1917) I.L.R. 45 Cal. 634.
4. (1933) I.L.R. 61 Cal. 711 at 724.
5. (1918) 55 I.C. 258.
6. (1934) I.L.R. 12 Rang. 512.

Moideen Saheb v. Gaffoor Sahib.

of a debtor's estate, I should have been compelled to regard this well-considered decision as a very strong authority for Mr. Ramachandra Aiyar's position that S. 7 (iv) (*f*) was the proper provision of the Court-Fees Act to determine both the question of court-fee and the question of jurisdiction; but can the analogy for purposes of court-fee between an administration suit and a suit for accounts be extended to other kinds of administration suits in which the next of kin, the legatee, or the executor seeks to have the estate of the deceased person administered for the benefit of those entitled to some share of the deceased person's property, and which may involve not merely the taking of accounts but the division of movable and immovable property?

In *Khatija* v. *Shekh Adam Husenally*[1], the question discussed was whether the suit, which was for accounts and the administration of an estate of a deceased person, was really an administration suit or whether it was not a suit for a definite share of property. The pleadings were discussed and the learned Judges came to the conclusion that it was an administration suit. They did not discuss what provision of the Court-Fees Act to apply to an administration suit. They say:

"According to the provisions of the Court-Fees Act, if the plaintiff succeeds in showing upon the accounts that she is entitled to a share in the property and assets of Tyeballi Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of S 11 of the Court-Fees Act until the difference between Rs. 130 and the fee which would have been payable, had the suit comprised the whole of the amount decreed, has been paid to the proper officer. That being so there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under S. 7 (*iv*) (*f*) of the Court-Fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases."

Saraju Bala Dasi v. *Jogemaya Dasi*[2], was an administration suit of a somewhat similar kind to that in *Khatija* v. *Shekh Adam Husenally*[1], but the learned Judges do not discuss whether that particular kind of administration suit would properly be governed for purposes of court-fee by S. 7 (*iv*) (*f*) of the Court-Fees Act. They follow *Khatija* v. *Shekh Adam Husenally*[1] and *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[3] without expressing any reasons. *Shiva-*

1. (1915) I.L.R. 39 Bom. 545. 2. (1917) I.L.R. 45 Cal. 634.
3. (1916) I.L.R. 44 Cal. 890.

Moideen Saheb *v.* Gaffoor Sahib.

prasad Singh v. *Prayagkumari Debee*[1], has been quoted by Mr. Ramachandra Aiyar because of a sentence found in the judgment in which the learned Judges were discussing whether the suit under consideration was an administration suit or not. They held that it was not; because (quoting *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[2]), "an administration suit is in essence a suit for accounts". *San Paw* v. *Ma Yin*[3], merely follows *Khatija* v. *Shekh Adam Husenally*[4], and *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[2] without argument. *Ma Thin On* v. *Ma Ngwe Hmon*[5] dealt with an administration suit, the nature of which is not clear from the judgment. The learned Judges purported to follow *C. K. Ummar* v. *C. K. Ali Ummar*[6], which, however, did not deal with an administration suit at all, but with a suit for accounts. They apparently assumed, as a proposition that needed no argument, that an administration suit is a suit for accounts. *Ma Thin On* v. *Ma Ngwe Hmon*[5] also contains a reference to *Ma Fatima* v. *Momin Bibi*[7] which dealt with a suit for the administration of the estate of a deceased Muhammadan. There, the relief was valued by the plaintiff at Rs. 2,000, that being her share in the property. It was held by the learned Judge that that was the correct valuation. Clearly S. 7 (*iv*) (*f*) was not applied in that case. The learned Judge went on to say that as the suit was not of the nature described in the Court-Fees Act, S. 7, paragraphs 5, 6 and 9 and paragraph 10 of clause (*d*), and that as the court-fee was payable *ad valorem* on the claim, the value of the suit for the computation of court-fees and the value for purposes of jurisdiction were the same. He therefore concluded that the value of the share of the plaintiff in the deceased's estate determined jurisdiction.

In none of the above decisions was it considered whether it would not be more appropriate to apply Art. 17-B of Sch. II of the Court-Fees Act. The question in each case was whether the plaintiff should pay court-fee on a reasonable valuation of his share of the deceased's assets If not, it was assumed

1. (1933) I.L.R. 61 Cal. 711 at 724.
2. (1916) I.L.R. 44 Cal. 890.
3. (1918) 55 I.C. 258.
4. (1915) I.L.R. 39 Bom. 545.
5. (1934) I.L.R. 12 Rang. 512.
6. (1931) I.L.R. 9 Rang. 165 (F. B.)
7. (1929) I.L.R. 7 Rang. 164.

Moideen Saheb *v.* Gaffoor Sahib.

that S. 7 (*iv*) (*f*) was the correct provision of the Court-Fees Act to apply. The learned District Munsif quoted the decision of Mr. Justice Wadsworth in C. M. A. No. 235 of 1938. This was a short order on a check slip put up by the office in which the learned Judge pointed out that an administration suit was not merely a suit for account, that S. 7 (*iv*) (*f*) could not therefore be applied, and that as there was no provision in the Court-Fees Act applicable to an administration suit it followed that the residuary provision of Art. 17-B of Sch. II would have to be applied. He did not discuss the case-law on this point, beyond saying that *Ramaswami Aiyar* v. *Rangaswami Aiyar*[1] was an authority for the position that an administration suit was not a suit for accounts. The point that fell for decision in *Ramaswami Aiyar* v. *Rangaswami Aiyar*[1] was whether creditors who were impleaded in an administration suit as defendants would have to pay court-fee on the value of their claims. It was argued by the learned Government Pleader, on the analogy of S. 11 of the Court-Fees Act, that as a suit for administration was substantially a suit for accounts, the defendant creditors would have to pay a court-fee. The learned Judges, while conceding that in a sense a creditor's suit for administration was a suit for accounts, pointed out that the analogy between an administration suit and an ordinary suit for accounts broke down in many respects. They were not prepared to consider it a suit for accounts for the purpose of applying S. 11 of the Court-Fees Act. They pointed out that it would be improper in a fiscal enactment like the Court-Fees Act to argue by analogy and to apply to an administration suit rules that were laid down solely for a suit for accounts. The learned Judges avoided expressing any opinion as to the court-fee payable by the creditor who filed the suit; but if we exercise the caution thought necessary by the learned Judges in applying the provisions of a fiscal enactment relating to one type of suit to another, it is clear that we ought not to regard an administration suit as a suit for accounts for any purpose relating to court-fee, above all in a suit which is not one by a creditor for the administration of the assets of a deceased person to be divided amongst the creditors, but one in which a division of

1. (1931) 61 M.L.J. 933: I.L.R. 55 Mad. 26.

Moideen Saheb *v.* Gaffoor Sahib,

movable and immovable property might have to be made. I therefore respectfully agree with Mr. Justice Wadsworth's expression of opinion in C. M. A. No. 235 of 1938 that as an administration suit is not a suit for account, it should be valued under Art. 17-B of Sch. II of the Court-Fees Act.

It is conceded that if Art. 17-B of Sch. II of the Court-Fees Act is to govern the court-fee, then the jurisdiction is determined by the market value of the property. If the market value exceeds the pecuniary jurisdiction of the Court, then the plaint will have to be returned for presentation in the Court having jurisdiction. As this is conceded, it is not necessary to discuss the authorities on this point. It is sufficient to refer to *Karuppanna Nadar* v. *Karuppa Nadar*[1], which follows *Vasireddi Veeramma* v. *Butchayya*[2]. The learned Munsif while holding that Art. 17-B of Sch. II governed the court-fee, came to the conclusion that the court-fee paid was sufficient; because the plaintiff had paid Rs. 22 whereas, under Art. 17-B of Sch. II, all that was necessary was a court-fee of Rs. 15. On the question of jurisdiction, he contented himself with saying:

"As regards issue X, since there is nothing preventing an administration suit being filed in this Court and since this suit is a suit for administration, I find on this issue that this Court has jurisdiction."

He did not consider whether, despite its being an administration suit, the value of the property was such as to preclude him from trying the suit. It seems probable that the market value of the property exceeded the pecuniary jurisdiction of the Court; but as the learned District Munsif has not given any definite finding on this point, he will have to do so.

It was argued by Mr. Ramachandra Aiyar that even though the District Munsif erred in holding that he had jurisdiction, this Court ought not to interfere at this stage; for if the suit is decreed in favour of the plaintiff, the defendant would be entitled to raise this question in appeal; and if he satisfied the Court that he had suffered prejudice by the wrongful exercise of jurisdiction by the District Munsif, he would be able to get the decree set aside. He quoted *Zamindar of Kallikote* v. *Mongolopur*[3], in support of his argument. I do not think that *Zamindar of Kallikote* v. *Mongolopur*[3] can be

1. (1939) 2 M.L.J. 226: 50 L.W. 154.
2. (1926) 52 M.L.J. 381: I.L.R. 50 Mad. 646.
3. (1926) 51 M.L.J. 500 (F.B.)

Moideen Saheb v. Gaffoor Sahib.

considered to be an authority for the position that this Court should not interfere in revision on a question of jurisdiction when it arises at a preliminary stage in the suit. The learned Judges thought that under the peculiar circumstances of the case before them, it was not necessary for them to consider the principal point raised in revision. This Court has frequently interfered before the disposal of a suit where it has been found that a Court has wrongfully assumed jurisdiction. I quite appreciate the argument as to the inconvenience caused by holding up the trial of a suit in order that this Court might consider the correctness of decisions made during the course of trial. If I had considered the question of inconvenience soon after admission, I might have held that it was not advisable to interrupt the trial of the suit; but that inconvenience has already been caused and the disposal of the suit has been delayed for a considerable time owing to the pendency of this Civil Revision Petition. That cannot now be avoided; so there is no longer any reason why, when the suit is still in its early stages, this Court should not interfere to correct an error which affects jurisdiction

The petition is therefore allowed and the suit remanded to the District Munsif for fresh consideration of the question of jurisdiction. If he finds that the market value of the property exceeds Rs. 3,000, he should return the plaint to the plaintiff for presentation in a Court having jurisdiction. The costs of the parties to this application will abide the result and will be provided for in the order of the District Munsif. The Government Pleader will be entitled to his costs from the Government.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

K. K. A. Ponnuchami Goundar .. *Petitioner** (*Plaintiff*)

v.

Muthusami Goundar and another. *Respondents* (*Defendants*).

Ponnuchami Goundar v. Muthusami Goundar.

Partnership Act (IX of 1932), S. 69 (2)—Registration of firm subsequent to filing of suit—If can cure the defect and make suit maintainable.

* C. R. P. No. 916 of 1940. 15th October, 1941.

Ponnuchami Goundar *v.* Muthusami Goundar.

S. 69 of the Partnership Act is mandatory. Registration of the firm is a condition precedent to its right to institute a suit. If a firm was not registered at the time a suit was filed by it the subsequent registration of the firm does not entitle the Court to proceed with the suit and the only course open to the Court is to dismiss the suit.

Case-law discussed and *Varadarajulu Naidu and Kuppuswami Naidu & Co.* v. *Rajamanicka Mudaliar*, (1937) 2 M.L.J. 273, overruled.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsif of Palni dated 15th February, 1940, in S. C. S. No. 263 of 1939.

S. V. Venkatasubramaniyan for Petitioner.

K. S. Ramamurti for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—S. 69 (2) of the Partnership Act states that no suit to enforce a right arising from a contract shall be instituted in a Court by or on behalf of a firm against a third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. The question which arises in this petition is whether the registration of a firm after it has filed a suit can cure the defect.

In this case an unregistered partnership instituted a Small Cause suit in the Court of the District Munsif of Palni. It had applied for registration before filing the plaint, but the application had not been granted. In fact it was not granted until over a month had elapsed after the filing of the plaint. In these circumstances the District Munsif dismissed the suit with costs. The reported cases disclose a difference of opinion, but the majority of the judgments are to the effect that subsequent registration of the firm does not entitle the Court to proceed with the suit and that the only course open to it is to dismiss it.

The question has been considered on different occasions by four Judges of this Court, namely, by Menon, J., in *Subramania Mudaliar* v. *The East Asiatic Co., Ltd*[1]., Stodart, J., in *Firm of Syed Ibrahim Sahib* v. *Gurulinga Aiyar*[2], Horwill, J., in *Varadarajulu Naidu and Kuppuswami Naidu & Co.* v. *Rajamanicka Mudaliar*[3] and Venkataramana Rao, J., in *Girdharilal Son & Co.* v. *Kappini Gowder*[4]. Menon, Stodart and Venkataramana Rao, JJ., formed the opinion that subsequent registra-

1. (1936) 71 M.L.J. 663.
2. (1937) 2 M.L.J. 717.
3. (1937) 2 M.L.J. 273.
4. (1938) 2 M.L.J. 44.

Ponnuchami Goundar v. Muthusami Goundar. — Leach, C.J.

tion did not remedy the defect. On the other hand Horwill, J., held that it did. Menon, Stodart and Venkataramana Rao, JJ., considered that the wording of the section compelled the Court to dismiss a suit filed by an unregistered firm. Venkataramana Rao, J., in addition to relying on the wording of the section drew attention to the fact that the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India in Council*[1], had pointed out that S. 80 of the Civil Procedure Code, is explicit and mandatory. S. 80, Civil Procedure Code, has very much in common with S. 69 of the Partnership Act. It says that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer for an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been given. The Privy Council also observed that S. 80 imposes a statutory and unqualified obligation upon the Court, and S. 69 (2) of the Partnership Act does the same. Venkataramana Rao, J., relied further on the decisions of this Court with regard to S. 28 (2) of the Provincial Insolvency Act. That section prevents a suit being filed against an insolvent without the leave of the Insolvency Court, and in *Ghouse Khan* v. *Bala Subba Rowther*[2] and *Davood Mohideen Rowther* v. *Sahabdeen Sahib*[3], this Court held that a subsequent leave would not cure the initial defect and validate the institution of a suit.

In expressing the contrary opinion Horwill, J., in *Varadarajulu Naidu & Kuppuswami Naidu & Co.* v. *Rajamanicka Mudaliar*[4] observed:

> "It is a well-established principle that the Court can take notice of events that happen subsequent to the filing of the suit and that any irregularities or deficiencies in the cause of action that may exist on the date of the filing of the plaint can be overlooked if on some date subsequent to the filing of the plaint and before the suit comes up for trial those irregularities or deficiencies are rectified by the plaintiff or by process of law."

Whatever may be the principle which applies to the rectification of irregularities and deficiencies in the cause of action we are of the opinion that it cannot be applied here.

The conclusion of Horwill, J., that subsequent registration will put the suit on a proper basis receives support, however, from the judgment of the Calcutta High Court in *Radhacharan*

1. (1927) 53 M.L.J. 81: L.R. 54 I.A. 338: I.L.R. 51 Bom. 725: (P.C.).
2. (1927) 53 M.L.J. 412: I.L.R. 51 Mad. 833.
3. (1937) 2 M.L.J. 223: I.L.R. (1937) Mad. 841.
4. (1937) 2 M.L.J. 273.

Ponnuchami Goundar v. Muthusami Goundar.
—
Leach, C.J.

Saha v. *Motilal Saha*[1] and that of the Nagpur High Court in *Jakiruddin Badruddin* v. *Vithoba Jagannath Gadali*[2]. These cases were decided by Judges sitting alone. In the Calcutta case it was said that when registration had been effected the suit might be treated as though the plaint had been received and the suit instituted on the day following the day of registration. The Patna High Court expressed dissent from this opinion in *Firm Laduram Sagarmal* v. *Jamuna Prasad Chaudhuri*[3], where Harries, C.J., observed that he knew of no provision of law which permits a Court to treat the plaint as having been filed, on a date subsequent to the date upon which it was actually filed, and we know of no such provision. It has been pointed out to us that a Bench of this Court expressed the opinion in *Ramakrishna Nadar* v. *Ponnayya Tirumalai Vandaya Thevar*[4], that a defect in a suit filed under the provisions of O. 33, r. 15 of the Civil Procedure Code could be remedied after the suit had been instituted and that in such circumstances it should be treated as having been instituted on that date. O. 33, r. 15 states that an order refusing to allow a person to sue as a pauper shall be a bar to a subsequent application of a like nature by him in respect of the same cause of action, but he shall be at liberty to institute a suit in the ordinary manner provided he first pays the costs incurred by Government and by the opposite party opposing his application for leave to sue as a pauper. The wording of O. 33, r. 15 is not the same as the wording of S. 69 (2) of the Partnership Act. O. 33, r. 15 gives liberty to institute a suit in certain circumstances. S. 69 (2) says that no suit shall be instituted in certain circumstances which is more emphatic, and the circumstances are very different. Therefore we do not regard *Ramakrishna Nadar* v. *Ponnayya Tirumalai Vandaya Thevar*[4], as having application here.

The Allahabad High Court in *Danmal Parshotamdas* v. *Baburam Chhotelal*[5], the Patna High Court in *Firm Laduram Sagarmal* v. *Jamuna Prasad Chaudhuri*[3], the Lahore High Court in *Krishanlal Ramlal* v. *Abdul Ghafur Khan*[6], and *Chhaganlal* v. *Firm Mangal Sainraj Narain*[7], have all held that subsequent registration of the firm will not allow the suit

1. (1937) 41 C.W.N. 534.
2. A.I.R. 1939 Nag 301.
3. (1938) I.L.R. 18 Pat. 114.
4. (1935) 69 M.L.J. 791.
5. (1935) I.L.R. 58 All. 495.
6. (1935) I.L.R. 17 Lah. 275.
7. A.I.R 1938 Lah. 767.

Ponnuchami Goundar *v.* Muthusami Goundar. — Leach, C.J.

to proceed. All these cases except the second Lahore case were decided by Division Benches.

The great weight of authority is in favour of the opinion that registration will not put the suit on a proper basis and that the Court's duty is to dismiss it. We consider that the majority opinion is correct. A suit is instituted when the plaint is filed in a Court of competent jurisdiction. S. 69 says that a suit by a firm shall not be instituted until the firm has been registered. The registration of the firm is a condition precedent to the right to institute the suit and the Court has no jurisdiction to proceed with the trial when the condition precedent has not been fulfilled.

For the reasons given we consider that the District Munsif acted lawfully in dismissing the suit. It follows that the petition must be dismissed with costs.

K. S. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORDS ATKIN, RUSSELL OF KILLOWEN, AND ROMER; SIR SIDNEY ROWLATT AND SIR GEORGE RANKIN.

Commissioner of Income-tax, Punjab, North-West Frontier and another ... *Appellants**

v.

Dewan Bahadur Dewan Krishna Kishore ... *Respondent.*

P.C. — Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Income-tax Act (XI of 1922), Ss. 9, 8 and 12—Impartible estate governed by Mitakshara law—Income in the hands of holder—Mode of assessment—Practice—New point of law—Propriety of raising before Privy Council—Hindu law—Impartible estate—Origin and nature of right to maintenance of junior member.

On the question as to whether the holder of an ancestral impartible estate governed by the Mitakshara law who was joint with his kinsman was to be assessed in his status as an "individual," or as head of a "Hindu undivided family" in respect of the income from house properties and other income of the estate,

Held: Under the Hindu law it is the undivided family and not the holder for the time being who is the owner of the estate and therefore in respect of the income from the property consisting of buildings or lands appurtenant thereto, the assessee cannot be taxed as an "individual" under S. 9 of the Income-tax Act.

The income of an impartible estate is not income of the undivided family but is the income of the holder notwithstanding that he may have sons from whom he is not divided and the income which consists of interest can hence be assessed to income-tax as that of an 'individual' under Ss. 8 and 12 of the Income-tax Act.

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* P. C. Appeal No. 44 of 1940. 4th July, 1941.

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

The *Gorakhpur case* only decides that rights of maintenance out of an impartible family estate is not enjoyable by any one who has ceased to be joint; that such enjoyment is *prima facie* an affirmation that the right to succeed by survivorship persists and that the absence of a right to partition will not negative such a right. It does not however mean that in the absence of a custom provable by the holder, the junior male members have a claim for maintenance as "actual co-owners" or that the right to maintenance is a "real right." The right of the junior members to maintenance can only be ascribed to custom.

It is neither convenient nor conducive to accuracy that new and important points of law should be raised for the first time before the Privy Council, or that decisions should be given, upon matters not duly submitted to the High Court.

Appeal from the order of the Full Bench of the Lahore High Court, [I.L.R. (1939) Lah. 520] dated 18th April, 1939 on a case referred by the Commissioner of Income-tax, Punjab under S. 66 (1) of the Indian Income-tax Act.

J. Millard Tucker, K. C., and *W. Wallach* for Appellants.

J. M. Parikh and *R. Parikh* for Respondent.

Their Lordships' Judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal arises out of a reference made to the High Court of Lahore under S. 66 of the Indian Income-tax Act (XI of 1922) in respect of the year of assessment 1937—1938. The assessee is Dewan Bahadur Dewan Krishna Kishore. His family is governed by the Mitakshara but by custom the rule of primogeniture controls the devolution of the impartible property, in the Punjab to which this appeal relates. He is the present holder of the impartible estate having succeeded as the eldest son of the previous holder. He has a younger brother who established against him in arbitration proceedings a right to maintenance which has now been fixed at Rs. 600 per month. He has also four sons who live with him, are maintained by him, and are with him joint and undivided members of a Hindu family. He has certain personal and individual income chargeable to tax as well as income which is not taxable being derived from a *jagir*. No question now arises as to these classes of income. The problem laid before the High Court for solution has reference only to the income which is derived from the impartible estate and the question is confined to this: whether in respect of that income the assessee is chargeable as an individual. The contention of the assessee is that such income is only chargeable as the income of a Hindu undivided family of which he is the *karta* or managing member.

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Sir George Rankin.

If so, less super-tax is payable upon it; the Hindu family as the law stood in the year of assessment, being favourably treated as regards the gradation of the tax.

The question as framed by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, who is the appellant before the Board, was in these terms:

"Whether the income of the impartible estate to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara is chargeable in his hands in the status of "individual" the assessee being the head of the family consisting of himself and his sons."

A second question framed was merely formal and consequential: it asked whether if the income was chargeable as his individual income, his other "personal" income is to be "clubbed together" with it for a combined assessment.

The sections of the Act to which the question directly refers are Ss. 3 and 55 which in language almost, but not quite, parallel impose the tax and the additional duty or super-tax. S. 55 prescribes that there shall be charged an additional duty in respect of the total income of the previous year, 'of every individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm'. The differences of wording in Ss. 3 and 55 though important for some purposes are not significant for the present purpose. The opening words of S. 9 and the first sub-section of S. 14 however, are as follows:

"9. (1) The tax shall be payable by the assessee under the head "property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner.

14. (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

By a decision of the High Court of Lahore given in 1932 with reference to the year of assessment 1929—1930 it was held that the income from this impartible estate was chargeable to tax as the income of a Hindu undivided family; and also that the younger brother's allowance was no part of the income of the family, though chargeable against the recipient as his income, *Krishan Kishore* v. *Commissioner of Income-tax*[1]. This ruling was carried out until the assessment now in question came to be made for the year 1937—1938. In consequence of a Madras decision, *Commissioner of Income-tax, Madras* v. *Rajah of Bobbili*[2], the assessee was notified by the

1. (1932) I.L.R. 14 Lah. 255.
2. (1937) 1 M.L.J. 707: I.L.R. (1937) Mad. 797 (F.B.).

P.C.
Commissioner of Income-tax Punjab v. Krishna Kishore.
Sir George Rankin.

Income-tax Officer in January, 1938, that it was proposed to assess the income from the impartible estate as his individual income. He promptly petitioned the Commissioner to state a case "at this interlocutory stage" for the opinion of the High Court and the Commissioner did so on 6th September, 1938. The result is that their Lordships have not before them any order of assessment or other formal statement in detail of income classified under the different heads mentioned in S. 6 of the Act. In the case stated the Commissioner says only that the income of the impartible estate "comprises mainly rent of property and interest". To this Dalip Singh, J., in his judgment adds:

". . . . this latter source is however small and the income consists mainly of rent from the house property."

There is a reference in a further passage of the judgment to "interest from securities if any" as distinct from income arising from property and coming under S. 9 of the Act. But there is no material before their Lordships to justify them in accepting as a fact that the income of the impartible estate other than that arising from house property is interest receivable on any of the kinds of security mentioned in S. 8.

The question as framed refers to the assessee as head of "the family consisting of himself and his sons." The maintenance paid to the younger brother is assumed to be an admissible deduction, as was held in the previous case of 1930. It may be inferred from the Commissioner's language and collected from the report of the previous case that the younger brother lives separately from the elder. This would not necessarily import division in any sense and certainly it nowhere appears that he has relinquished his right to succeed by survivorship to the estate so as to bring about a partition in respect thereof. On these matters the implications of fact and law which underlie the case as stated have not been made explicit. Their Lordships pick no quarrel on these points but desire to make it clear that they have neither occasion to examine them nor the materials for a conclusion. They proceed upon the case as stated.

The learned Judges of the High Court have rejected the claim of the Commissioner to tax the assessee as an individual upon the income of the house property under S. 9 of the Act. The ground of their decision is that "the owner" of the buildings and lands appurtenant thereto is not the assessee but the Hindu undivided family. With this reasoning their Lordships

P.C.

Commissioner of Income-tax, Punjab
v.
Krishna Kishore.

Sir George Rankin.

agree. They think that the learned Judges were right in refusing to follow the Bombay case wherein it was held that the words "property of which he is the owner" are to be read as meaning "of which annual value he is the owner", *Commissioner of Income-tax, Bombay* v. *Abubacker Abdul Rehman*[1]. However difficult it may be in some cases to apply the simple and ordinary phrase "owner of property" to the facts it is not permissible to substitute a phrase which is of dubious and noticeably different meaning. Again, the distinction between property owned by an individual Hindu and property owned by a Hindu undivided family must be made by applying the Hindu law and if the distinction in certain cases be somewhat fine and difficult to draw it is all the more necessary to keep close to the Hindu law. Their Lordships cannot accept the suggestion that because the statute to be interpreted is an Income-tax Act broader or more general notions of ownership than the Hindu law affords are to determine the matter. The Act is an Indian Act and the distinction takes its meaning from the Hindu law. Since the decision of the Board in *Baijnath's case*[2], it has been settled law that property though impartible may be the ancestral property of a joint family, and that in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara. The concluding words of the judgment delivered on behalf of the Board by Lord Dunedin in *Baijnath's case*[2], are to that effect, and in that case as well as in the case of *Shiba Prasad Singh*[3], which followed it, "the keynote of the position" is—not that property which is not joint property devolves by virtue of custom as though it had been joint—but that the general law regulates all beyond the custom, that the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line:

> "The birth right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered".

The later cases are to the same effect. Though the co-ownership of the junior member may be "in a sense" only,

1. I.L.R. (1939) Bom. 284.
2. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).
3. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331 at 345: I.L.R. 59 Cal. 1399 (P.C.).

P.C.

Commissioner of Income-tax, Punjab v. Krishna Kishore.

Sir George Rankin.

carrying no present right to joint possession, if the question be whether the Hindu undivided family or the present holder is owner of the estate the answer of the Hindu law is that it is joint family property. The assessee as an individual cannot therefore be charged in respect of it under S. 9 of the Act. But their Lordships do not affirm that the family consists for this purpose solely of the assessee and his sons.

This answers the main contention of the Commissioner before the High Court. On this appeal learned counsel for the Commissioner intimated a contention that the assessee as an individual might be charged in respect of the income from house property not under S. 9 but under S. 12 which deals with "other sources"—a contention which as their Lordships understand, proceeds upon the footing that the Hindu undivided family is not chargeable under S. 9 or at all; because, though it owns the property it derives no income therefrom, since the income belongs to the present holder as an individual. No such contention is raised in the case as stated; nor has the Commissioner referred to it in the opinion which the statute requires him to give; nor was it dealt with in the Court. Hitherto the assessments on the family would appear to have been made under S. 9 as to the house property. It is neither convenient nor conducive to accuracy that new and important points of law should be raised for the first time at their Lordships' Board, or that decisions should be given upon matters not duly submitted to the High Court. Their Lordships will therefore express no opinion as to this new line of attack. If it is persisted in, as for example by an order of assessment made in respect of income as coming under S. 12, the assessee will doubtless be able to test its legality hereafter.

The important question remains whether the income which consists of interest is income of the family or of the individual. The High Court have held in general terms—apart from the particular provisions of S. 8 or S. 9—that the income of an impartible estate is income of the family and not of the present holder. The same matter had been fully considered in the High Court of Madras in the *Bobbili case*, where a different conclusion was reached. It has been the subject of much argument on this appeal and their Lordships think it right to give their decision upon it, especially as they have arrived at a result which will not be affected whether the income in question be found to

P.C.

Commissioner of Income-tax, Punjab.
v.
Krishna Kishore.

Sir George Rankin.

come under S. 8 or S. 12. In their Lordships' view the income of an impartible estate is not income of the undivided family but is the income of the present holder notwithstanding that he has sons from whom he is not divided.

In its simplest form the question is whether such interest comes to the hands of the assessee as being the person beneficially entitled to it or as being a manager on behalf of himself and others. In *Jagadamba Kumari* v. *Narain Singh*[1], the last holder had out of the income accumulated considerable property moveable and immoveable and the question was whether this formed an accretion to the impartible estate by reason that it had been entered in the same books of account as the estate transactions. Lord Buckmaster on behalf of the Board said:

> " In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the *raj*. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character".

And their Lordships went on to contrast the income of an impartible estate with that of an ordinary joint estate:

> " It is possible that this confusion is due to the consideration of the position of an ordinary joint family estate. In such a case the income, equally with the *corpus* forms part of the family property and if the owner mixes his own moneys with the moneys of the family.... ...his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property".

Mr. Parikh in a learned and careful argument for the assessee contended that this language was to be explained by the fact that in the particular case before the Board the Raja had no sons, and that no maintenance was payable out of the income from the estate. But the language of the judgment seems too general to have been directed to a speciality of that particular case. It may be said perhaps that savings out of the income might be the Raja's although the income was not originally received by him as his income. But that again does not seem to be the point of the judgment. The line of decisions must be considered.

The principle of *Sartaj Kuari's case*[2], that there is no coparcenary was logically extended by the second *Pittapur case*[3],

1. (1922) 44 M.L.J. 503: I.L.R. 2 Pat. 319: L.R. 50 I.A. 1 (P.C.).
2. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.)
3. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Sir George Rankin.

to negative any right to maintenance in a junior member of the family save by custom:

"An impartible zamindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim (*sc.* to maintenance) is gone........This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom so custom may and does affirm a right to maintenance in certain members of the family".

It was held, moreover, that proof of special custom would be required to extend the right beyond the sons of the last holder. This was pointedly followed by the Board in the *Jeypore case*[1], and followed again in 1927 in the *Dhalbum case*[2], after *Baijnath's case* in 1921 had set to the doctrine of *Sartaj Kuari's case* this limit, that it applied to "presently existing rights" but not to chances of succession. The second *Pittapur case* was trenched upon in *Baijnath's case* by saying that:

"Any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*".

But it was re-stated that the right of a junior member to maintenance was not "of the nature of a real right" as he was not "a person who was in some way an actual co-owner of the estate". In *Shiba Prasad Singh's case* the Board expressly notice that the ordinary right of a junior male member to maintenance out of the joint family property is incompatible with the custom of impartibility and include it in the reflection:

"To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property........Though the other rights which a co-parcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains".

Again in holding quite generally that moveable property cannot be incorporated with an impartible estate, the Board said that "the income even of such an estate is not an accretion to the estate" and they selected for quotation a sentence in the judgment in *Jagadamba's case*, "the income when received is the absolute property of the owner of the impartible estate", adding that it does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate (p. 353). The circumstance that the last holder had died childless does not seem to be the basis and turning point of these reflections.

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1. (1919) 37 M.L.J. 188: 24 C.W.N. 226 (P.C.).
2. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289 (P.C.).

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Sir George Rankin.

The High Court's decision in the present case seems to have turned entirely upon a passage in the judgment of the Board delivered by Lord Blanesburgh in *Collector of Gorakhpur* v. *Ram Sundar Mal*[1]. This had also been considered in the *Bobbili case* but the Madras High Court did not think that it touched the present question. The question in the *Gorakhpur case* was whether one Indrajit had succeeded by survivorship to an impartible estate. The objection taken to his son's claim was that his branch of the family had long been separated from that of the last holder. That they had long been separate in food and worship was clear enough, the common ancestor being very remote. The claimant's branch or some of its members had for many years possessed a *babuai* property which had been carved out of the impartible estate by a previous holder thereof. Considering whether this fact tended to show separation or jointness of the branches, the Board referred to *Baijnath's case* as having negatived the doctrine that an impartible zamindari could not be in any sense joint family property. They add:—

"One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance, the Chellapalli case, (*Raja Yerlagadda Mallikarjuna Prasada Naidu* v. *Raja Yerlagadda Durga Prasada Naidu*)[2], which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession. Such was the position of the junior branch in this case under the *babuai* grant of Dharamner."

On the strength of these observations, which they consider to contradict the previous decisions (the *second Pittapur case* and *Shiba Prasad Singh's case* in particular), the High Court of Lahore have now held that the members of the joint family have a right to maintenance which arises from their right in the property of the joint family "of which they are co-owners". They consider that the Board have negatived the view that there is no right to maintenance save such as is impressed by custom and conclude that the income of the estate cannot be said to be "the income solely of the incumbent". They say:—

"The members of the joint family have the right to receive maintenance from the estate and this right arises because they are owners of the estate

1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286 at 302: I.L.R. 56 All. 468 (P.C.).
2. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.).

P.C.

Commissioner of Income-tax, Punjab v. Krishna Kishore.

Sir George Rankin.

and is not a right to maintenance from the joint family, though not from the property, as is the case of female members of a joint family. The distinction is really quite clear: in the one case the female member has a right to maintenance from the joint Hindu family but this right does not confer any right in the estate or property of the joint family; in the other case the members of the co-parcenary have a right to maintenance arising from their right in the property of the joint Hindu family of which they are co-owners. It follows from this again that the income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate, there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family, namely, the incumbent of the impartible estate."

Before attributing these effects to the passage cited above from the *Gorakhpur case* there is a good deal to consider. The character of the income as received by the holder of the estate was not even indirectly before the Board, and if it had been, there is all the difference between the case where junior members have a right to maintenance and one where they are in enjoyment of a maintenance (*korposh*) grant of lands. The passage seems to recognise by the words "however limited" that the right is in some sense less extensive than in the case of partible property. The statement that it is "based upon" the joint ownership is insufficient to show the intention to exclude custom as having no effect whatever, and it is only reasonable to interpret the reference to joint ownership in the light of *Baijnath's case*. General considerations of theory have their proper place but impartibility and primogeniture when introduced into the Mitakshara involve competition and compromise between different lines of theory; if the doctrine that "there is no co-parcenary" may be pushed too far in one direction the doctrine that the junior members "are in a sense co-owners" may be pushed too far in another: the special incidents of joint family property which is impartible being overlaid in either case by rigid theory.

Though the judgment of Dalip Singh, J., is not quite clear upon the point, their Lordships do not understand the learned Judges of the High Court to affirm that all male members of the family are entitled to maintenance from an impartible estate. This is not contended by Mr. Parikh for the assessee; it is contrary to much authority and practice and it would in many if not in most cases convert a heritage into a burden. If some members have and some have not the right, although all are equally "co-owners" or "joint owners" the difference can

P.C.

Commissioner of Income-tax, Punjab
v.
Krishna Kishore.

Sir George Rankin.

only be attributed to custom. If it is custom whose power has superseded the ordinary law and introduced the rule of primogeniture the unique incidents of single heirsuccession (so to call it) can have no other origin. What then is the doctrine which the High Court derive from the passage cited from the *Gorakhpur case*? Is it that custom has taken away from some of the junior members their rights of maintenance but left to others those rights of maintenance which the ordinary law would give them in the case of partible property? This was thought by the Madras High Court in the *Chemudu case*[1] to have been laid down by the Board's judgment in the second *Pittapur case*, but as has been already noticed, that judgment is opposed to it. The same doctrine, it may be, is what the High Court of Lahore have discerned in the *Gorakhpur* judgment.

In any view their Lordships think it important to make clear that this theory cannot be accepted. In partible property under the Mitakshara the right of members of the co-parcenary while the family is joint is characterised by unity of ownership (community of interest) and unity of possession. This has often been stated and expounded—*cf.* the judgments of the Board delivered by Lord Justice Turner in the first *Shivaganga case*[2], and by Lord Westbury in *Appovier* v. *Rama Subbien*[3]. Before partition, the right of brother, son or nephew of the karta may be called and often is called a right to be maintained, but it is the same right as the karta has himself. Unity of possession is the basis of their right, which is a right to live upon the fruits of their own property. The karta has no special interest therein; there is community of interest and each co-parcener is in joint possession of the whole. The right of son or nephew in the income is not a right to an exact fraction of the income; the karta may well spend more on a son whose family is large or who has special aptitudes or necessities. But however wide his discretion within the extensive range of family purposes, he has no right to apply any part of the income to other purposes; and is liable in appropriate proccedings to make good to the other members their shares of any sums which he has actually misappropriated. For this purpose it is irrelevant to consider whether and in what circumstances

1. (1934) 67 M.L.J. 306: I.L.R. 57 Mad. 1023 (S.B.).
2. (1863) 9 M.I.A. 539 (611). 3. (1866) 11 M.I.A. 75, (89).

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Sir George Rankin.

the remedy is available apart from partition; the question is of right not of remedy. The various powers of management as karta though given even to the father, confer on him no larger interest in the income or the *corpus* and no larger rights of enjoyment on his own behalf. The consequences attached to the son's pious duty to pay a father's debts may make sad havoc at times with the son's birth-right to an equal interest, but that is another matter.

Now it is at least certain that the holder of an impartible estate stands in no such relation to those of the junior male members of the family who are entitled to maintenance. Can he not say

> "I have provided sufficiently for my sons: I shall invest the balance of the income for myself?"

Certainly he can, so far as the sons are concerned. Single heirsuccession is inconsistent with any son having the same right in respect of income as he would have had in the income of partible property and the use of the word "maintenance" to describe the latter right cannot be allowed to confound the two. The right to maintenance in the former case is a right of a different character from that of a co-sharer to enjoy his share and live upon his own property by way of joint possession. To represent that custom takes away the right to maintenance from some members but leaves it to others does not explain the facts as to impartible estates. The son's right of maintenance out of impartible property cannot be accounted for as an original and separable right untouched when custom takes away his right to joint possession. It is not something that is left after something else has been subtracted. It is a different right given sometimes to sons only and sometimes to others in consequence of the impartible character of the property; being sometimes a right of maintenance simply, and sometimes a right to a maintenance grant of lands. In their Lordship's judgment it can only be ascribed to custom as has repeatedly been held. It may be excessive to say that there is no co-parcenary but it is certain that there is no joint possession.

It by no means follows, however, that the right is conferred or is available independently of membership of the joint family. There is no question of joint possession, but if "unity of ownership" be severed—and it has been held that it can only be severed by relinquishment on the part of the junior member

P.C.
Commissioner of Income-tax, Punjab v. Krishna Kishore.
Sir George Rankin.

—it may well be that even close relationship would not satisfy the custom. This relation between the rights of sons to maintenance and the "birth-right" of every male member to take by survivorship should he become senior in the senior line is the subject-matter of the observation in the *Gorakhpur case*. That observation may be taken to establish that enjoyment of the maintenance is *prima facie* an affirmation that the right to succeed by survivorship persists just as a maintenance grant may well be evidence negativing separation at least at the date of the grant. Their Lordships are not now called upon to examine or expound these matters but are solely concerned with the character of the receipt and of the recipient of the interest which it is proposed to tax. They do not for this purpose find it necessary to answer questions hitherto undecided with respect to maintenance.

But they find it necessary to say that the law as declared in the cases of *Baijnath* and *Shiba Prasad Singh* has not been unsettled by the *Gorakhpur case*. The observation itself and its context show that the reference to other judgments of the Board is controlled by the reference to *Baijnath's case* as having negatived the view that an impartible estate could not be in any sense joint family property. The issue in the *Gorakhpur case* was Indarjit's right to succeed and the passage cited was addressed to that. It appears to waive aside, as no longer an obstacle, the extreme logic that as there is no right to a partition the junior branch could have no right, actual or prospective, which the enjoyment of maintenance could evidence. It need not be taken as swinging to the opposite extreme: indeed it would be in a high degree unreasonable, having regard to the line of decisions, to interpret it as meaning that there is no reason why holders of impartible estates should not now be told that, unless they can prove a custom to the contrary, all junior male members of the family have a claim for maintenance—that is, all who have not relinquished their right of succession. The point made is only this: that rights of maintenance out of an impartible family estate—however little they may be and to whichever member they be extended—would not be enjoyed or enjoyable by any one who had ceased to be joint in respect of the estate. In their Lordships' opinion this should not be taken to affirm any disputable doctrine as to the origin of the right of maintenance or any other doctrine which would

P.C.

Commissioner of Income-tax, Punjab v. Krishna Kishore.

Sir George Rankin.

make junior members "actual co-owners" or the right a "real right" in the sense negatived by the Board in *Baijnath's case*.

In the *Chellapalli case* above-mentioned, the origin of the junior members' right to maintenance was not under discussion: only the amount recoverable and the property to be charged therefor. The character of the right was fully considered, however, and it was said by the Board that,

"The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable".

Their Lordships will in the present case assume that the sons of the assessee have a right to be maintained by him, that this right arises from the fact that he is the present holder of the impartible estate, and that the right is a right to be maintained out of the current income thereof in such sense that it could be enforced against the assessee in default by the Courts in India giving them a charge upon the property or a sufficient part of it. Even so, it is not true in fact or in law to say that the income from the estate is received by the assessee as the income of a joint Hindu family receivable by the *karta*, nor is it received by him on behalf of himself and his sons; but on his own account as the holder by single heir succession of the impartible estate. The "presently existing right" of the sons is to be paid a suitable maintenance or to have it provided for them in the ordinary course of Hindu family life. The Hindu law is familiar not only with persons such as wives, unmarried daughters and minor children for whose maintenance a Hindu has a personal liability whether he may have any property or none, but also with cases in which the liability arises by reason of inheritance of property and is a liability and to provide maintenance out of such property. It applies to persons whom the late owner was bound to maintain. The facts that the sons' right to maintenance arises out of the father's possession of impartible estate and is a right to be maintained out of the estate do not make it a right of a unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income.

Unity of ownership, unaccompanied by joint possession on the part of the sons or any other right of possession, would not seem to affect the character in which the income is received. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable; and their Lordships see no

P.C.

Commissioner of Income-tax, Punjab *v.* Krishna Kishore.

Sir George Rankin.

reason to restrict the observations which they have cited from the judgment in *Jagadamba's case* to the special class of cases where no maintenance is payable to any junior member. It cannot, in their view, be held that the respective chances of each son to succeed by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and them, or on behalf of a Hindu family of which he and they are some of the male members.

Their Lordships think that the answer proper to be given to the first question propounded in the case stated is as follows:—As regards house property: for the purposes of S. 9 of the Act, No. As regards interest: for the purposes of Ss. 8 and 12 of the Act, Yes. The second question may be answered, as regards interest, Yes, and need not be further answered.

Their Lordships will humbly advise His Majesty accordingly and that this appeal should be allowed and the High Court's order varied in accordance with the answers above given. The High Court's order will stand as regards costs. Since the assessee has succeeded as regards the house property which is the main part of the case the appellant must pay the assessee respondent's costs of this appeal.

Solicitors for Appellants: *India Office.*

Solicitors for Respondent: *Stanley Johnson and Allen.*

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

R. Kailasa Aiyar ... *Petitioner* (1st Plaintiff)*

v.

Payyalur Gramam Vanchi Pattar's son, Sundaram Pattar and others. *Respondents (Defendants 1 to 7).*

Kailasa Aiyar *v.* Sundaram Pattar.

Court-fees and suit valuation—Co-mortgagee suing to recover his individual share in mortgage—Valuation for court-fees and jurisdiction—If to be of full amount of mortgage or only plaintiff's share in it—Applicability of principle to charge.

One of several co-mortgagees who are in the position of tenants in common can sue to recover his own share of the mortgage provided that he makes his co-mortgagees defendants, if they refuse to join him as plaintiffs.

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*C. R. P. No. 1271 of 1939. 10th October, 1941.

Kailasa Aiyar v. Sundaram Pattar.

Such a co-mortgagee when suing to recover his individual share in the mortgage debt must value his suit according to the full amount due under the mortgage deed for purposes of court-fee and jurisdiction. The same principle will apply to a charge.

Observations of Varadachariar, J, in *Peer Ammal* v. *Nalluswami Pillai*, (1937) 2 M.L.J. 666, approved.

Seth Bansiram Jeshamal v. *Gunnia Naga Aiyar*, (1930) 59 M.L.J. 928, disapproved.

Sunitibala Debi v. *Dhara Sundari Debi Chowdhurani*, (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.), relied on.

Petition under Ss. 115 and 151 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Sub-ordinate Judge of South Malabar at Palghat dated 8th February, 1939 and made on the returned plaint in O.S. No. 27 of 1936 on the file of the said Court of the Subordinate Judge of South Malabar at Palghat.

N. R. Sesha Aiyar for Petitioner.

K. Subba Rao for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This civil revision petition raises the question whether a co-mortgagee when suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed, or whether he may value it according to his own share. The question has arisen in other cases in this Court and there is a conflict of opinion. It is certainly one of some difficulty. In the present case there is a charge on immoveable properties and not a mortgage, but the same principle admittedly will apply.

In the year 1919 one Vanchi Pattar organised a chit fund, of which he constituted himself the manager. The subscriptions were to be paid to him and as security for the discharge of his obligation to the subscribers he created a charge on certain immoveable properties. Rama Pattar, the father of the petitioner and of the fourth and fifth respondents, subscribed to the fund on behalf of his family, which was then joint. Eventually the family became entitled to withdraw from the fund Rs. 3,032, but Rama Pattar died without receiving payment. After his death his sons separated and under the decree passed in a partition suit the petitioner became entitled to two-fifths, the fourth respondent to two-fifths and the fifth respondent to one-fifth of the Rs. 3,032. With two exceptions all subscribers to the fund have now been paid. The two exceptions are Rama Pattar's family and one P. M. Krishna Aiyar.

Kailasa Aiyar v. Sundaram Pattar.

Leach, C.J.

In 1936 the petitioner filed a suit in the Court of the Subordinate Judge of South Malabar at Palghat to recover his two-fifths share of the Rs. 3,032 by the enforcement of the charge created by Vanchi Pattar who is now dead. The defendants were the first and second respondents, who are the sons of Vanchi Pattar; the third respondent, who is the alienee of the properties; the petitioner's brothers and P. M. Krishna Aiyar. The amount due to P. M. Krishna Aiyar was Rs. 1,429 and therefore at the time the suit was filed the properties remained charged in respect of a total sum of Rs. 4,461. The petitioner prayed for a decree for Rs. 1,212-6-4, the amount of his own share in the Rs. 3,032, and stamped his plaint accordingly. As the amount claimed was less than Rs. 3,000 the Subordinate Judge held that he had no jurisdiction to try the suit and returned the plaint to the petitioner to enable him to present it to the Court of the District Munsif of Alatur. In accordance with the decision of the Subordinate Judge the petitioner presented the plaint to the District Munsif, who accepted it, but in consequence of a plea raised by the third respondent in his written statement the District Munsif framed an issue on the question whether the suit had been properly valued for the purposes of court-fees and jurisdiction. The District Munsif considered that the suit should be valued in accordance with the full amount due under the document creating the charge and therefore ordered the plaint to be returned to the petitioner for presentation to the Court having jurisdiction; in other words, to the Court of the Subordinate Judge. The petitioner then re-presented the plaint to the Subordinate Judge, who adhered to his previous decision and refused to accept it. In these circumstances the petitioner asks this Court, in the exercise of its revisional powers, to set aside the Subordinate Judge's order directing the plaint to be returned and compel him to try the suit. In re-presenting the plaint to the Subordinate Judge the petitioner did not amend it in any way and did not tender any additional court-fee. The petitioner admits that he must ask for the sale of all the properties included in the charge and that the total amount due to the members of his family and to P. M. Krishna Aiyar under the document creating it is Rs 4,461, but he says that notwithstanding he is entitled to sue in the Court of the Subordinate Judge on payment of a court-fee based on the amount of his own share only.

Kailasa Aiyar v. Sundaram Pattar.

Leach, C. J.

S. 7 of the Court-fees Act and S. 8 of the Suits Valuation Act contain the only relevant statutory provisions. Sub-S. (1) of S. 7 of the Court-fees Act states that in suits for money the amount of the court-fee shall be computed according to the amount claimed. It is common ground that when a mortgagee or a person entitled to a charge on immoveable property sues to recover what is due to him the plaint falls to be stamped under this sub-section. Sub-S. (9) requires a suit against a mortgagee for the recovery of the mortgaged property or a suit by a mortgagee to foreclose the mortgage to be stamped according to the principal money expressed to be secured by the instrument of mortgage, but this sub-section goes no further and a suit to enforce a mortgage by a decree for sale obviously does not come within it. S. 8 of the Suits Valuation Act states that where in suits other than those referred to in S. 7 (*v*), (*vi*), (*ix*) and [*x* (*d*)] of the Court-fees Act, court-fees are payable *ad valorem* under the Court-fees Act, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. Therefore in a suit like the one referred to in the petition it is the value of the claim which determines the forum, but it remains to be seen whether in such a suit the claim must be taken to be limited to the payment of the plaintiff's individual share or whether it is to be construed as one for the enforcement of the whole mortgage, and valued as such.

It is not disputed, nor can it be in view of the authorities, that one of several co-mortgagees who are in the position of tenants in common can sue to recover his own share of the mortgage, provided that he makes his co-mortgagees defendants, if they refuse to join him as plaintiffs. See *Atchamma* v. *Subbarayudu*[1], and *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2]. The last mentioned case was decided by the Privy Council and in delivering the judgment of the Board Lord Buckmaster said:

> " Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor."

1. (1903) 15 M.L.J. 496.
2. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).

Kailasa Aiyar v. Sundaram Pattar.

Leach, C J.

Neither in *Atchamma* v. *Subbarayudu*[1], nor in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2], did any question of court-fee or jurisdiction arise. Therefore these cases leave open the question under discussion, although we consider that the observations of Lord Buckmaster just quoted greatly assist in the solution of the problem. We shall return to *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2] presently but at this stage it will be convenient to examine the judgments of this Court which are in conflict. They are the judgment delivered by Ramesam, J., in *Seth Bansiram Jeshamal* v. *Gunnia Naga Aiyar*,[3] and the judgment of Varadachariar, J., in *Peer Ammal* v. *Nalluswami Pillai*[4].

The case of *Seth Bansiram Jeshamal* v. *Gunnia Naga Aiyar*[3], was decided by Ramesam, J., sitting alone. The learned Judge held that S. 67 (*d*) of the Transfer of Property Act does not prevent a person interested in part only of the mortgaged property instituting a suit. He may institute a suit for the recovery of his share provided the reliefs he prays for relate to the entire property. In the course of his judgment the learned Judge observed:

"Thus the real question in all such cases is not one of maintainability of the suit but what is the court-fee to be paid by the plaintiff in such cases and perhaps though the point does not arise now there is also the question of jurisdiction. In such cases, should the plaintiff pay court-fee upon the whole of the mortgage money or only upon his share? It is true that for realizing his share of the mortgage money he has to pray for sale of the whole property........If the whole of the mortgaged property realised more than the amount due on the document to all the mortgagees, the plaintiff will be simply paid his amount and the rest of it will be held by the Court and will not be paid to the other co-mortgagees until they pay their court-fees. The fear that the Government will be deprived of the Government revenue while the whole of the mortgage amount is being realised and only a small amount is being paid as court-fee, is therefore illusory. After the trial of the case and the final decree is passed, the Court will make a provision directing the defendants mortgagees to pay their court-fees within a certain time and if they do not pay the court-fees the amount will be paid to the mortgagor after taking security. In such a case no mortgagee will allow his money to go back to the mortgagor's hands owing to non-payment of court-fees, so that ultimately the Government will get the whole court-fee due upon the whole of the mortgage money".

It follows from these observations that Ramesam, J., was of the opinion that the plaintiff could only be called upon to stamp

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1. (1903) 15 M.L.J. 496.
2. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I L.R. 47 Cal. 175 (P.C.).
3. (1930) 59 M.L.J. 928,
4. (1937) 2 M.L.J. 666,

Kailasa Aiyar v. Sundaram Pattar.

Leach, C.J.

his plaint according to the value of his share in the mortgage, and if this opinion is correct the petitioner has complied with the requirements of the law and the proper forum will be the District Munsif's Court.

In *Peer Ammal* v. *Nalluswami Pillai*[1], Varadachariar, J., sitting with Mockett, J., indicated strong dissent from the opinion expressed by Ramesam, J., in *Seth Bansiram Jeshamal* v. *Gunnia Naga Aiyar*[2]. In the course of his judgment the learned Judge said:

> "Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale proceeds amongst the co-mortgagees. It accordingly seems to me more reasonable to regard the mortgage as a *single* cause of action at any rate for purposes of jurisdiction and in such a case under S. 8 of the Suits Valuation Act, the valuation for purposes of court-fee cannot be different. Ramesam, J., suggests that as regards the defendant co-mortgagee's share, the Court may be able to collect the court-fees later on before distributing the monies to him. With great respect, I venture to doubt if there is anything in the Court-fees Act authorising the Court to do so".

With great respect we consider that the opinion of Varadachariar, J., is to be preferred to that of Ramesam, J. The governing section is S. 7 of the Court-fees Act and not S. 8 of the Suits Valuation Act, but in deciding what court-fee is payable under S. 7 of the Court-fees Act the Court must have regard to the real nature of the claim. A co-mortgagee suing alone for his share must ask for a preliminary mortgage decree in respect of the entire debt. As already pointed out, Lord Buckmaster in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[3], stated that where a co-mortgagee is suing alone he must ask for the proper decree which would provide for all the necessary accounts and payments, although a defendant mortgagee could not ask for judgment in his favour. This can only mean that the plaintiff must ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety. There can be no redemption in part. Therefore the plaintiff cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. In these circumstances it seems to us that the primary claim can only be taken to be the enforcement of payment of the full mortgage debt, which means that the plaint

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1. (1937) 2 M.L.J. 666.   2. (1930) 59 M.L.J. 928.
3. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.).

Kailasa Aiyar v. Sundaram Pattar.

Leach, C.J.

must be stamped accordingly. Although hardship cannot be regarded as a factor, it may be pointed out that to require a co-mortgagee suing alone to pay court-fees on the full amount of the mortgage debt will not result in hardship. If he obtains a mortgage decree he will be entitled to recover out of the money paid into Court by the mortgagor or out of the proceeds of the sale of the mortgaged property the full amount of which he has had to pay in court-fees.

The question of what would be the proper course for a mortgagee defendant to take to recover his share of the moneys brought into Court as the result of a suit by a co-mortgagee does not arise in this case and the question can be left for decision until it does arise.

In the course of his judgment the District Munsif referred to the decision of Pandrang Row, J., in *Ramachandra Aiyar* v. *Sivarama Aiyar*[1], and the decision has been quoted to us in the course of the arguments. In that case a mortgage deed had been executed in favour of several creditors of the mortgagors for the aggregate amount of their dues, but it was the intention of the parties that there should be no separate payment to any of the co-mortgagees until the entire amount had been realised. Pandrang Row, J., considered that the judgment of the Privy Council in *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*,[2] did not apply and he held that one of the creditors could not bring a suit for his share. There are observations in the judgment which are open to criticism but it is not necessary to embark upon a discussion of the judgment because in this case it is common ground that *Sunitibala Debi* v. *Dhara Sundari Debi Chowdhurani*[2], does apply. The only contest is with regard to its bearing on the question raised by the petitioner.

For the reasons given we hold that the petitioner should value his suit at Rs. 4,461 and pay court-fees on that amount, which means that the proper Court to try this suit is that of the Subordinate Judge of Palghat, provided, of course, the plaint is properly stamped. The costs of this petition will be costs in the cause.

The petitioner attached the plaint to his petition. The plaint will now be returned to him.

K.S. *Ordered accordingly.*

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1. (1936) 44 L.W. 502.
2. (1919) 37 M.L.J. 483; L.R. 46 I.A. 272; I.L.R. 47 Cal. 175 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

The Secretary of State for India in Council represented by the Collector of East Godavari. *Appellant** (*Respondent—Defendant*),

v.

Sait Jodaraj Dhupajee (died) and others. *Respondents* (*Appellants—Plaintiffs*).

Secretary of State for India in Council *v.* Jodaraj Dhupajee.

Madras Land Encroachment Act (III of 1905), S. 9—Penal assessment under—Sale of land for recovery—If prevails over prior encumbrances—Madras Revenue Recovery Act (II of 1864) S. 42—Applicability.

S. 9 of the Madras Land Encroachment Act III of 1905 equates the penal assessment levied under it to land revenue and provides that it may be recovered as land revenue. The sale of the defaulter's property for recovery of such assessment passes the property free of all encumbrances, as S. 42 of the Madras Revenue Recovery Act II of 1864 applies to the sale.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in A. S. No. 85 of 1938 preferred against the decree of the Court of the District Munsif of Amalapuram in O. S. No. 42 of 1937 etc.

The Advocate-General (Sir A. Krishnaswami Aiyar) instructed by the Government Solicitor for Appellant.

Ch. Raghava Rao and *G. Chandrasekhara Sastri* for Respondents.

S. A. No. 508 of 1939.

The Court delivered the following

JUDGMENT.—The question involved in this second appeal is whether a sale held for recovery of penal assessment imposed under the Madras Land Encroachment Act III of 1905 prevails over prior encumbrances.

A sum of Rs. 1,182 and odd was the assessment and penalty imposed by the Government for the encroachments on certain lands belonging to the Government by one Venkata Satteyya. The plaintiff in the suit had obtained two mortgages from Satteyya on his properties and had filed a suit and obtained a final decree on foot of those mortgages. As the Government was bringing the property to sale under the provisions of Madras Act III of 1905 read with Madras Act II of 1864 the plaintiff protested that the land should be sold subject to his mortgages. But the Government ordered the sale to be held

* S. A. No. 508 of 1939 and
C. R. P. No. 204 of 1941. 1st September, 1941.

Secretary of State for India in Council v. Jodaraj Dhupajee.

free of all prior encumbrances. The plaintiff then paid the amount under protest and filed the present suit for recovery of the sum. If a sale for penal assessment and penalty imposed under Madras Act III of 1905 does not prevail over prior encumbrances of the defaulter's properties, then the plaintiff is entitled to recover the sum which he paid under protest in order to save the property from being sold for such penal assessment and penalty. S. 9 of Madras Land Encroachment Act III of 1905 lays down:

"The amount of assessment and penalty imposed under this Act on any person unauthorisedly occupying any land shall be deemed to be land-revenue and may be recovered from him as arrears of land-revenue under the provisions of the Madras Revenue Recovery Act, 1864, or the Madras City Land Revenue (Amendment) Act, 1867, as the case may be".

This section provides that the amount of assessment and penalty imposed under this Act *should be deemed* to be land revenue and it provides further that such amcunt may be recovered *as arrears of land revenue* under the provisions of the Madras Revenue Recovery Act. Where the Legislature says that the amount of penalty and penal assessment shall be deemed to be land revenue, though it is not in reality land revenue, we must take it that it is land revenue for the purposes of the Act. The Judicial Committee had to consider a similar case under the Indian Income-tax Act. By S. 43 of the Act:

"Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent".

The Judicial Committee say this in *Commissioner of Income-tax, Bombay Presidency* v. *Bombay Trust Corporation, Ltd*[1],:

"Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were".

Therefore though the penal assessment and penalty are not in fact land revenue, we must take them to be land revenue. The next portion of S. 9 makes the matter further clear by providing that the amount may be recovered as arrears of land revenue under the provisions of the Madras Revenue Recovery Act. Thus, the amount is to be and revenue and may be recovered as arrears of land revenue.

1. (1929) 58 M.L.J. 197: L.R 57 I.A. 49: I.L.R. 54 Bom. 216 (P.C.).

This being so, it is difficult to escape the conclusion that all the consequences which result in the case of a sale under the Revenue Recovery Act for arrears of land revenue strictly so called also result in the case of a sale for recovery of penal assessment and penalty levied under Madras Act III of 1905.

Secretary of State for India in Council. v. Jodaraj Dhupajee.

Reliance is placed by Mr. Raghava Rao upon various decisions of this Court which have considered the effect of sales under the Abkari Act or the Income-tax Act—whether they pass the property free of prior encumbrances or only subject to the encumbrances then existing. The earliest of these cases is the case of *Ramachandra* v. *Pitchaikanni*[1]. The sale was held under the provisions of S. 10 of the Madras Abkari Act which provided that the Collectors may proceed against abkari renters or other persons licensed under the Act for the recovery of arrears due by them *"in like manner as for the recovery of arrears of land revenue"*. Turner, C.J., and Muttuswami Aiyar, J., held that such a sale did not pass the property free of prior encumbrances. They held that it was only the procedure laid down in Madras Act II of 1864 that was to be followed for recovering arrears due by an abkari renter and that a sale under the Abkari Act did not carry the consequences provided by S. 42 of the Madras Revenue Recovery Act, II of 1864. Emphasis was laid on the expression "in like manner as for the recovery of arrears of land revenue". After referring to the various sections of Madras Act II of 1864 the Judges said this:

" S. 42 declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. Taking these sections together, the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration........The question is—Has S. 42 been extended by S. 52 to sales for arrears of Abkari revenue? We must certainly answer it in the negative. The expression, "In like manner as for the recovery of arrears of land revenue", indicates only that the same procedure is to be followed, and the language used in S. 52 is to the same effect".

In *Ibrahim Khan Sahib* v. *Rangasami Naicken*[2], Benson and Boddam, JJ., followed the decision just cited and held that a purchase at a sale for arrears due by an Abkari renter did not pass the land free of encumbrances as in the case of a sale for arrears of land revenue. In the old Abkari Act of 1864 the provision was that the arrears may be recovered in like manner as for recovery of arrears of land revenue. In the Abkari Act

1. (1884) I.L.R. 7 Mad. 434.
2. (1905) I.L.R. 28 Mad. 420.

Secretary of State for India in Council v. Jodaraj Dhupajee.

I of 1886 the provision was that abkari arrears may be recovered as if they were arrears of land revenue—see S. 28 of Madras Act I of 1886. It was held that this change did not affect the applicability of the decision in *Ramachandra* v. *Pitchaikanni*[1].

Cases of sales under the provisions of the Income-tax Act came up for decision more than once. In *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar*[2], this Court had to deal with the provisions of the Income-tax Act then in force (Act II of 1886). Under S. 30 of that Act:

"The Collector may in default of payment of the tax recover the amounts as if they were arrears of land revenue or by any process applicable to the recovery of a municipal or local tax or may pass an order for recovery of the amount from the defaulter, and such order may be executed as a decree for payment of money passed under the Civil Procedure Code".

Act II of 1886 is an Imperial Act and the question was whether a sale under S. 30 of that Act which provided that the tax may be collected by the Collector as if it was arrear of land revenue passed the property free of encumbrances. The Judges applied the principle of the decision in *Ramachandra* v, *Pitchaikanni*[1], and pointed out that the difference in the wording between the provisions of the Income-tax Act and the Abkari Act was merely verbal. They say this at page 233:

" We are clearly of opinion that S. 30 of the Income-tax Act has not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income-tax, but that its effect simply is to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890, to the recovery of arrears of income-tax".

S. 46 (2) of the Indian Income-tax Act of 1922 provides:

"The Income-tax Officer may forward to the Collector, a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue",

and the same result would follow even in respect of sales held under the present Income-tax Act.

The question has next been considered with reference to loans granted under the Land Improvement Loans Act (XIX of 1883). S. 7 of that Act provides for the recovery of the loan. It was held by this Court in *Sankaran Nambudripad* v. *Ramaswami Aiyar*[3], that a sale held under S. 7 (c) of that Act

1. (1884) I.L.R. 7 Mad. 434.
2. (1902) 12 M.L.J. 368: I.L.R. 26 Mad. 230.
3. (1918) 34 M.L.J. 446: I.L.R, 41 Mad. 691.

Secretary of State for India in Council. *v.* Jodaraj Dhupajee.

passed the property free of encumbrances. This is a decision on the other side of the line.

Mr. Raghava Rao urges that the decision in *Ramachandra* v. *Pitchaikanni*[1], and the cases following it, proceed upon the principle that it is only where a land is sold for arrears of land revenue accruing on that very land, that the sale passes the property free of encumbrances and not where the sale is for recovery of an amount due on another land of the landholder. In *Secretary of State for India in Council* v. *Pisipati Sunkarayya*[2], Miller and Munro, JJ., decided that for the arrears of land revenue due on the land included in one patta, the land in another patta in another village may be sold free of encumbrances. They pointed out that under S. 5 of the Revenue Recovery Act all the lands and buildings of the defaulter are a charge. This view of Miller and Munro, JJ., was followed by this Court in *Sankaran Nambudripad* v. *Ramaswami Aiyar*.[3] Seshagiri Aiyar, J., says at page 700:

> "During the course of the argument I felt some little doubt as to whether the decision of Justices Miller and Munro in *The Secretary of State for India in Council* v. *Pisipati Sunkarayya*[2], was right. But on closely examining the sections of the Revenue Recovery Act, I feel that the effect of S. 42 is not only to discharge pre-existing incumbrances upon the property on which the arrear is due but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter."

See also *Gunnam Dorayya* v. *Ayyama Charrulu*[4].

Therefore, though the amount which is sought to be recovered did not accrue in respect of the land which is now sought to be proceeded against, the Government has the right to proceed against that property and to enforce all the rights given to them under the Madras Revenue Recovery Act. No doubt in the case of arrears under the Abkari Act or the Income-tax Act, they do not accrue on any land of the defaulter. So, likewise in the case of penal assessment and penalty, they do not accrue on the lands which are now sought to be proceeded against.

Once the amount levied as penal assessment and penalty is to be deemed to be land revenue and is to be recovered as such, it is impossible to come to any other conclusion than that

1. (1884) I.L.R. 7 Mad. 434.
2. (1910) 20 M.L.J. 794: I.L.R. 34 Mad. 493.
3. (1918) 34 M.L.J. 446: I.L.R. 41 Mad. 691.
4. (1914) 27 M.L.J. 295.

Secretary of State for India in Council v. Jodaraj Dhupajee.

a sale of the defaulter's property for such an amount passes the property free of all encumbrances.

Mr. Raghava Rao then argued that if it is so, the Legislature need not provide that the amount may be recovered as arrears of land revenue. He says that these words will be superfluous if under the expression "shall be deemed to be land revenue", the amount in question became land revenue. I think the Legislature used the expression "and may be recovered as land revenue" only for the purposes of further clarification and that the addition of this expression does not cut down the effect to be given to the expression "shall be deemed to be land revenue." All the decisions referred to by Mr. Raghava Rao proceed upon the wording of the provisions of the particular Acts all of which have this common feature that the arrears due under these Acts were to be recovered as if they were land revenue or in the like manner as land revenue. But here the provision is "that the amount shall be deemed to be land revenue" and "may be recovered as land revenue" and not "in the manner provided for the recovery of land revenue." Therefore the Legislature has expressed in the clearest terms possible that for the purpose of recovery, penal assessment is land revenue and if this is so, S. 42 of Madras Act II of 1864 applies.

Before closing the judgment, it is only necessary to say that Madras Act III of 1905 was necessitated by the decision of the Full Bench of this Court in *Madathapu Ramayya* v. *The Secretary of State for India in Council*[1], which held that the provisions of Madras Act II of 1864 could not be applied to recovery of penalties and other amounts of like nature from persons who were not landholders and who were treated by the Government as trespassers. It was said that the impost was not land revenue, that the trespasser was not a landholder within the meaning of the Revenue Recovery Act, that he was only in improper possession of Government property and that his act was a wrongful act and a trespass. It is because the Full Bench held that the impost in such cases was not land revenue that Madras Act III of 1905 was passed and the acceptance of Mr. Raghava Rao's argument will be to defeat one of the main purposes of the Legislature in enacting Madras Act III of 1905.

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1. (1903) 14 M.L.J. 37: I.L.R. 27 Mad. 386 (F.B.).

I hold that S. 9 equates the penal assessment to land revenue and also provides that it may be recovered as land revenue. This being so, the view of the lower appellate Court is wrong. I reverse the decision of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court. Secretary of State for India in Council v. Jodaraj Dhupajee.

C. R. P. No. 204 of 1941.

In view of my decision in the second appeal, the civil revision petition does not arise. It is dismissed without costs.

Leave refused.

K. S. *Appeal allowed and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Karuppayya Thevar ... *Appellant* (Accused).*

Penal Code (XLV of 1860), S. 304 (2), para 2—Murder by causing bodily injury sufficient to cause death—Death 'likely' and 'not necessary' according to medical evidence—Whether in the circumstances conviction for murder sustainable. Karuppayya Thevar, *In re:*

A person can be guilty of murder even though death is not a necessary consequence of the act done, provided the act has been done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Appeal against the order of the Court of Session of the East Tanjore division at Negapatam in C. C. No. 14 of 1941.

V. T. Rangaswami Aiyangar for Appellant.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—The learned Sessions Judge of East Tanjore charged the appellant with the murder of Visalakshi Ammal by striking her on the head with a heavy stick and causing an extensive fracture of the skull. He however found him guilty only under S. 304, para. 2, Indian Penal Code, and sentenced him to seven years rigorous imprisonment.

According to the prosecution evidence, there was a quarrel because P. W. 7 had stolen a chisel from Rangaswami Asari, a relative of the accused, when Rangaswami Asari failed to pay

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* Crl. Appeal No. 255 of 1941. 2nd September, 1941.

Karuppayya Thevar, *In re.*

P. W. 7 his wages. On the 11th of September, P. W. 7 was beaten by the accused, and on the following day, that is, on the 12th, Murugayya and Rangaswami Asari went to P. W. 8's house and continued the quarrel. There was also a disturbance in the early evening of the 13th. The actual attack which resulted in the murder took place at about 8 P.M.; and it arose because P. W. 4, a respectable man in the village, went to the persons who were quarrelling and attempted to pacify them. He was accompanied by his aged father (P.W. 6) and his mother, the deceased. The accused, a young man of 22 or so, seems to have got incensed at the interference. Finding it easier to deal with a woman than with a man, he struck the deceased with his stick, fracturing her skull. He then ran after P.W. 8, another elderly woman; but she was fortunately able to escape into her house and secure the door.

The murder is spoken to by as many as six eye-witnesses. Although P. Ws. 4 and 6 are closely related to the deceased, there is no reason why their evidence should not be accepted. On the contrary, it seems most unlikely that P. Ws. 4 and 6, with whom the deceased went to pacify the accused, would foist this murder on the accused, with whom they had no quarrel whatsoever. The dispute was between P. Ws. 7 and 8 on the one hand and Rangaswami Asari and Murugayya on the other. P. Ws. 4 and 6 had no concern with the matter at all, except as elders asked to intervene. P. Ws. 9 and 10 are also trustworthy witnesses.

The learned advocate for the appellant has relied on certain discrepancies in the medical evidence, and has argued that—contrary to the prosecution story—the deceased probably received two blows; because she had one injury on the forehead to the left side of the middle line and also what is commonly known as a black eye on the other side. The young Lady Assistant Surgeon was quite sure that these were due to two distinct blows; but the two much older men doctors (P. Ws. 3 and 5). were of opinion that they might well have been caused by one blow; for one of the fractures radiating from a central depressed fracture extended to the right orbital cavity. This particular radial fracture might well have led to an extravasation of blood which would have made the skin appear blue. It was not however necessary for the Court to have tried to reconcile the various statements made by expert witnesses with regard to

the nature of the blows which caused the injuries; it should have asked itself whether the medical evidence precluded the prosecution story. The prosecution witnesses stated that there was only one blow; and although the evidence of P.W. 2 may be said to be inconsistent with that, yet reading the medical evidence as a whole, it cannot be said to render the prosecution story unworthy of credit. | Karuppayya Thevar, *In re.*

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The accused put forward a theory that the deceased fell on a survey stone, but there is no evidence at all that she did so. It is unworthy of consideration in the face of the evidence of so many eye-witnesses.

The learned Sessions Judge, instead of finding the accused guilty of murder, has found him guilty only under S. 304, para. 2, Indian Penal Code, holding that although the accused should have known that death was a likely result of such a blow, death was not the necessary consequence of it. He seeks support for that conclusion from the evidence of P. W. 5, one of the doctors examined. P. Ws. 2 and 3 say that death was the necessary consequence of the blow; but P.W. 5 says that it was not a necessary result but only likely. He appears to have used the word 'likely' in contradistinction to 'necessary.' A person can be guilty of murder even though death is not a necessary consequence of the blow given. Persons make remarkable recoveries at times from severe injuries that ordinarily lead to death. P. W. 5 does not explain how the deceased could have recovered from a depressed and extensively radiating fracture; but perhaps the piece of bone that was depressed could have been removed by operation. Ordinarily, however, an injury of the nature caused to the deceased ends fatally. Even P. W. 5 says that death might have resulted instantaneously from such an injury, and it is one's experience that injuries of this kind ordinarily end fatally. A person commits the offence of murder if the act he does is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The blow given to the deceased must have been a very heavy one to have caused such a severe injury, and the accused must be presumed to have intended the probable consequence of such a blow. The injury so caused being sufficient in the ordinary course of nature to

Karuppayya Thevar, *In re.*

cause death, the accused committed the offence of murder and should have been convicted accordingly. The learned Public Prosecutor thinks that the learned Sessions Judge may have felt himself restrained by an apparent admission of the Public Prosecutor of East Tanjore that the offence committed was not that of murder. If the local Public Prosecutor made such a statement, he did wrongly. One expects a Public Prosecutor to be fair to an accused person and not to press for a conviction of a graver offence if he thinks a lesser has been committed. On the other hand, it is his duty to put before the Sessions Judge all that can be said in support of the charge. To do the Public Prosecutor justice, however, I very much doubt whether the learned Sessions Judge felt himself restrained in any way by anything that the learned local Public Prosecutor said.

The conviction and sentence are affirmed and the appeal dismissed.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Thiruvengadam Pillai and others ... *Appellants** (*Plaintiffs*)

v.

Koolai *alias* Muthuswami Pillai and others ... *Respondents* (*Defendants*).

Thiruvengadam Pillai *v.* Koolai.

Revenue Recovery Act (II of 1864)—Death of registered proprietor before the date fixed for sale for recovery of arrears of revenue—Failure to serve notices of sale on the legal representatives—Effect on the validity of sale.

The Revenue Recovery Act contemplates the continued existence of the defaulter till the date of sale and if before such date the defaulter dies, the sale would be infructuous and would pass no title to the purchaser. Accordingly where a registered ryotwari pattadar dies before the date fixed for sale for recovery of arrears of revenue the proper course for the revenue authorities would be to register the heirs of the deceased as owners in the revenue registers, serve notices on them and fix a fresh date for sale or start the whole procedure *de novo* by issuing a fresh demand and taking further steps as provided in the Act. A sale without following such a course is invalid.

Appeal against the decree of the Court of Small Causes of Trichinopoly in A. S. No. 17 of 1938 preferred against the

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* S. A. No. 471 of 1939. 12th September, 1941.

Thiru-vengadam Pillai *v.* Koolai.

decree of the Court of the District Munsif of Trichinopoly in O. S. No. 371 of 1935.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal relates to the validity of a revenue sale. The relevant facts are these. The suit properties belonged to one Ramanarayana Pillai in whose name the patta stood in the revenue registry and the total extent of land sold was about 14 acres. There was default in the payment of arrears of revenue for fasli 1340 amounting to Rs. 11—5—0. On 10th September, 1931 a notice (Ex. III) was issued under S. 25 of the Revenue Recovery Act calling upon the said Ramanarayana Pillai to pay the arrears within ten days. The notice was not personally served on him but was affixed to his house. A copy of the notice was also affixed on the land and published in the District Gazette. In the notice it was stated that the sale would take place on 12th November, 1931. Ramanarayana Pillai died on 27th October, 1931, leaving the plaintiffs his sons who were then minors. The property was sold on 12th November, 1931, and purchased for Rs. 11-12-0 by the first defendant who has since transferred the property to the third defendant. This suit was filed by the plaintiffs for a declaration that the sale is null and void. It was attacked on various grounds but both the lower Courts decided against the plaintiffs and held that the sale was valid.

Mr. Thiruvenkatachari, the learned counsel for the plaintiffs has confined himself only to one ground, namely, that Ramanarayana Pillai having died before the date of sale, the sale must be held to be null and void and in support of his contention he relied on some observations of the learned Judges in *Marukkolandai Ammal* v. *Secretary of State for India*[1]. In that case the registered pattadar was dead and his legal representative the widow was not registered in his place. His widow was however paying the assessment but she committed default in fasli 1331. The Collector took steps for realising the same. The requisite notices under the Revenue Recovery

1. (1932) 63 M.L.J. 249: I.L.R. 55 Mad. 876 at 881.

Thiru-vengadam Pillai v. Koolai.

Act were issued in the name of the dead man and affixed to the property and the property was sold. It was held that the sale was invalid. The learned Judges observed thus:

"The whole procedure in connection with sale of immovable property is based on the assumption that there is a "defaulter," *i.e.*, in the case of a human being a living person who is in default........To go through with the name of a dead man, the procedure intended for giving living men a chance of saving their property is a farce and a futility......The sale proceedings......were of no force and effect by reason of the absence of the fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale, *i.e.*, that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears."

Mr. Muthukrishna Aiyar for the contesting respondent contends that this case was distinguishable on the ground that the daughter in that case was dead even before the proceedings were initiated, whereas in the present case all the requisite notices were served on the defaulter and all that remained was to sell the property and therefore the jurisdiction of the Revenue Court could not be said to have been taken away by the mere fact that the defaulter died, that after service of the requisite notices the jurisdiction to sell the property was complete and that there is no procedure for bringing on record in the proceedings the legal representatives of the deceased defaulter.

The question is which of these contentions is tenable. A close analysis of the various provisions of the Act leads me to the conclusion that the Act contemplates the continued existence of the defaulter till the date of sale and if before the date of sale the defaulter dies, the sale would be infructuous and would pass no title to the purchaser. S. 2 of the Act says:

"The land, the buildings upon it, and its products, shall be regarded as the security of the public revenue."

The land in that section means the land of the landholder and in the present case the ryotwari interest of the proprietor Ramanarayana Pillai. If there was default in the payment of arrears of revenue, the Act empowers Government to initiate proceedings for realising the said revenue by sale of the defaulter's moveable or immoveable property which would include land in respect whereof there has been default in the payment of revenue, or by execution against the person of the defaulter. Ss. 25 to 44 deal with the procedure which the Collector is enjoined to adopt if he decides to sell the land in respect

Thiru-vengadam Pillai. v. Koolai.

whereof arrears are due or the other immoveable property of the defaulter, and these provisions undoubtedly indicate that what will be sold will be "the land of the defaulter." Ss. 26 and 44 clearly provide what it is the Collector is empowered to sell. S. 26 says:

"He shall proceed to recover the arrear by the attachment and sale of the defaulter's land".

S. 44 says:

"It shall be lawful for the Collector, or other officer empowered by the Collector in that behalf to sell the whole or any portion of the land of a defaulter in discharge of arrear of revenue".

In *Subbaraya* v. *The Sub-Collector of Chingleput*[1], Innes J., explained thus the rights of the Government in regard to the realisation of revenue when default was committed, (page 310):—

"On non-payment of the Government dues, the right to the land would be liable to forfeiture, and the Collector might proceed according to law to sell the lands. Until such procedure was taken, it is difficult to see how the mirasdars could have forfeited their right to the land......For the right of the Government is only a right to a charge on the land, and a right to forfeit, by due course of law, the title of the person holding the land who does not pay the charge".

Therefore until the property is sold, the title of the defaulter to the land is not lost, and the Government could have the property sold only by due course of law, that is, by following the appropriate procedure provided by the Act. What would be sold and what would pass at the revenue sale is only the proprietory interest of the registered pattadar. That is clear from the declaration which has to be made by the Collector after the issue of a sale certificate. Under S. 39 of the Act

"The Collector has to advertise the name of the purchaser and the date of purchase together with a declaration of the lawful succession of such purchaser to all the rights and property of the former land-holder in the said lands".

Construing this section Turner, C.J., in *Zamorin of Calicut* v. *Sitarama*[2], observed:

"According to S. 3 it is the proprietor that is liable for the payment of the revenue. According to S. 39 it is his right and property that passes by the revenue sale".

(*Vide* also the observations of Wallis, C.J., in *Subbaroya Goundan* v. *Ranganadha Mudaliar*[3]. The form of declaration

1. (1883) I.L.R. 6 Mad. 303.
2. (1884) I.L.R. 7 Mad. 405 at p. 406.
3. (1915) 30 M.L.J. 387: I.L.R. 40 Mad. 93 at p. 96.

Thiru-vengadam Pillai v. Koolai.

framed by the Board of Revenue and which is actually published establishes this beyond doubt.

The form in the Board of Revenue Standing Orders, Vol. II, page 398 (Form No. 10) runs thus:

It is hereby publicly notified for general information that AB, of village in Taluk of the District has purchased on 191 at a public auction the undermentioned lands sold for arrears of revenue due by , land-holder in the undermentioned village and has paid the full purchase money, namely, Rupees , and that the lands have been registered in his name. It is therefore, declared that the said AB has succeeded to all the rights and property of the present registered holder in the said lands".

This view is further strengthened by S. 36 (4) of the Act which provides that where a re-sale takes place in consequence of the non-payment by the purchaser of the purchase money and where the lands may on the second sale sell for a higher price than at the first sale, the difference or increase shall be the property of him on whose account the said first sale was made. This clearly indicates that what was sold is only the proprietory interest of the defaulter and that until the property is sold it continues in the defaulter. That the law contemplates the continued existence of the defaulter down to the date of sale is also clear from Ss. 37 and 47 of the Act, which provide that it is open to the defaulter to pay up the arrears before the date of sale or tender security to avert the sale. As observed in *The Secretary of State for India in Council* v. *Pisipati Sunkarayya*[1], in the eye of the law the land must be his property at the time of the sale. The question therefore is, can it be considered to be Ramanarayana Pillai's property on the date of sale in this case? He having died, his property vested in his sons and therefore on the date of sale the property belonged to them. No doubt they took the property subject to the obligation of paying the arrears of revenue; nevertheless it was their property. The moment a man dies, the ownership which he had in the property is lost. That is the fundamental principle of jurisprudence (*Vide* Holland's Jurisprudence, 13th edition, page 222). As Salmond observes in his book on Jurisprudence:

"Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as they are free from liabilities......They do not even remain the owners of their property until their successors enter upon the inheritance" (page 332, 8th edition).

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1. (1910) 20 M.L.J. 794: I.L.R. 34 Mad. 493 at p. 495.

Thiru-vengadam Pillai v. Koolai.

So when the land is sold as the property of the defaulter, what was sold was the right of the dead man and the sale would pass no title to the purchaser. I would respectfully adopt the following observations in *Groves* v. *Administrator-General of Madras*[1], though they were made in connection with a sale in execution of a decree of Court:

"The only thing sold was the right of a dead man which passes no property, as the dead man had no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record"

According to the declaration under S. 39 of the Act, the purchaser succeeds to the rights and property of the "present registered holder". When the registered holder is dead, there could be no present registered holder to whose rights the purchaser can succeed.

It is contended by Mr. Muthukrishna Aiyar that there is no procedure for bringing on record the legal representatives of a defaulter under the Revenue Recovery Act and that a revenue sale cannot be rendered invalid on that account. I quite agree; but there can be no doubt that the proceedings taken by the Collector under the Act are legal proceedings to which the defaulter must be deemed to be a party. Though strictly speaking there is no provision for substituting his legal representative, still when a party to a proceeding is dead, there can be no valid legal proceeding against him. A duty is enjoined on revenue officers to substitute the legal representatives in the registry. What the Collector should have done was to substitute the names of the minors in the registry, fix a fresh date of sale, issue a fresh notification under S. 36 of the Act and serve a copy on the mother, the legal guardian of the minors and proceed with the sale or commence the whole procedure *de novo* by issuing a fresh demand under S. 25 of the Act on the mother as the guardian of the minors and in default of compliance with it, take further steps as provided in the Act. As neither procedure was adopted by the Collector in this case, I must hold that the sale was invalid and therefore passed no title to the purchaser the first defendant.

In the result the decrees of both the lower Courts are set aside and there will be a decree in favour of the plaintiffs. The plaintiffs are directed to pay Rs. 100 to the third defendant

1. (1898) 8 M.L.J. 288: I.L.R. 22 Mad. 119 at p. 125.

Thiruvengadam Pillai v. Koolai.

as and for the improvements effected by him. The plaintiffs are entitled to get delivery of possession of the property only after payment to the third defendant of the said sum of Rs. 100 has been made. The plaintiffs are given leave to deposit the said sum into Court. Having regard to the circumstances of this case I direct each party to bear his own costs of the litigation throughout. There will be no order in regard to mesne profits.

Leave to appeal is refused.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kakatur Linga Reddi ... *Petitioner** (*Appellant—Petitioner*)

v.

Yerabolu Subbarami Reddi and others. ... *Respondents* (*Respondents*).

Linga Reddi v. Subbarami Reddi.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (f)—Applicability—Liability of surety for person in fiduciary relationship—If one arising out of breach of trust.

The liability towards the beneficiary of a surety for the due discharge by a person under a fiduciary relationship of his duties, is a contractual liability enforceable only in case the trustee commits a breach of trust and not one "arising out of a breach of trust" excluded from the operation of the Madras Agriculturists' Relief Act by S. 4 (*f*) of the Act.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying that the High Court will be pleased to revise and Appeal against the Order of the District Court of Nellore dated 27th February, 1939 and made in I. A. No. 113 of 1938 in O. S. No. 6 of 1925 on the file of the Subordinate Judge's Court, Nellore (I. A. No. 76 of 1937 on the file of the District Court of Nellore).

K. Kuppuswami for Appellant.

R. Ramamurti and *P. S. Raghavarama Sastri* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These two matters both arise out of an application under S. 19 of the Madras Act IV of

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* C. R. P. No. 1846 of 1939 and
A. A. O. No. 389 of 1939. 4th August, 1941.

Linga Reddi v. Subbarami Reddi — Wadsworth, J.

1938. The question is as to the effect of S. 4 (*f*) of the Act which excludes from the operation of the Act liabilities of an agriculturist falling under the head of "any liability arising out of a breach of trust". The applicant was a surety for the next friend of certain minors who realised a sum of Rs. 6,385 and odd in a suit filed on behalf of the minors and drew this money out of Court on the strength of a security bond given under O. 32, r. 6, Civil Procedure Code, by the present applicant. When the minors came of age they brought a suit against their guardians for an account, claiming this money as money to which they were entitled. In that suit the surety was impleaded and after a decree had been obtained against the guardians, I. A. No. 76 of 1937 was filed to enforce the security bond to the extent of the amount for which the guardians were found liable. The surety filed the present application under S. 19 to scale down the decree passed against him in I. A. No. 76 of 1937 and his application has been rejected by the learned District Judge on the ground that his liability under the security bond is a liability arising out of a breach of trust."

It seems to us that this decision is wrong. When a third party gives security for the due discharge by a person under a fiduciary relationship of his duties, the surety incurs towards the beneficiary a contractual liability which is enforceable only in case the trustee commits a breach of trust, but the proximate or immediate basis of the surety's liability is the contract. The breach of trust is a more remote cause from which the liability can be said to arise only indirectly. No doubt the surety will not be obliged to pay anything so long as the person whom he guarantees fulfils his obligations completely; but when the claim is made against the surety, it is made primarily on the basis of the contractual liability which the surety has undertaken, though the extent of the claim and the time at which it is made will be determined by the default of the person guaranteed. It seems to us that the words of this clause "arising out of a breach of trust" should not be read so as to cover any liability which is in any way connected with a breach of trust. As we read this clause, its object is not to place creditors who have lost money owing to a breach of trust in a more favourable position than creditors who have merely placed excessive confidence in their debtors. The object of this section must be to prevent dishonest trustees from pleading the Act in order to

Linga Reddi v. Subbarami Reddi

Wadsworth, J.

retain the fruits of their dishonesty, that is to say, this exception, just like the other exceptions enumerated in S. 4, is based on grounds of public policy, not on a desire to benefit one class of creditors as compared with another class of creditors. An attempt has been made to argue that in the circumstances of the case the surety must himself be deemed to have incurred a liability arising out of a breach of trust, because according to the affidavits the money drawn by the guardians on the strength of the surety bond was subsequently invested in a mortgage executed by the surety himself and it is alleged that the surety's default to the guardians is primarily responsible for the guardians' default to the minors. There is no reference to this contention as having been raised before the learned District Judge and necessary facts do not appear to have been established. Even assuming them to be as alleged, it seems to us apparent that there was no breach of trust on the part of the guardians in investing the money which they had drawn; and the failure of the person who has borrowed that money on a mortgage to pay his creditor, will certainly not amount to a breach of trust. It seems to us, therefore, that the decision of the learned District Judge rests on a misunderstanding of S. 4, Cl. (*f*) and that the applicant is not, by reason of S. 4, Cl. (*f*) precluded from getting the benefits of S. 19 of the Act.

The Civil Revision Petition is, therefore, allowed with costs and the application is remitted to the trial Court for disposal in the light of this judgment.

The Civil Miscellaneous Appeal does not lie and is dismissed. No separate costs.

K. S. *Petition allowed and Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Yeddula Kothapalle Muthyalu .. *Petitioner* (Petitioner)*

v.

Bolla Chinnayya and others .. *Respondents (Respondents 1 to 4 & 6).*

Muthyalu v. Bolla Chinnayya

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Surety under S. 145, Civil Procedure Code—If entitled to apply under S. 19 for scaling down his liability—Extent of right.

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* C.R.P. No. 2318 of 1939. 25th September, 1941.

Muthyalu *v.* Bolla Chinnayya

As a condition precedent to the setting aside of an *ex parte* decree a person gave a surety bond in July, 1934 undertaking to satisfy any decree which might ultimately be passed against the judgment-debtor and the *ex parte* decree was accordingly set aside on such undertaking. The decree itself was in respect of promissory notes in renewal of earlier ones of 1929 and 1931. When the liability under the ultimate decree passed in 1934 was sought to be enforced against the surety,

Held, since the surety is for the purposes of execution in the position of a judgment-debtor there is no reason why he should not be given the benefit of the procedure laid down in S. 19 of Act IV of 1938 for agriculturist judgment-debtors to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act having regard to the date on which the liability of the surety himself was incurred. The liability of the surety must be taken to have arisen in 1934 when the bond and the decree came into existence and the surety is entitled to the benefit of the first part of S. 9. The surety is not entitled to go behind the decree and have his liability reduced with reference to the original promissory notes by the judgment-debtors.

Decision in C. R. P. No. 1965 of 1939, explained.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Gooty dated 21st August, 1939 and made in I. A. No. nil of 1939 in O. S. No. 429 of 1933.

T. R. Arunachalam for Petitioner.

K. S. Jayaram for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The question in this civil revision petition is whether the petitioner, who gave a surety bond undertaking to satisfy any decree which might be passed against respondents 2 and 3, can be deemed to be a judgment-debtor entitled to scale down the decree which was ultimately passed, by the procedure laid down in S. 19 of Madras Act IV of 1938.

The matter arises out of a suit brought by the first respondent against respondents 2 and 3 on two promissory notes, one dated 31st July, 1929 and the other dated 27th June, 1931. A decree was passed *ex parte* and subsequently there was an application to set aside the *ex parte* decree. The defendants were required to give security as a condition precedent to the setting aside of the decree and the present petitioner gave a bond on 4th July, 1934 in which he undertook to satisfy any decree which might be passed against the respondents 2 and 3. The *ex parte* decree was therefore set aside and the suit reopened and on 10th September, 1934, a compromise decree was passed in favour of the first respondent against respondents 2 and 3 for a sum of Rs. 603-10-0 with interest at 12 per cent. on Rs. 500 from the date of the plaint to the date of the

Muthyalu v. Bolla Chinnayya — Wadsworth, J.

decree and Rs. 83 costs and subsequent interest at six per cent. After this compromise decree was obtained, the decree-holder proceeded to execute the decree against the surety. The surety contended that he was not bound to satisfy the decree because it was based on a compromise. This contention was overruled both in the executing Court and in two appellate Courts. After the appeals had failed, the surety filed applications under Ss. 19 and 20 of Act IV. The application under S. 19 was dismissed *in limine* on the ground that the surety was not a judgment-debtor entitled to maintain the application. Against this order the civil revision petition is preferred.

It is contended that by reason of S. 145 of the Code of Civil Procedure the decree becomes executable against the surety and for purposes of execution he is in fact in exactly the same position as a judgment-debtor and that there is no reason why to the extent to which he is an agriculturist entitled to relief under Act IV, he should not claim that relief by asking that the decree be scaled down under S. 19. Now it seems to us quite manifest that the surety, assuming that he is entitled to take proceedings under S. 19, must be limited to the relief which he can get with reference to the actual decree debt. But he cannot treat that decree as a renewal or inclusion in a fresh document of a previous debt due from himself and therefore there is no occasion for going into the origin of the two promissory notes upon which the decree was passed. The surety executed his bond in 1934 and it was in 1934 that the liability against him first became crystalised in the form of the decree which he had undertaken to satisfy. The liability of the surety therefore falls under S. 9 of Act IV and the proviso to that section has no bearing on the case.

Under S. 7, all debts payable by an agriculturist at the commencement of the Act must be scaled down in accordance with the provisions of the Chapter, notwithstanding any law, custom, contract or decree of Court to the contrary. From this it follows that on the admission that the surety is an agriculturist, he is entitled to a remission of interest on the decree debt to the extent laid down in the first part of S. 9. The only question is: what is the procedure by which the relief shall be given? Two courses might be open. It might be possible for the surety to plead in bar of execution the statutory relief to which he has become entitled; or it might be open to the surety to claim to be treated as a judgment-debtor and to get the

Muthyalu v. Bolla Chinnayya — Wadsworth, J.

decree amended under S. 19 by the Court which passed the decree, by the reduction of interest in accordance with S. 9. The respondents here have relied upon two judgments of a single Judge which seem to suggest that the proper procedure is by pleading the Act in bar of execution. The two cases are C. R. Ps. Nos. 1965 of 1939 and 1869 of 1939. We think the latter case has no bearing because it was a case in which the surety was a non-agriculturist. The former case does contain an observation that the surety cannot apply to have the decree amended under S. 19 though he might have a right to a reduction of interest on the amount treating it as a debt under S. 9. But the question really agitated in that case was not the procedure whereby the surety could get the decree for interest reduced, but the right of the surety to apply under S. 19 to get the substantive liability scaled down on the basis of the antecedent debt. To the extent to which the observations in C.R.P. No. 1965 of 1939 appear to indicate that the procedure under S. 19 is not available to an agriculturist-surety, against whom a decree is being executed, to get the interest embodied in the decree reduced, we are of opinion that they are misleading. Since the surety is, for the purposes of execution in the position of a judgment-debtor, we see no reason why he should not be given the benefit of the procedure laid down in S. 19 for agriculturist judgment-debtors to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act having regard to the date on which the liability of the surety himself was incurred. In the present case, the matter is simple. Both the bond and the decree came into being in the course of 1934. It follows that the surety is entitled to the benefit of the first part of S. 9; that is to say, the amount of the debt both for costs and for the substantive portion of the decree will bear interest not at the rate of six per cent. as laid down in the decree but at the rate of five per cent. with effect from the date of the decree to 22nd March, 1938, subsequent interest being at the decree rate of six per cent.

The decree will be amended accordingly. As the petitioner has failed in his attempt to go behind the decree and scale down his liability with reference to the original notes, we think it proper to order that each party should bear his own costs.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

V. Bhuvaraha Aiyangar .. *Petitioner** (*Accused*).

Bhuvaraha Aiyangar *In re.*

Defence of India Act (*XXXV of* 1939)—*Rules under r.* 130-*A, Cl.* (b)—Intra vires *the Central Government.*

R. 130-A, Cl. (*b*) of the rules framed under the Defence of India Act is *intra vires* the Central Government. Power given to make rules with regard to arrest and trial by S. 2 (3) (1) of the Act appears to imply power to make rules for the custody of persons pending trial even apart from the general power conferred by sub-S. (1) of S. 2. Accordingly no person accused of an offence under the Defence of India Act or its rules can be released on bail unless the Court was satisfied that there were reasonable grounds for believing that he was innocent. In respect of offences under the Defence of India Act, that Act governs all other statutory provisions and therefore the provisions of the Criminal Procedure Code, with regard to bail do not apply. The trial of such offences is governed by the special rules under the Defence of India Act, though the offences are now tried in the ordinary criminal Courts and not by special tribunals.

Petition praying that in the circumstances stated in the affidavit in support the High Court will be pleased to issue an order, directing the release of the petitioner herein, on bail pending the criminal case sought to be filed against the petitioner in the Court of the Joint Magistrate, Negapatam.

K. Bhashyam Aiyangar and *J. R. Gundappa Rao* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *the Public Prosecutor* (*V.L. Ethiraj*) for the Crown.

The Order of the Court was pronounced by

Leach, C.J.

The Chief Justice.—On the 1st October, 1941 the petitioner delivered a speech at a meeting held in open air at Negapatam and in the course of it made statements which it is alleged constituted offences specified in the rules framed under the Defence of India Act. A police officer was present at the meeting and it is said that he made notes of the petitioner's statements. On the 16th October, the police filed in the Court of the Joint Magistrate of Negapatam a first information report in which the statements alleged to have been made by the petitioner on this occasion were set out. Immediately after the report had been presented the petitioner was arrested and a charge sheet prepared in which it was alleged that the petitioner had committed offences under r. 34 (6) (*e*) (*g*) (*k*)

* Crl. M. P. No. 1162 of 1941. — 31st October, 1941.

and (*p*) read with r. 38 (1) (*a*). R. 38 (1) (*a*) states that no person shall, without lawful authority or excuse, do any prejudicial act. Sub-r. (6) of r. 34 indicates what is meant by a 'prejudicial act'. Cl. (*e*) of that sub-rule says that it is a prejudicial act to bring into hatred or contempt, or to excite disaffection towards His Majesty or the Crown Representative or the Government established by law in British India, or in any other part of His Majesty's dominions. Cl. (*g*) states that it is a prejudicial act to cause fear or alarm to the public or to any section of the public. Cl. (*k*) provides that it is a prejudicial act to influence the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of war. Cl. (*p*) says that it is a prejudicial act otherwise to prejudice the efficient prosecution of the war and the defence of British India, or the public safety or interest. The statements alleged to have been made by the petitioner would appear to come within these rules.

On the 20th October, the petitioner applied for bail, but his application was rejected by the Joint Magistrate by reason of the provisions of r. 130-A and the Sessions Judge agreed with the Joint Magistrate when a similar application was made to him. The petitioner asks this Court in the exercise of its revisional powers to set aside the orders of the Joint Magistrate and the Sessions Judge and grant him bail.

The basis of the petition is the allegation that r. 130-A (*b*) is *ultra vires* the Central Government. The rule reads as follows:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no person accused or convicted of a contravention of these rules shall, if in custody, be released on bail or on his own bond, unless—

(*a*) the prosecution has been given an opportunity to oppose the application for such release; and

(*b*) where the contravention is of any such provision of these rules as the Central Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention".

If Cl. (*b*) contains a valid provision the Court must be satisfied that there are reasonable grounds for believing that the accused is innocent before releasing him on bail. It is said that this provision contravenes the fundamental principle of English law that a person is presumed to be innocent until it is proved that

Bhuvaraha Aiyangar, *In re.*

Leach, C.J.

he is guilty and that the Defence of India Act and the rules framed thereunder do not permit of a departure from the provisions of the Code of Criminal Procedure with regard to bail applications.

With regard to the first contention, it is to be observed that neither the Act nor the rules indicate any attempt to depart from the principle of English justice that a person is presumed to be innocent until he has been proved to be guilty. R. 130-A merely indicates that where a person is accused of an offence under the rules the Court may not liberate him on bail pending the trial, except when it has reasonable ground to believe that he is innocent. When the Court comes to decide the case it must acquit the accused if the prosecution has failed to establish the charge.

Examination of S. 2 and S. 3 leaves no doubt in our minds that r. 130-A is *intra vires*. Sub-S. (1) of S. 2 states that the Central Government may, by notification in the Official Gazette make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Sub-S. (2) says that without prejudice to the generality of the powers conferred by sub-S. (1), the rules may provide for, or may empower an authority to make orders providing for, all or any of certain specified matters. The fact that the specified matters do not include bail applications does not mean that the Central Government cannot make rules with regard to bail applications if it considers that in the public interest it is necessary to do so. The general power conferred by sub-S. (1) is left entirely unaffected by what is stated in sub-S. (2). Moreover, sub-S. (3) (1) of S. 2 says that the rules made under sub-S. (1) may further provide for the arrest and trial of persons contravening any of the rules. This provision in itself appears to be wide enough to cover r. 130-A without any recourse to sub-S. (1). If power is given to make rules with regard to the trial does this not imply power to make rules with regard to the custody of the accused pending trial? But even if it does not the scope of the general powers conferred by sub-S. (1) remains unaffected.

Mr. Bhashyam Aiyangar has laid great stress on S. 14 which reads as follows:

Bhuvaraha Aiyangar, *In re.*

Leach, C. J.

"Save as otherwise expressly provided by or under this Act, the ordinary Criminal and Civil Courts shall continue to exercise jurisdiction."

This section has been inserted because power is given to the Provincial Government in Chapter III, which embraces Ss. 8 to 13, to constitute special tribunals to try offences under the rules framed by the Central Government by virtue of its powers under the Defence of India Act. Special tribunals have not been set up and all offences under the Defence of India Act are still tried in the ordinary Criminal Courts. That does not, however, mean; that trials in the ordinary Criminal Courts are not subject to the special provisions of the Act. S. 3 states that a rule made under S. 2, or an order made under such a rule, shall have effect notwithstanding anything inconsistent therewith is contained in an enactment other than the Defence of India Act or in an instrument having effect by virtue of an enactment other than the Act. In respect of offences which come within the rules framed under the Defence of India Act that Act governs all other statutory provisions and therefore the provisions of the Code of Criminal Procedure with regard to bail do not here apply if r. 130-A is *intra vires*, which we hold it to be.

It is conceded that in placing the Defence of India Act in the statute book the Central Legislature acted within its powers. Therefore the Joint Magistrate and the Sessions Judge acted in accordance with law in rejecting the petitioner's application for bail. In the first information report and the charge sheet grave charges are alleged against the petitioner by a responsible police officer and at the stage at which the applications for bail were made it was impossible for the Magistrate or the Sessions Judge to be satisfied that there were reasonable grounds for believing that the petitioner was not guilty of a contravention of the rules, and that is the position now. Therefore the petitioner is not entitled to ask the Court to release him on bail. In these circumstances the petition will be dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE LAKSHMANA RAO.

The Official Receiver of Ramnad at Madura. *Appellant** (*Transferee—plaintiff—2nd petitioner*).

v.

Sivasuriya Narayanaswami Thevar and others. *Respondents* (*Defendants 2 to 8—Respondents 2 to 8*).

Official Receiver of Ramnad *v.* Narayanaswami Thevar

Limitation Act (IX of 1908), Art. 182, Cl. 5—"Final order"—Meaning—Unregistered execution petition returned with endorsement "direction not attended to"—If "final order"—Such petition re-presented with fresh execution petition—If to be deemed to be continuation or revival of earlier execution petition.

A final decree for sale on a mortgage was passed on 21st October, 1932, and an application for execution was filed in 1933. Notice was ordered but the petition was dismissed for non-payment of batta. Another petition filed on 23rd August, 1934, by the Official Receiver in whom the estate of the decree-holder had vested, was returned on 13th September, 1934, for complying with certain requirements. After various re-presentations and returns the petition which was unregistered was returned on 15th January, 1935 with the endorsement that the directions had not been attended to and it was not re-presented till 18th August, 1937, when it was filed along with a fresh execution petition.

Held: The order of the 15th January, 1935, is not a "final order." The suspension of the proceedings between 15th January, 1935, and 18th August, 1937, was due to the act or default of the decree-holder in not re-presenting within a reasonable time the petition returned for rectification, and in the circumstances the unregistered petition cannot be deemed to be pending or revived. Accordingly the fresh execution petition filed in 1937 is barred by limitation.

Appeal against the order of the Court of the Subordinate Judge of Ramnad at Madura dated 15th September, 1938 and made in E. P. No. 72 of 1937 in O. S. No. 8 of 1931.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

V. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the decision of the Subordinate Judge of Ramnad dismissing E. P. No. 72 of 1937 as barred by limitation, and declining to revive a prior unregistered petition for execution returned on 15th January, 1935 for compliance with a direction of 29th November, 1934, and re-

* A. A. O. No. 339 of 1939. 28th October, 1941.

presented along with E. P. No. 72 of 1937 on 18th August, 1937 with a prayer to revive it if necessary.

Official Receiver of Ramnad *v.* Narayana-swami Thevar.

The decree sought to be executed is the final decree for sale on a mortgage passed on 21st October, 1932, and an application for execution was filed in 1933 (E. P. No. 19 of 1933). Notice was ordered and the petition was dismissed for non-payment of batta. The next petition is the unregistered petition, and it was filed on 23rd August, 1934. The application was made by the appellant the Official Receiver in whom the estate of the decree-holder had vested, and it was returned on 13th September, 1934 with the endorsement:

"Affidavits in support of the transfer of the decree and also the vesting order should be filed. Sale papers and encumbrance certificate and Union tax should be filed. Columns *G* and *H* should be revised. Vakil's fee claimed is excessive. Serial number of this petition should be stated in the cause title".

Two weeks were allowed for complying with the directions, and the petition was re-presented on 27th September, with the endorsement:

"Re-presented—encumbrance certificates have been applied for and not received yet. It is prayed that two weeks' time may be granted for filing the sale papers etc".

The petition was returned on 28th September, with an endorsement that prayer for time should be made by means of an application supported by an affidavit, and it was re-presented on 9th October, with the endorsement:

"Re-presented. The vesting order and other main records are reported by the Official Receiver to have been sent by him to the High Court and that it may take a long time for the High Court to return them. Inasmuch as the Official Receiver, a responsible officer of this Honourable Court, has made statements in columns *D* and *J* about the vesting in him and he being a transferee decree-holder, *i.e.*, by operation of law, the filing of any affidavit may be dispensed with. The filing of the vesting order may also be dispensed with for the present. If the defendants deny the vesting then it may be ordered to be produced. Vakil's fee has been claimed as per r. 84 on page 253 of Vol. I, Civil Rules of Practice on the amount due as shown in column *G*. If it is pointed out how the calculation is wrong, I am ready to amend it. Serial number of this petition can be known only after it is filed and as soon as it is filed the serial number will be given. As regards sale papers, I have since obtained encumbrance certificates. It may take some time for the original decree-holder to arrange for preparing other sale papers—I pray for two weeks' time for the same and I am presenting an application for more time".

An application for time (E.A. No. 401 of 1934) was also filed, and time was granted till 23rd October. The petition was re-presented on 23rd October, with the endorsement, "Complied

Official Receiver Ramnad *v.* Narayanaswami Thevar.

with and re-presented", and it was returned on 25th October, with the endorsement:

"Vakil's fee on Rs. 19,424 comes to Rs. 170-10-11. Judgment-debtor's interest has not been stated in column, J. As regards the second item, to state whether the judgment-debtor has got both *warams* or *melwaram* only, what is the *jama* for the village as per account?"

Two weeks were allowed for compliance and the petition was re-presented on 8th November with the endorsement:

"Re-presented. The fees portion has been amended. For the rest, the Village Munsif of Athiyathur has been addressed by the Official Receiver. Since it may take some time for getting the reply, if the execution petition is now filed, the information will be given on or before the date fixed for notice to defendants."

The petition was returned on 13th November, with the endorsement:

"Direction Number 2 has not been attended to. Time two weeks."

And it was re-presented on 27th November, with the endorsement:

"Re-presented—When a letter was written by the Official Receiver of Ramnad to the Village Munsif of Athiyathur, asking him to give particulars regarding the *jama*, direction No. 2 and the *warams* belonging to the defendants, the said Village Munsif without giving the said particulars, has reported that the defendants 1 to 4 have no claim over the second item of property. It is therefore necessary that further two weeks' time should be granted for writing to the said Village Munsif again and ascertaining the particulars regarding *jama* and *waram*".

The petition was returned on 29th November, with the endorsement:

"Prayer for time should be moved by means of an application supported by an affidavit".

And it was re-presented on 20th December, with the endorsement:

"Re-presented. In spite of the best efforts of the Official Receiver, Ramnad, he is not able to get the information as regards the *jama* and *warams*. The Official Receiver has no objection for fixing any amount as the upset price for the second item. In these circumstances the petition may be filed without the information as regards the *jama* and the *warams* and without any further information".

The petition was returned on 21st December, with the endorsement:

"Extension of time has not been applied for by means of an application to re-present this on 20th December and the directions called for on 25th October, have not been attended to".

And it was re-presented on 11th January, 1935 with the endorsement:

"Re-presented—In view of the reply of 20th December, the filing of a

petition for extension of time may be excused. The directions of 25th October, have been attended to, namely, by amending the vakil's fee portion (*vide* re-presentation dated 8th November) and by saying that other information is not available (*vide* re-presentation of 20th December)"

Official Receiver of Ramnad *v.* Narayanaswami Thevar.

The petition was again returned on 15th January, with the endorsement that the direction of 29th November had not been attended to and it was not re-presented till 18th August, 1937 when it was filed along with E. P. No. 72 of 1937.

The present application (E. P. No. 72 of 1937) was filed more than three years after the dismissal of E. P. No. 19 of 1933 and it would be barred by limitation unless the order of 15th January, 1935 on the unregistered petition is the final order thereon within the meaning of Cl. 5 of Art. 182 of the Limitation Act or the unregistered petition filed on 23rd August, 1934 should be deemed to be pending. The initial question therefore is whether the order of 15th January, is a final order and as pointed out in *Chidambaram* v. *Murugesam*[1], in which all the previous decisions were considered, the expression 'final order' means an order putting an end to the application in respect of which it is made and not merely the last order in point of time. An order requiring the petitioner to do something in order that the Court may proceed with his application does not even contemplate the end of the execution petition, and the unregistered petition in this case was returned on 15th January, for attending to the directions of 29th November, that prayer for time should be moved by means of an application supported by an affidavit. Further action on the petition was contemplated, and the decision in *Kandasami Chetti* v. *Gokuldas Madanji & Co.*[2], is clearly distinguishable. In that case on an application filed in 1932 to transmit the decree to Bombay for execution, an order of transmission was made in August, 1932, and another application was filed in February, 1935, to transmit the decree again to Bombay for execution. The decree had not been received from Bombay and the application was returned on 27th February, 1935 with the endorsement:

"Copy of the decree has not been received from the High Court, Bombay—returned".

The petition was not returned for remedying any defect nor was any action required to be done by the applicant. Nothing could have been done until the decree was received from Bombay,

1. (1939) 2 M.L.J. 671: I.L.R. (1940) Mad. 60.
2. (1941) 1 M.L.J. 837.

Official Receiver of Ramnad *v.* Narayanaswami Thevar.

and it was held that in the circumstances the only interpretation that can reasonably be given to the language was that the Court had decided that it would have nothing further to do with the application. Such an order would be a final order, but it is impossible to give the same interpretation to the order of 15th January in this case. The petitioner was required to attend to the directions of 29th November, and the order was in no sense a final order on the petition.

The order of 15th January, 1935 is thus of no avail and it remains to consider whether the unregistered petition should be deemed to be pending. No doubt the petition did conform to the requirements of rr. 11 to 14 of O. 21 of the Civil Procedure Code but the amount claimed towards vakil's fees was incorrect and the vesting order had not been filed. The petition had to be returned on that account, and the sale papers which should not properly be called for till a later stage were also required. Exception was not taken to this course and the vakil's fee was amended on 8th November, 1934 after further returns. Time was requested on 27th November, for furnishing information regarding the interest of the judgment-debtor in the second item and the petition was returned on 29th November, with the endorsement that prayer for time should be moved by means of an application supported by an affidavit. The petition was re-presented on 20th December, and it was returned on 21st December, for attending among other things to the direction, regarding the filing of an application for time. The petition was re-presented on 11th January, with a request to excuse the filing of a petition for extension of time and it was returned on 15th January, with an endorsement that the direction of 29th November, had not been attended to. The petition was not re-presented thereafter and as pointed out in *Chidambaram* v. *Murugesam*[1], if the petition is returned to the decree-holder for some amendment or compliance with some requisition, it is his duty to re-present it within the time allowed or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can properly be described as the final order upon it. If, having received back the petition, he takes no further action upon it, then he should be treated as if he had never put in his petition at all. It is not permissible for a

1. (1939) 2 M.L.J 671 : I.L.R. (1940) Mad. 60 at p. 66.

Official Receiver of Ramnad v. Narayanaswami Thevar.

decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification and the proper way to deal with such a petition as that is to treat it as not having come into existence at all. The suspension of the proceedings in such cases is due to the act or default of the decree-holder in not re-presenting the petition, and as held in *C. R. Naidu* v. *Venkataswami Naidu*[1], the petition has no judicial existence pending its re-presentation. If it is re-presented within time, the date of the original presentation will be the date of the execution petition, and the same position would result if it is re-presented late with an application to excuse the delay and the delay is excused. It cannot be deemed to be pending if it is withheld for an inordinately long period and re-presented without any application to execuse delay merely in the hope of saving limitation for a fresh application, and we are unable to subscribe to the view taken in C. M. S. A. No. 193 of 1939 that even in such cases the application should be deemed to be pending. As pointed out in *Krishnamachari* v. *Chengalraya Naidu*[2], an application returned for complying with certain requirements and not re-presented within a reasonable time even if none was fixed by the Court cannot be held to be of any avail, and no question of improper disposal or illegal dismissal arises here as in *Krishnamachari* v. *Chengalraya Naidu* and C. M. S. A. No. 193 of 1939. The unregistered petition was returned on 15th January, 1935 for compliance with the direction of 29th November, 1934 and it was not re-presented till 18th August, 1937 when it was filed along with E. P. No. 72 of 1937. It was not accompanied by any application to excuse the delay nor was the Court requested to excuse the delay. The reason for the delay was not even stated and execution of the decree was barred by that time. The suspension of the proceedings till then was due to the act or default of the decree-holder in not re-presenting the petition, and the decision in *Qamar-ud-din-Ahmad* v. *Jawahir Lal*[3], is not applicable. In the circumstances the unregistered petition cannot be deemed to be pending or revived and the decision of the Subordinate Judge is correct.

The appeal therefore fails and is dismissed with costs.

K. S. *Appeal dismissed.*

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1. (1939) 2 M.L.J. 864 at 866.
2. (1939) 2 M.L.J. 469 at 472.
3. (1905) 15 M.L.J. 258: L.R. 32 I.A. 102: I.L.R. 27 All. 334 (P.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Thangathammal .. *Appellant** *(Petitioner)*

v.

Veerama Reddiar ... *Respondent (Respondent)*

Thangathammal *v.* Veerama Reddiar.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Creditor succeeding as heir and legal representative of debtor under Hindu law—Legal effect—Whether entitled to share in rateable distribution of assets realised in execution proceedings against him as such representative.

Where the heir to a deceased person is also a creditor of the estate, he may retain out of the assets in his possession the amount of the claim for which he cannot sue, his being the hand to receive as well as to pay. The principle is founded on common justice and the fact that the heir is a limited owner will not make any difference. Nor is there anything in Hindu law which precludes the application of the principle.

A decree was obtained by *T* against her brother *R* who died subsequently leaving *T* as his heir and representative. Another creditor of *R* obtained a decree against *T* as the heir and representative of *R* and before assets were realised in execution by that creditor, *T* applied for rateable distribution in respect of the amount due under the decree in her favour, in regard to which she had obtained an attachment before judgment which was subsisting on the date of the sale in execution by the other creditor and had also applied for execution.

Held, that if *R* had left assets other than the property which was sold, sufficient to satisfy T's decree T's claim must be disallowed. But if the only asset left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the other creditor.

Though T may not be entitled to apply under S. 73 as the decree must be deemed to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under S. 47, Civil Procedure Code, and prevent the other creditor from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her getting the limited relief which she has claimed.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly dated 14th November, 1938 and made in A. S. No. 50 of 1938 (A. S. No. 361 of 1937 District Court) preferred against the order of the Court of the District Munsif of Thuraiyur dated 15th October, 1937 and made in E. A. No. 404 of 1937 in S. C. S. No. 340 of 1936.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

K. V. Sesha Aiyangar for Respondent.

* A. A. A. O. No. 157 of 1939. 26th September, 1941.

The Court delivered the following

Thangathammal *v.* Veerama Reddiar.

JUDGMENT.—This appeal raises a question of some difficulty. The question is whether the appellant is entitled to a rateable distribution by virtue of her being the holder of a decree in O. S. No. 334 of 1934 on the file of the District Munsif of Thuraiyur against one Ramaswami Pillai from and out of the sale proceeds of property realised in execution of a decree in S. C. S. No. 340 of 1936 on the file of the said Court. The said Ramaswami Pillai was the brother of the appellant. The decree in O. S. No. 334 of 1934 was obtained by the appellant against the said Ramaswami Pillai who died subsequent to the decree, and the appellant became his heir and representative. The decree in S. C. S. No. 340 of 1936 was obtained by the respondent against the appellant as the heir and representative of the said Ramaswami Pillai in respect of a debt due by him. The respondent in execution of his decree attached the immovable property belonging to Ramaswami Pillai. The property was sold and the sale proceeds were deposited into Court. The appellant as the decree-holder in O. S. No. 334 of 1934 applied for rateable distribution. From the affidavit filed by her, it appears that she obtained an attachment before judgment of the said property in her suit and the said attachment was subsisting on the date of sale. The attachment must therefore have been obtained during the lifetime of Ramaswami and after the decree it would enure to her benefit under O. 38, r. 11, Civil Procedure Code. She has stated in her affidavit that she filed an execution petition and the same was pending on the date of her application for rateable distribution. The learned District Munsif allowed rateable distribution to her; but his order was reversed by the learned Subordinate Judge of Trichinopoly. In the course of the order the learned Subordinate Judge observes thus:

"As soon as Ramaswami Pillai died, the petitioner respondent (the appellant) became his heir and legal representative. In other words, in the decree which the petitioner respondent obtained against Ramaswami Pillai she became both the judgment-creditor and the judgment-debtor. The result is, I think, a total merger........That merger, I think, has taken place as soon as Ramaswami Pillai died and he died long before the petitioner respondent filed the petition E. A. No. 404 of 1937 from which this appeal arose. So on the date that petition was filed petitioner's decree was not in existence as it had become merged long before that date and thereby ceased to exist ....So it follows that she was not entitled to apply for rateable share".

This appeal is against the said decision and the question is whether the view of the learned Subordinate Judge is tenable.

Thangathammal v. Veerama Reddiar.

Mr. Ramanatha Aiyar on behalf of the appellant contends that the doctrine of merger on which the lower appellate Court relied is not applicable because the appellant, when she succeeded to the estate of Ramaswami Pillai as his heir, took only a limited interest analogous to that of a widow's interest under the Hindu law and further, the doctrine of merger should not be allowed to operate when there are also other creditors of the deceased besides the appellant. Mr. K. V. Sesha Aiyangar on behalf of the respondent contends that where a debtor and creditor happen to be the same person, the doctrine of merger will operate and the only remedy of the creditor who succeeds as heir to the debtor, if at all, is to file a suit for administration and get her rateable share of the debt and the remedy by way of rateable distribution is not open to her because the decree by reason of the merger was no longer executable. In order to test the soundness of these contentions it is necessary to examine the legal effect of a creditor succeeding as heir to his debtor under the Hindu law by which the parties are governed. Under the Hindu law when a person dies, his property vests in his heir irrespective of his will. But the heir takes the property subject to the obligation of paying the debts of the deceased. Dealing with the right of an heir under the Mohammadan law their Lordships of the Privy Council in *Kazim Ali Khan* v. *Sadiq Ali Khan and Jahan Begum* v. *Sadiq Ali Khan*[1], remarked thus:

"That the right of an heir under the Mohammadan law is a share in the estate after debts and valid legacies have been provided for is undeniable ....But in providing that the heir takes a share in the *nett estate* after deduction of the debts of the deceased, the Mohommadan law is in line with other laws including the Hindu law". (The italics are mine).

Therefore the debt due to an heir is also one of the debts which will have to be deducted in finding out the net residue taken by an heir. Can it therefore be said that when a Hindu heir to whom the deceased was indebted succeeds to his property only the net balance after deduction of such a debt is taken by the heir? Spencer, J., seems to think that only the net balance would vest in him (*vide* the observations in *Sami Iyer* v. *Ramaswami Chetti*[2].) In English law where the creditor of the deceased happens to be his executor, what is known as the

1. (1938) 2 M.L.J. 210: L.R. 65 I.A. 219: I.L.R. 13 Luck. 494 (P.C.).
2. (1922) 44 M.L.J. 171 at p. 174.

Thangathammal
v.
Veerama Reddiar.

principle of retainer is applied. What is 'retainer' is thus explained by Cotton, L.J., in In re *Compton., Norton* v. *Compton*[1]:

"What is retainer? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgment against the executor could obtain priority, while the executor not being able to sue himself could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands. The word 'retainer' speaks for itself. When the personal representative is also a creditor of the estate he may retain out of the assets which he has got in his possession, the amount of the claim for which he cannot sue, and when money has been paid into Court during the life of the executor, the Court does not withdraw from the executor his right in respect of that money. The Court treats that payment into Court as in effect a payment into the executor's own hands."

In In re *Baker., Nichols* v. *Baker*[2], Lindley, L.J., stated the origin of the principle thus:

"A man cannot sue himself, and out of that the law developed the right of an executor to retain a debt due to him from the testator."

He further explained it in In re *Rhoades., Rhoades* Ex parte[3] thus:

"The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt....such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His words are 'so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose.' Plowden goes further, and says that the property in the assets is changed".

On this principle it has been held that if the assets in his hands were insufficient to pay his debt he is entitled to retain the whole of it in satisfaction of his debt. In English law it is also well settled that an executor can assert the right of retainer until distribution of the estate; it is not lost even by a decree for the administration of assets (1 Sm. and Giff. 415) and Lindley, L.J., in In re *Rhoades., Rhoades* Ex parte[4], points out when a right can be asserted by the executor and when it is lost:

"It is quite plain from these authorities that the executor's right to retain assets in his hands was, as against him, treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when some one seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer; and, if he asserts it then, his right must be protected,

1. (1885) 30 Ch.D. 15 at 19.
2. (1890) 44 Ch.D. 262 at 272.
3. (1890) 2 Q.B. 347 at 352.
4. (1890) 2 Q.B. 347 at 353.

Thangathammal v. Veerama Reddiar.

unless, of course, he has released it or done something to deprive himself of it."

What happened in that case was, the executrix after collecting a sum of £.1,100 paid the amount to the trustee in bankruptcy. The testator was indebted to her in the sum of £.600. It was held that only the balance of £.1,100 less the sum of £.600 vested in the trustee in bankruptcy and she was entitled to be paid the £.600. The same principle was applied before the Land Transfer Act to the case of an heir to whom the testator owed a specialty debt, the foundation of the rule being that he cannot sue himself. (*vide* the observations of Cotton, L.J., in In re *Illidge., Davidson* v. *Illidge*[1]. The question is how far these principles can be applied to Hindu law and whether there is anything in that law which precludes the application of those principles. In a very early case in *Banarsi Das* v. *Maharani Kuar*[2], a question arose as to the legal effect of one of several joint judgment-debtors acquiring only a partial interest in the decree by right of inheritance. It was there held that the effect was not to extinguish the judgment debt in its entirety which could only happen if he acquired the whole debt but so much only as the judgment-debtor had acquired. Mahmood, J., in the course of the judgment remarked thus:

"We are prepared to hold that, when on account of death a creditor becomes heir to a debtor or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person, the obligation to pay money may be regarded as extinguished. But this rule, even though applied in its full scope to judgment creditors and judgment debtors, falls short of showing that when the debtor inherits the rights of only one of his joint creditors the effect is to extinguish the entire judgment-debt. The rule, no doubt, owes its origin to the *confusio* of the Roman Law."

In *Kudhai* v. *Sheo Dayal*[3], the same learned Judge affirmed this principle. The principle of these decisions was followed in our High Court (vide *Sami Iyer* v. *Ramaswami Chetti*[4], and *Sankaralingam* v. *Arumugham*[5].) In *Sami Iyer* v. *Ramaswami Chetti*[4], the question arose thus. There was a decree for mesne profits in favour of the plaintiffs against the first defendant in the suit out of which the appeal, with which the learned Judges were dealing, arose. The first defendant died subse-

1. (1884) 27 Ch.D. 478 at 481.
2. (1882) I.L.R. 5 All. 27.
3. (1888) I.L.R. 10 All. 570.
4. (1922) 44 M.L.J. 171.
5. (193) 2 M.L.J. 156 : I. L.R. (1939) Mad. 73.

Thangathammal v. Veerama Reddiar.

quent to the decree and his mother the second defendant succeeded to his property as his heir. Subsequently the second defendant surrendered the property to the plaintiffs. During the course of the litigation a person stood surety for the payment of the mesne profits and executed a surety bond. The question was whether the plaintiffs could recover the amount of the mesne profits from the surety. The learned Judges held that he could not on the ground that the plaintiffs having become the heirs of the first defendant the debt must be deemed to have been paid out and extinguished and as the principal obligation became extinguished, the surety's obligation also became extinguished. Venkatasubba Rao, J., in the course of the judgment made the following observations:

"The plaintiffs became the legal representatives of their debtor and they were therefore entitled to execute the decree against themselves to the extent of his property which had come to their hands and the plaintiffs must accordingly be deemed to have obtained satisfaction of their decree. The circumstance that the plaintiffs did not actually take out execution against themselves and recover the sum in execution is immaterial and I am therefore satisfied that the principal obligation was in this case extinguished."

Spencer, J., observed thus:

"What they must be deemed to have got in succession by the first defendant's untimely death and his mother's release deed was the balance of his estate after wiping out his debt to them."

In *Sankaralingam* v. *Arumugham*[1], Venkatasubba Rao, J., had to deal with a case where a decree-holder became an heir of one of the judgment-debtors. After observing that O. 21, r. 16, Civil Procedure Code would not in terms apply, he remarked that the principle which that section would embody was that:

". . . . where the decree-holder's right and the judgment-debtor's liability became united in one and the same individual, it stands to reason that the decree should be treated as satisfied."

But a distinction should be made between a partial and complete satisfaction and the decree must only be treated as satisfied *pro tanto*, that is, to the extent of his share. This was the view taken in the early Allahabad cases and also in the recent decision of that Court reported in *Asia Bibi* v. *Malik Aziz Ahmad*[2]. But in a case in *Chidambaram Pillai* v. *Thangathammal*[3], Spencer, J., took the view that where a creditor was a limited owner like a Hindu widow there would be no extinguishment. In that case one *N* died leaving a widow and a daughter. The

1. (1938) 2 M.L.J. 156: I.L.R. (1939) Mad. 73.
2. (1931) I.L.R. 54 All. 448.
3. (1918) 16 L.W. 678.

Thangathammal v. Veerama Reddiar.

widow succeeded to the estate of *N* and she was also a creditor of her husband. The widow died subsequently leaving a will by which she assigned that debt to the plaintiff. The plaintiff brought a suit to recover the amount from the daughter who succeeded to the estate of her father after the widow's death. He was held entitled. The ground on which the learned Judge put it was that the principle of English law of retainer which applies to executors would not apply to Hindu widows as such, that the question of merger was one of intention and that it was not for the advantage of a widow to pay off her stridhanam debt out of the income of her husband's estate as she was entitled to enjoy the whole of the income of the estate.

This principle of retainer could not be considered to be a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it is the same hand that has to receive and pay, he cannot sue himself and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative whether he be the executor or heir. The fact that the heir is a limited owner would not make any difference in the application of the principle. The principle is founded on common justice. In *Attorney-General* v. *Jackson*[1], Lord Atkin refers to the case of *Woodward* v. *Darcy*[2], for the reason underlying this principle and states thus:

> "The reason for it is to be found in the report in Plowden of the opinions of the Judges of both the King's Bench and the Common Pleas in the case of *Woodward* v. *Darcy*[2] given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator's debt to himself unpaid".

In *Woodward* v. *Darcy*[2], the scope of the principle is thus explained in a passage which in spite of its length I shall quote as it is informing and instructive:

> "If the execution of the administration should extinguish the debt, this would be derogatory to testaments, and to the souls of testators. To testaments, for that executors would refuse rather than lose their debts, and without an executor a will is null and void; and to the souls of testators, for that if the executor takes upon him the administration, which is an act of charity, then thereby the just debt due from the testator to the executor, would remain for ever unpaid, which would be dangerous for the soul of the testator. So that such a law would induce a man to omit charity and

1. (1932) A.C. 365 at 370.
2. (1558) 1 Plow. 184: 75 E.R. 282.

Thangathammal *v.* Veerama Reddiar.

friendship, or if he did execute it, he would be ungratefully requited with the loss of a just debt due to him, and would be forced to pay all the other debts of the testator, and to leave the testator's debt due to himself unpaid. But our law is not so unreasonable or uncharitable for the executor may retain assets to pay himself, notwithstanding he may not bring an action to recover it, for true it is that the action is gone by the act of administration.. ....But the reason why the action is lost for ever is, because in judgment of law he is satisfied before, for if the executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and vested in himself, that is, he has them as his own proper goods in satisfaction of his debt, and not as executor. So that there is a transmutation of property, by the operation of law, without suit and execution, for inasmuch as Windham here could not have an action against himself as executor, nor have execution against himself as executor, the operation of the law is equivalent to a recovery and execution for him, and the property is as strongly altered as it could be by recovery and execution. So that the reason why the action is gone is, because, he has full satisfaction by the alteration of the property. And although the debt was a chose in action, yet it is not so in him as executor, for his action is totally gone for the reason aforesaid, in which respect the chose in action is become converted into a chose in possession and a satisfaction executed. Wherefore Windham might well retain goods to satisfy his own debt."

No doubt, Wright, J., in In re *Gilbert.*, Ex parte *Gilbert*[1], doubted whether it was the law that the property in the assets was absolutely altered without something showing assent or appropriation by the executor. Lindley, L.J., seemed to approve of it and Lord Atkin in referring to *Woodward* v. *Darcy*[2], did not express any doubt about it. Whether in the case of a creditor executor the principle of alteration of property should be held to be applicable or not, I do not see why it should not be applied to the case of a property vesting in an heir. However the basis on which the debt is said to be extinguished is clear, that is, so much of the property as is available in his hands must be deemed to have been appropriated and only the net balance of the estate must be deemed to have vested in him. So that if any other creditor brings a claim for his debt he will be entitled to assert the right of retainer and plead the creditor can only claim payment from and out of the balance of the assets in his hands after deduction of his debt. I do not see there is anything in the Hindu law which precludes the application of this principle. In fact this principle was applied in the Indian decisions referred to above. In *Tamiz Bano* v. *Nand Kishore*[3], dealing with a case of a dower debt Ashworth,

1. (1898) 1 Q.B. 282.
2. (1558) 1 Plow. 184: 75 E.R. 282.
3. (1927) I.L.R. 49 All. 645.

Thangathammal v. Veerama Reddiar.

J., expressed the view in which Mukerji, J., concurred, that this principle would apply to India (*vide* the observations of Ashworth, J., at pages 650 and 651). As remarked in *Woodward* v. *Darcy*[1], it would be unreasonable and uncharitable that an heir should forego his debt and that the other creditors should be paid. So far as I am able to see there is nothing in the Hindu law which says that the moment an heir succeeds to his debtor, he foregoes his debt. The appellant in this case is entitled to say that it is only the net balance of the sale proceeds of the house that will be available for the payment of the debt of the respondent if the suit property was the only property left by the deceased Ramaswami. But she claims rateable distribution. The question is can she claim it? In order that a decree-holder may claim rateable distribution the following requisites are necessary: (1) he must have made an application to the Court which holds the assets before their receipt for the execution of his decree; (2) it must be a decree for the payment of money; (3) it must be against the same judgment-debtor, and (4) he has not obtained satisfaction of it. In this case she has applied for the execution of the decree before the receipt of the assets and it is pending. It is a decree for payment of money. Though her decree was obtained against Ramaswami and the decree of the respondent was obtained against her as the legal representative of Ramaswami it must be held to be against the same judgment-debtor. In regard to the question of satisfaction her case is that no satisfaction of the decree has been entered up and the decree must be deemed to be subsisting. The contention of Mr. Sesha Aiyangar is, though the execution application is still pending, no order can issue thereon because the appellant cannot have execution against herself. This again brings in the theory of satisfaction because the ground on which execution is denied is that she being the same hand to receive and to pay, the debt due to her must be deemed to have been paid from and out of the assets in her hands and therefore it must be deemed to have been satisfied. As pointed out in Williams on Executors this remedy arises from the mere operation of law (Volume 1, 11th edition, page 797). In the language of the learned Judges in *Woodward* v. *Darcy*[1], "the operation of the law is

1. (1558) 1 Plow. 184: 75 E.R. 282.

Thangathammal v. Veeramā Reddiar.

equivalent to a recovery and execution." The question whether the decree has been satisfied is one which has to be gone into. If Ramaswami had left assets other than the property which was sold sufficient to satisfy the decree debt of the appellant, her claim must be disallowed. But if the only asset that he left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the respondent. Though the contention of Mr. Sesha Aiyangar may be right in so far as S. 73 may not apply because the decree must be held to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under S. 47, Civil Procedure Code and prevent the respondent from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her getting this limited relief which she has claimed. In this connection I would like to refer to *Veerasokkaraju* v. *Papiah*[1] which appears to me to be a case in point. The facts in that case were as follows: *A* succeeded to the property of his mother *B*. *C*, a creditor of *B*, obtained a decree against *A* for the amount payable from and out of the assets of the mother in his hands. *C* then attached in execution of his decree certain jewels in the possession of *A*. *A* admitted liability of the jewels to attachment but claimed a lien on the sale proceeds of the jewels to the extent of Rs. 1, 562; Rs. 361 paid by him to redeem two of the jewels which had been pledged by the mother; Rs. 110 lent to the mother for re-making jewel No. 11; Rs. 1,091 paid by him in discharge of debts contracted by the mother. The District Judge took the view that *A's* contention that the assets in his hands must be taken to be what was left after he had satisfied his own claims against the mother's estate was unsound and he therefore disallowed the claim. On appeal Subrahmania Aiyar, J., and Davies, J., held that *A* was entitled to be paid out of the sale proceeds the sums which he proves he is entitled to. In regard to the debt owing to him they remarked thus:

"In regard to the Rs. 110 said to have been advanced to the mother in her lifetime the appellant *A* has a right to pay himself out of the assets *as he cannot sue himself*." (The italics are mine).

1. (1902) 13 M.L.J. 258: I.L.R. 26 Mad. 792.

Thangathammal v. Veerama Reddiar.

It will thus be seen that the learned Judges in that case applied the principle of retainer. They set aside the order of the District Judge and remanded the case for enquiry as to whether *A* in fact discharged the debt of the mother and if so, to what extent. Therefore, if the *ratio decidendi* of this case were to be applied to the present case, it follows that the appellant could have justly claimed that the amount payable to her under the decree should be paid first out of the sale proceeds and the balance only should be available for the respondent's decree. It was open to her to prefer this claim under S. 47, Civil Procedure Code, being a party to the decree. Since she has chosen only to ask for a rateable distribution, her claim to this limited extent is perfectly justified. But before a rateable distribution can be ordered, an enquiry must be held as to whether Ramaswami left any other estate besides the property that has been sold, so that if it is found that there were other assets of the judgment-debtor which would cover the value of the appellant's debt, to that extent it must be deemed to be satisfied and only for the balance she could claim rateable distribution; if there were no other assets of the judgment-debtor, she must be allowed to participate in the sale proceeds along with the respondent.

I therefore set aside the decision of the learned Subordinate Judge and remand the petition of the appellant to the learned District Munsif of Thuraiyur for disposal in the light of the observations contained in this judgment. I direct each party to bear his or her costs throughout. Leave to appeal refused.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The President, Panchayat Board, Mangalagiri. *Petitioner** (*Complainant*)

v.

Bommala Kotayya and others .. *Respondents* (*Accused*).

President, Panchayat Board, Mangalagiri v. Kotayya.

Madras Local Board's Act (XIV of 1920), S. 159—Power of president of Local Board to require owner or occupier of premises to remove encroachments.

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* Crl. R. C. Nos. 317, 318 and 335 of 1941.
Crl. R. P. Nos. 301, 302 and 318 of 1941. 19th August, 1941.

President, Panchayat Board, Mangalagiri *v.* Kotayya.

The application of S. 159 of the Madras Local Boards Act, which empowers the president of the Local Board to require the owner or occupier of any premises to remove an encroachment, does not depend upon the extent to which such encroachment is objectionable. A person who refuses to obey the president's order to remove an encroachment makes himself liable to a fine by a Criminal Court under S. 207 (1). The fact that the president of the Board and the person making the encroachment may belong to opposite factions in the Board is irrelevant.

Petitions under Ss. 435 and 439 of the Criminal Procedure Code, 1898 praying that the High Court will be pleased to revise the judgments of the Court of the Sub-Magistrate of Mangalagiri dated 30th November, 1940 and passed in C. C. Nos. 629, 634 and 627 of 1940 respectively.

S. Vepa and *J. Krishnamurthi* for Petitioner.

Respondents not represented.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—Three revision petitions have been filed by the President of the Panchayat Board, Mangalagiri, against the order of acquittal of the Sub-Magistrate of Mangalagiri of three persons alleged to have encroached upon the lands of the Panchayat Board.

In two out of the three cases, the accused admitted the encroachment, and yet the Magistrate refused to fine them. The reasons he gave for his order were that the Panchayat Board had not proved that the encroachment was objectionable and that it was "an instance of local influences and factions playing a large part with the Local Boards." The learned Magistrate has entirely misconceived the scope of the sections of the Madras Local Boards Act relating to encroachments. The application of S. 159, which empowers the president of the Local Board to require the owner or occupier of any premises to remove an encroachment, does not depend upon the extent to which such encroachment is objectionable. The president has a right to have the encroachment removed; and if the person who encroaches upon the land of the panchayat refuses to obey the president's order, he makes himself liable to a fine by a criminal Court. The learned Magistrate should therefore have taken action under S. 207 (1) and punished the offenders.

The fact that the president of the Board and the person making the encroachment are of opposite factions in the panchayat, even if true, is irrelevant. The powers of the president are none the less because he dislikes the person making the encroachment.

President, Panchayat Board, Mangalagiri v. Kotayya.

The proper course for the Panchayat Board to have adopted was to have moved the District Magistrate to prefer a Crown appeal. This Court, except under very special circumstances, does not interfere in revision with an order of acquittal. I understand that the Panchayat Board will be satisfied if the order of this Court makes it clear that a person making an encroachment is liable to punishment whether he belongs to the faction opposed to the president or not and whether the Court thinks the encroachment objectionable or otherwise.

The revision petitions are dismissed.

K. S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. V. Srinivasalu Reddiar .. *Petitioner* (1st Counter-Petitioner.*

Srinivasalu Reddiar, *In re.*

Criminal Procedure Code (V of 1898), *S.* 112—*Scope—Supplementary order—Validity.*

A preliminary order under S. 112, Criminal Procedure Code was issued calling upon the petitioner and others to show cause why they should not be bound over to keep the peace for a period of twelve months, and ten instances were cited of acts which tended to show that it was necessary to bind them over. The Magistrate began the enquiry and after one witness had been examined in chief, the police represented that even after the institution of the proceedings, the petitioner and others had committed a number of other misdeeds which showed that it was necessary to bind them over. The police therefore asked the Court to pass a supplementary order under S. 112.

Held, that the Court can take notice of what had taken place after the institution of proceedings of this nature and a supplementary order under S. 112 can validly be issued.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Tindivanam dated 28th April, 1941, and made in M. C. No. 88 of 1940.

V. T. Rangaswami Aiyangar and *E. V. Sundara Reddi* for Petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—A preliminary order under S. 112, Criminal Procedure Code, was issued by the Joint Magistrate of Tindivanam calling upon the petitioner and eight others to show

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* Crl. R. C. No. 488 of 1941. (Crl. R. P. No. 461 of 1941). 23rd September, 1941.

cause why they should not be bound over to keep the peace for a period of twelve months, and ten instances were cited of acts which tended to show that it was necessary to bind them over. The Magistrate began the enquiry; and after one witness had been examined in chief, the police represented to the Court that even after the institution of the proceedings the petitioner and the others had committed a number of other misdeeds which also showed that it was necessary to bind them over. The police therefore asked the Court to pass a supplementary order under S. 112. The Joint Magistrate acceded to the request of the police and the question that arises in revision is whether that practice is illegal or objectionable.

It would be unfortunate if a Court could not take judicial notice of what had taken place after the institution of proceedings of this nature; for the behaviour of a person who was subject to these proceedings after the institution of the proceedings is a very relevant factor to help the Court to determine what order it should pass. The behaviour and action of the person against whom a notice under S. 112 has been issued may be such as to lead the Magistrate to conclude that even though his behaviour before the issue of the notice had been reprehensible, yet in view of the evidence of his good intentions and good behaviour since the institution of the proceedings, it was not necessary to bind him over. If, on the other hand, the subsequent conduct of such a person indicates that despite the existence of these proceedings and his having been called upon to show cause why he should not be bound over to keep the peace and be of good behaviour, he continues to flout the law and to commit illegal acts, it would seem most desirable that the Court should take notice of this and be influenced by it in framing its final order. Admittedly, there is nothing in the Code which prohibits the issuing of a supplementary order under S. 112; and it can be open to no objection that I can think of. The persons affected by the second notice should, of course, have sufficient time to consider it, and such time has been given to the petitioner in this case.

I do not consider that the petitioner is in any way aggrieved. The petition is accordingly dismissed.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Namberumal Naidu .. *Petitioner** (*Complainant*)

v.

Muthukalathi Mudali .. *Respondent* (*Accused*).

Namberumal Naidu v. Muthukalathi Mudali.

Criminal Procedure Code (*V of* 1898) *S.* 250—*Order for compensation against complainant—Failure to call upon him to show cause why he should not pay compensation and to record reasons for directing compensation to be paid by complainant—Effect.*

S. 250 of the Criminal Procedure Code requires that the Magistrate should, if he considers a case to be false, frivolous or vexatious, call upon the complainant to show cause why he should not pay compensation. It is necessary under S. 250 (2) that the Magistrate should at least indicate in his judgment that he asked the complainant the requisite questions and he should set out the explanation which the complainant gave and say whether he thought the explanation satisfactory and if so, why. An order for payment of compensation cannot be sustained if the Magistrate has not complied with these requirements.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Tirupattur dated 17th March, 1941 and passed in C. C. No. 17 of 1941.

V. T. Rangaswami Aiyangar for Petitioner.

Respondent not represented.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—The accused in C. C. No. 17 of 1941 on the file of the Joint Magistrate of Tirupattur was charged under S. 409, Indian Penal Code, with misappropriating amounts paid to him as Village Munsif by the petitioner as kist. In passing an order of discharge the Joint Magistrate wrote:

"I find that P.W. 1 (petitioner) has not only failed to prove the charges but also admitted in effect that they are false, frivolous, and vexatious. I therefore discharge the accused under S. 253 (1) of the Criminal Procedure Code and direct that P.W. 1 shall pay the accused a compensation of Rs. 30."

The only question that arises is whether the Joint Magistrate has complied with the provisions of S. 250, Criminal Procedure Code, which requires of him that if he considers the case to be false, frivolous or vexatious, he should call upon the complainant to show cause why he should not pay compensation. Sub-S. (2) requires that:

"The Magistrate shall record and consider any cause which such com-

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* Crl. R. C. No. 417 of 1941. (Crl. R. P. No. 394 of 1941). 23rd September, 1941.

Namberumal Naidu v. Muthukalathi Mudali.

plainant . . . . . may show, and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation . . . . be paid by such complainant."

Counsel on both sides have been through the records and they have found nothing there which suggests that the learned Joint Magistrate asked the questions and made the record that he was required to under sub-Ss. 1 and 2 of S. 250, Criminal Procedure Code. I do not think it necessary to go as far as Mr. Justice Baguley did in *The King* v. *Maung Thoung Shwe*[1], and in *Ma E Myaing* v. *The King*[2], and say that the actual words used by the complainant should be recorded separately as in the case of an accused under S. 342, Criminal Procedure Code. It is however necessary that the Magistrate should at least indicate in his judgment that he asked the requisite questions and he should set out the explanation the complainant gave and say whether he thought the explanation satisfactory, and if so, why. In most cases, the complainant says nothing more than that the evidence let in is true. Even in such a simple case as that, the Magistrate should note in his judgment that the complainant had no explanation to offer. For the above reasons, it is necessary to set aside the order of compensation; and as it is unlikely that the Magistrate would remember after the lapse of more than six months exactly what he asked the complainant and what the complainant said in reply, it would be necessary, if remand were ordered, for the Magistrate to question the complainant afresh; but in the circumstances, I do not think such a step is necessary in view of the fact that the complainant admittedly had a receipt for the money which he says he paid. The Magistrate seems to have accepted the evidence of the karnam and the statement of the accused that it was customary to grant the ryots receipts in advance which would serve as a kind of demand notice. I find it difficult to believe that such a dangerous practice exists. Without therefore disagreeing with the finding which led to the discharge of the accused, I think that the nature of the evidence makes it unnecessary to remand the matter for fresh consideration.

The order of compensation is set aside and the money which, I understand, is in the Joint Magistrate's Court, should be refunded.

K.S. *Petition allowed.*

1, A.I.R. 1938 Rang. 161. 2. A.I.R. 1938 Rang. 247.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Krishnaswami for Sundaram Aiyangar .. *Respondent (Accused).*

Public Prosecutor *v.* Krishnaswami.

Motor Vehicles Act (IV of 1939), *Ss.* 3 *and* 112—*Expiry of driving licence and renewal after ten days as from date of expiry—Driving without licence in the interval—Offence.*

The accused's driving licence had expired on 10th December, 1940, and on 12th December, 1940, an accident occurred in which the accused ran over and killed a child. He at once applied for a renewal of his licence which was granted. In a prosecution for driving without licence it was contended that the subsequent renewal dated back to the 10th December and that therefore the accused must be deemed to have had an effective licence at the time of the accident.

Held, that the renewal cannot be regarded as a licence to infringe at pleasure another provision of the Act or as a grant of pardon by the licencing authority to one who has broken the law. The accused having contravened the provisions of S. 3 of the Motor Vehicles Act thereby committed an offence under S. 112 of the Act.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of the City First Class Magistrate, Madura, in C. A., No. 15 of 1941 on his file (C. C. No. 63 of 1941, Sub-Magistrate's Court, Madura Town).

Appellant in person.

K. V. Sesha Aiyangar and *N. S. Mani* for Respondent.

The Court delivered the following

JUDGMENT.—The accused's licence for driving a car expired on the 10th December, 1940. On the 12th December, 1940, an unfortunate accident occurred in which the accused ran over and killed a child. He at once applied for a renewal of his licence, which was granted. He was subsequently prosecuted for driving without a licence and was convicted by the Sub-Magistrate, Madura Town, because on the date on which the accident occurred he had no effective licence. The matter was taken in appeal to the First Class Magistrate of Madura, who set aside the conviction and acquitted the accused on the ground that the subsequent renewal dated back to the 10th December, 1940, and that the accused must therefore be deemed to have had an effective licence on the 12th December, 1940.

* Crl. Appeal No. 415 of 1941. 15th October, 1941.

Public Prosecutor v. Krishnaswami.

As the licence of the accused expired on the 10th December, 1940, and he had no licence on the 12th December, 1940, he contravened the provisions of S. 3 (1) of Act IV of 1939, which says that no person shall drive a motor vehicle without an effective licence. It is difficult to see how anything that the accused did after that date can cancel the offence committed before he obtained a renewal. S. 11 is however said to have that remarkable effect. S. 11 (1) gives a licensing authority power to renew a licence. Sub-S. (2) sets out the method to be adopted for obtaining a renewal. Sub-S. (3) deals with the fiscal aspect of the application for renewal and states that the fee for the renewal of a licence, if the application is made previous to or within fifteen days subsequent to the date of the expiration of the licence shall be three rupees; if after that date, five rupees. It is argued that sub-S. (3) of S. 11 gives fifteen days of grace within which period it is unnecessary to apply for a licence. It is difficult however to accept that argument, because, firstly, this sub-section deals only with the amount to be paid for a renewal of a licence and, secondly, the fifteen days is merely the period within which the renewal fee is limited to three rupees. A person is at liberty to apply for a renewal of his licence not merely within fifteen days but at any time subsequent to the expiry of the licence, with the proviso that if he makes his application beyond fifteen days after the expiration of the period of the licence he has to pay five rupees instead of three rupees. There is no limit at all set to the period within which he need apply for a renewal of the licence; so that if the argument of Mr. Sesha Aiyangar is sound, there is an unlimited period of grace within which a person can apply for a renewal of a licence; and no person could ever be convicted for offending against S. 3 (1) of the Act, unless the licensing authority became aware that the applicant had been driving without a licence and refused to renew the licence on that ground. The argument of the learned advocate for the respondent is based on the fact that when a licence is renewed, it dates back to the date of the expiry of the old licence. The reason for that is presumably that if a person wishes to have the benefit of a renewal, with its lower fee and absence of formalities, he must be prepared to pay from the date of expiry of the old licence. A renewal cannot be regarded as a licence to infringe at pleasure another provision of the Act or as a grant of pardon by the licensing authority to one who has

Public Prosecutor *v.* Krishna-swami.

broken the law. This sub-section nevertheless serves a real need; because it does not force a person who desires a renewal to do so at once if he has no intention of driving for some time.

I am therefore satisfied that the accused contravened the provisions of S. 3 of Act IV of 1939, and thereby committed an offence punishable under S. 112 of the Act. The order of acquittal is consequently set aside and the accused convicted.

The accused has been holding a driver's licence for a large number of years. He says that in the past he has always taken great care to apply for a renewal of his licence before the term has expired and that by inadvertence he had not noticed that the term for which the licence was effective had expired. I see no reason to doubt the truth of these statements; and so I think it will be sufficient under the circumstances if the accused is given a nominal sentence and ordered to pay a fine of one rupee.

K. S. *Order of acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Syed Murthuza Sahib ... *Petitioner** (*Accused*)

Murthuza Sahib, *In re.*

Madras Local Boards Act (XIV of 1920) S. 160 (3)—Lease of site—Notice to quit after expiry of period of lease purporting to be one under S. 159 (1) *instead of under S. 164 (2)—Lessee disregarding the notice—If offence.*

A lessee from a Local Board of a road side site on which he constructed a small shed did not quit the land at the end of the period of the lease and so a notice was sent to him purporting to be one under S. 159 (1) requiring him to remove the shed within a fortnight and threatening in default proceedings under the Local Boards Act. He ignored the notice and a prosecution was instituted for an offence punishable under S. 159 (1) read with S. 207 (1) (*a*) and (*c*) of the Local Boards Act.

Held, that though the notice did not purport to be a notice under the appropriate S. 164 (2) but one under S. 159 (1), the notice had made very clear what was required of the petitioner and he was accordingly guilty of the offence of disregarding a lawful notice of the President.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Tindivanam dated 24th December, 1940, and passed in C. A.

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* Cr. R. C. No. 323 of 1941.
(Cr. R. P. No. 307 of 1941.) 3rd October, 1941.

No. 76 of 1940 preferred against the judgment of the Court of the Second Class Magistrate, Tindivanam dated 25th November, 1940 and passed in C. C. No. 1354 of 1940.

Murthuza Sahib, *In re.*

M. S. Venkatarama Aiyar for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was granted a lease under S. 160 (3) of the Local Boards Act for a period of one year to use a road side site of 1 or 2 cents to sell his wares, and in it he constructed a small shed. He did not quit the land at the end of the period of the lease and so a notice was sent to him, purporting to be one under S. 159 (1), requiring him to remove the shed which was on the 1 or 2 cents in Survey No. 851 of the Local Fund road and threatening that unless he removed the encroachment within a fortnight from the date of service of that notice further proceedings under the Act would be taken against him. He ignored this notice; and so the present case was instituted against him. He has been charged with having committed an offence punishable under S. 159 (1), read with S. 207 (1) (*a*) and (*c*) of the Madras Local Boards Act. He was sentenced to pay a fine of Rs. 25 and his conviction and sentence were upheld on appeal by the Joint Magistrate of Tindivanam.

It is fairly clear that the petitioner did not contravene the provisions of S. 159 (1). S. 159 (1) permits the president of a Local Board to issue a notice to the owner or occupier of any premises to remove or alter any projection, encroachment, or obstruction situated against or in front of such premises. This sub-section governs the extension or projection of a premises over or into a public road and not the erection of some structure independently of any existing premises. The very foundation for this sub-section is the existence of premises which have been extended into a public road.

Notice should have gone to the petitioner under S. 164 (2) and not under S. 159 (1). S. 164 (1) makes liable for payment of a penalty any person who occupies any land set apart for any public purpose without the previous sanction of the Local Board. The petitioner entered into possession of this land with the sanction of the Local Board; but he however continued in possession without the sanction of the Local Board. It is argued that continuing in possession is not occupying. Occupying a land means "being on the land" and

Murthuza Sahib, *In re.*

therefore includes continuing in possession as well as entering into possession. As the petitioner did not obtain the previous sanction of the Local Board to occupy that land during the period in question, he is liable to a penalty under S. 164 (1).

S. 164 (2) empowers the president to issue notice to such a person as is referred to in S. 164 (1). If a person occupying the land disregards the notice under S. 164 (2), then he becomes liable under S. 207 (1) (*a*) for contravening the provisions of one of the sections specified in the first column of Schedule VIII. Schedule VIII makes express mention of S. 164 (2). It was argued by the learned Public Prosecutor that S. 160 (6) would also apply. I do not think it would. Ss. 160 (1) and 160 (2) refer to licences and S. 160 (3) to a lease. S. 160 (6) mentions only licences and not leases. There is a great difference between a licence and a lease, a licence being merely a permission whereas a lease conveys certain legal rights over the land to the lessee. While, however, S. 160 (6) gives the president of the Local Board the power to remove buildings and recover the costs for doing so from the owners, it does not create a punishable offence.

It is next argued for the petitioner that even though the petitioner was wrong in continuing in possession after the expiry of the lease, he did not commit a punishable offence by doing so, because the notice issued to him was a faulty one. What is punished, it is argued, is not the continuing in possession but the disobedience of a notice, and that if a notice is not a proper one then the disobedience of it cannot be an offence. It is true that the notice that was sent to the petitioner did not purport to be a notice under S. 164 (2), but one under S. 159 (1), but I do not think that this makes any material difference, because the notice made it very clear what was required of the petitioner. He was ordered to remove the shed which he had been permitted to put up under the licence that was previously granted to him and he knew that the president had power to order the removal of such shed and he knew that he was wrongfully in possession of that plot of land. By disobeying the lawful notice of the president, even though it was labelled S. 159 (1) and not S. 164 (2), the petitioner committed an offence.

I therefore find no sufficient reason for interfering in revision. The petition is dismissed.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Swaminatha Aiyar ... *Petitioner** (*Accused*)

Swaminatha Aiyar, *In re.*

Madras General Sales Tax Act (IX of 1939), S. 15 (a)—*Failure to submit return—If should be "wilful" to constitute an offence.*

To constitute an offence under S. 15 (*a*) of the General Sales Tax Act the failure to send a return need not be "wilful". The word "wilfully" in the section does not govern the second part of the sub-section.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Kumbakonam dated 18th December, 1940 and passed in C. C. No. 199 of 1940.

N. Rajagopala Aiyangar for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by the Joint Magistrate of Kumbakonam of an offence punishable under S. 15 of the Sales Tax Act in failing to submit a return as required by the provisions of the Act and the rules made thereunder, and he has been sentenced to a fine of Rs. 50.

The petitioner deals in hand-woven cloth on which, according to S. 5 of the Act, he is exempted from the taxation laid down in S. 3. Under the rules in force at the time when the petitioner is said to have committed this offence, it was however necessary for him to get a licence for selling even hand-woven articles. As he was already in possession of a licence under the Sale of Cloth Act of 1937, all that was necessary for him to do was to take that licence to the assessing authority and get an endorsement on it. He failed to do so. Since that date the Government have ordered that it is not necessary for persons selling only hand-woven material to obtain a licence.

It is contended that S. 15 does not apply to the petitioner because the petitioner did not know what the rules under the Act were and his failure to submit a return was not wilful.

* Crl. R. C. No. 338 of 1941.
(Crl. R. P. No. 321 of 1941). 23rd September, 1941.

Swaminatha Aiyar, *In re.*

S. 15 (*a*) runs as follows:—

"Any person who wilfully submits an untrue return or fails to submit a return as required by the provisions of this Act. . . . . shall . . . . be liable to a fine. . . . . ."

It is argued that the word 'wilfully' governs the second part of the sub-section as well as the first. If this were so, then very few persons could be made liable for failing to take out a licence, because every person would naturally plead that he did not know what was written in the Act or in the rules. Every person is supposed to know what the law is; and if he fails to act in accordance with the law, then he has to suffer the consequences. A person might inadvertently send in a return which was not strictly correct; but he would not be punished for that if the mistake was due to some error in arithmetic or some cause which did not amount to a 'wilful act' in contravention of the rules. As the rules in force at the time required the petitioner to submit a return (*see* r. 6), the petitioner was guilty of the offence of which he was charged.

Although the petitioner contravened the provisions of the law, it would have been unnecessary for him to have submitted a return if he had taken out a licence; because he had nothing to enter in the return. If he had taken out a licence, then I think S. 90 of the Indian Penal Code would have covered this offence and he would have been entitled to an acquittal; but as he did not take out a licence, he was bound to submit a return.

It has been pointed out that in the Tamil translation of the Act it is said that a return need only be sent in if the annual turnover exceeds Rs. 20,000. As the annual turnover of the petitioner is only Rs. 11,000, it is argued that he was entitled to rely on the Government translation of the Act and that therefore he committed no offence. There might have been some ground for the argument if the accused had put that forward in the lower Court; but the discovery of the Tamil translation seems to have been the act of his counsel rather than of the accused himself. The actual Act gives Rs. 10,000 as the limit below which a return is unnecessary.

As the offence of the petitioner was only a technical one and he would not have been liable for any taxation if he had taken out a licence—which is not now necessary—I reduce the fine from Rs. 50 to Rs. 5. The excess fine paid will be refunded.

K.S. *Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Indukuri Suryanarayana Raju (died) and others. *Petitioners** (*Petitioner and nil*)

v.

Indukuri Viswanadharaju and others ... *Respondents* (*Counter Petitioners 2, 4 and 18*).

Surya-narayana Raju *v.* Viswa-nadharaju.

Criminal Procedure Code (V of 1898), Ss. 145, 435 *and* 561-*A—Scope—Revision application against order under S.* 145*—Death of petitioner—Power to bring on record legal representative—When to be exercised.*

In 1923, S. 435 of the Criminal Procedure Code, was extended to proceedings under Chapter XII and S. 561-A was enacted. As S. 435 was made to apply to Chapter XII also, from the date of the amendment the High Court in dealing with revision applications against orders under S. 145 of the Criminal Procedure Code, had the wide powers of an appellate Court instead of the restricted powers conferred under S. 15 of the Charter Act which governed such proceedings before the amendment. Further S. 561-A too gave very wide additional powers to the High Court by preserving its inherent power to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Accordingly where pending a revision petition against an order under S. 145 of the Criminal Procedure Code, the petitioner dies, the Court has ample power to bring his legal representatives on record if the ends of justice require it.

Alluri Subbaraju v. *Alluri Rambhadra Raju*, (1916) 4 L.W. 440, distinguished.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Bhimavaram dated 3rd March, 1941 and made in M. C. No. 43 of 1940.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioners.

V. V. Srinivasa Aiyangar for *K. Venkatarama Raju* and *S. Vepa* and *J. Krishnamurthi* for Respondents.

K. Venkataraghavachariar for *The Public Prosecutor* for the Crown.

The Court made the following

ORDER.—In a dispute between one Suryanarayana Raju, who originally filed this criminal revision petition, and a large number of counter-petitioners, the Sub-Divisional Magistrate of Bhimavaram passed an order that certain items of property should be retained in the possession of the counter-petitioners, and the petitioner was prohibited from interfering with their

*Cr. R. C. No. 282 of 1941
(Cr. R. P. No. 268 of 1941). 16th September, 1941.

Suryanarayana Raju v. Viswanadharaju.

enjoyment. After the filing of this petition, Suryanarayana Raju died; and his wife and sister were brought on record as his legal representatives. Mr. Jayarama Aiyar for the petitioners argues that the order of the lower Court is not only a travesty of justice but also a gross abuse of the powers of the Court. In particular, he says that none of the facts stated by the counter-petitioners was satisfactorily proved and that in any event the Magistrate did not give a finding as to possession on the date of the preliminary order.

A preliminary objection was raised by Mr. V. V. Srinivasa Aiyangar that this Court had no jurisdiction to bring on record the legal representatives of the man who filed this petition; and he has quoted *Alluri Subbaraju* v. *Alluri Rambhadra Raju*[1], where it was held that S. 145 (7), which permitted Magistrates to continue their enquiry despite the death of any of the parties, applies only to the proceedings of the Magistrates' Court and not to this Court in revision. The learned Judges said that they had been shown no authority for the extension of the purview of S. 145 (7) to other proceedings, such as the proceedings before them under the Charter Act. That revision petition had to be filed under the Charter Act; because at the time that case was decided, S. 435, Criminal Procedure Code did not apply to proceedings under Chapter XII of the Criminal Procedure Code. In 1923, however, S. 435 was extended to proceedings under Chapter XII and S. 561-A was enacted. As S. 435 was made to apply to Chapter XII also, it followed that from the date of the amendment, this Court, in dealing with revision applications against orders under S. 145, Criminal Procedure Code, had the wide powers of an appellate Court instead of the restricted powers conferred under S. 15 of the Charter Act. S. 561-A, too, gave very wide additional powers to the High Court. It says:

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

If there had been a gross miscarriage of justice in this case, then, to secure the ends of justice, it would have been necessary to have brought the present petitioners on record in order that the wrong order of the lower Court could be corrected. I think

1. (1916) 4 L.W. 440.

therefore that as the law now stands, this Court has ample power to bring legal representatives on record if the ends of justice require it.

Surya-narayana Raju v. Viswa-nadharaju.

* * * *

[Then his Lordship dealt with the case on the merits and dismissed the petition].

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Maddipatla Narayanaswami and others. *Petitioners** (*Accused 1 to 5*)

v.

Edala Narayya ... *Respondent* (*Complainant*).

Criminal Procedure Code (V of 1898), S. 247—Illegal disposal of a trial by a Bench of Magistrates—Rectification by re-trial not competent for the Bench.

Narayana-swami v. Narayya.

Where three Bench Magistrates sat to consider a criminal case and were joined by another Magistrate at a later hearing but at the final hearing and disposal there were only three Magistrates present, of whom two had sat throughout, and on realising that their disposal of the case was illegal, the Magistrates sought to rectify it by re-hearing the case,

Held, that a Bench Court has no power to correct errors in its judgments or to review its own illegal orders and that such power vests only in the High Court.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying that the High Court will be pleased to revise the judgment of the Court of the First Class Bench of Magistrates of Rajahmundry dated 13th February, 1941 and passed in C. C. No. 1931 of 1940.

G. Balaparameswari Rao for Petitioners.

T. Venkatadri for Respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—Three Bench Magistrates sat to consider C. C. No. 1931 of 1940 on the file of the First Class Bench Court of Rajahmundry. At a later hearing of the case a fourth Magistrate joined. At the final hearing there were only three Magistrates present, of whom two had sat throughout. So it is clear that the Magistrate who did not sit at the first hearing had no

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* Crl. R. C. No. 346 of 1941
(Crl. R. P. No. 329 of 1941). 30th July, 1941.

Narayanaswami v. Narayya.

legal power to participate in the disposal of the case. As three Magistrates constitute a quorum and only two Magistrates sat throughout, they could not have passed a legal order. On the date of the final disposal of this case the complainant was absent and so the case was dismissed under S. 247, Criminal Procedure Code. Later, the Magistrates realised that they had passed an illegal order and so proceeded to rectify it by hearing the case once again. The trial is proceeding. The accused has therefore filed the present petition for revision.

A Bench Court has no power to correct errors in its judgments or to review its own illegal orders. Such power vests only in the High Court. The present trial is therefore illegal; and although the order of acquittal passed by the three Bench Magistrates was also illegal, it stands until set aside.

The only question that now arises is whether, after quashing the proceedings now taking place, I should order a re-trial or, bearing in mind what has taken place, I should allow the order of acquittal, illegal though it may be, to stand. The case was dismissed because the complainant did not attend; and it seems unlikely that even if the Magistrate who had been present at the beginning had sat throughout, the case would have taken a different turn. It would almost certainly have been dismissed just as it was by the improperly constituted Bench. I do not think therefore that the interests of justice require that the accused, who was acquitted so long ago as 5th February, 1941, should now be called upon to stand his trial afresh.

This revision petition is allowed and the present proceedings quashed.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Vankadari Somappa .. *Appellant** (*Defendant*)

v.

Chippagiri Nagi Reddy .. *Respondent* (*Plaintiff*).

Somappa v. Nagi Reddy.

Hindu law—Manager of joint family executing promissory note—Decree obtained on the note—Executable against property of other junior members also—Conditions to be established.

If a member of a joint Hindu family against whom a decree was passed occupied a representative capacity at that time and the debt which

* S. A. No. 149 of 1938. 20th February, 1941.

was the basis of the decree had been incurred for a family necessity, the interest of the other members of the family in the joint family property will be liable in respect of the decree, though such members were not *eo nomine* parties to the suit. It makes no difference that the suit was laid on the promissory note and not on the debt and that the note does not show that it was executed on behalf of the family.

Somappa v. Nagi Reddy.

Once a decree has been obtained, the question whether the judgment-debtor was liable individually or was also representing the other members of the family of which he was the *kartha* should be left to be determined in appropriate proceedings and the power of the creditor to get the liability of persons other than the judgment-debtor declared subsequently should not be taken away or held to have been impliedly adjudicated against him simply because he brought the suit against the maker in the first instance.

Nanomi Babuasin v. *Modhun Mohun*, (1885) L.R. 13 I.A. 1: I.L.R. 13 Cal. 21 (P.C.), *Daulat Ram* v. *Mehr Chand*, (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P. C.), *Jai Kishen* v. *Ram Chand*, A.I.R. 1935 Lah. 1 and *Vadlamannati Venkatanarayana Rao* v. *Gottumukkula Venkata Somaraju*, (1937) 2 M. L. J. 251: I.L.R. (1937) Mad. 880 (F.B.), relied on.

Appeal against the decree of the District Court of Bellary in A. S. No. 116 of 1936, presented against the decree of the Court of the District Munsif of Bellary in O. S. No. 172 of 1936.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

K. Kuppuswami for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question of some importance. The facts are these. A promissory note was executed on the 24th July, 1930, by one Linga Reddi for Rs. 400 in favour of D. W. 1 Bhimakka. A suit was brought on the basis of the promissory note by the promisee (O.S. No. 166 of 1932) which resulted in a decree. In execution of that decree, a house and certain lands belonging to the joint family consisting of Linga Reddi and his nephew, the present plaintiff respondent, were attached and purchased on the 22nd September, 1933, by the defendant appellant who is a stranger. A sale certificate was accordingly granted to him on the 27th November, 1933, (Ex. II). The sale certificate describes that the whole of the property mentioned therein and not merely the share belonging to Linga Reddi was sold in execution of the decree. When the auction-purchaser proceeded to recover possession of the property purchased by him, he was obstructed by the other member of the joint family of which Linga Reddi was the *kartha*. The auction-purchaser applied for removal of

Somappa v. Nagi Reddy.

the obstruction (E. A. 1276 of 1935) and it was ordered to be removed on the 6th February, 1936. The obstructor, that is, Linga Reddi's nephew brought a suit to set aside the order passed in execution on the ground that he was no party to the suit in O. S. No. 166 of 1932 and could not therefore be dispossessed of the share which he owned in the family property. The auction-purchaser contended that as Linga Reddi was the manager of the family at the time when the suit was brought against him, as the debt was incurred by him for joint family necessity and as he was entitled to alienate the whole of the property for that debt, the entire family property sold in execution of the decree and not merely Linga Reddi's share, must be held to have been purchased by the auction-purchaser. Relying on the decision in *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[1], the lower Courts held that the question of necessity could not be gone into in this suit and inasmuch as the decree was passed against Linga Reddi alone on the basis of the promissory note, his nephew, that is, the present plaintiff, could not be held bound by that decree with the result that his share of the property could not be held to have passed to the defendant appellant in execution of the decree. The auction-purchaser was thus prevented from establishing that the debt incurred by Linga Reddi was for family necessity and that the entire family property had passed to him in the auction sale. The question to decide in this appeal is whether the decision of the subordinate Courts is correct.

It is well settled that a sale in execution conveys the entire family property:

> "If a decree is passed against the *kartha* or manager of a joint Hindu family in respect of a liability properly contracted for the necessities of the family",

and that:

> "The binding character of the decree upon the interests of the other members depends not upon their having or not having been parties to the suit, but on the authority of the manager to contract the liability".

(See *Kunj Behari Lal* v. *Kandh Prashad Narain Singh*[2], *Hari Vithal* v. *Jairam Vithal*[3], *Sakharam* v. *Devji*[4], *Baldeo Sonar* v. *Mobarak Ali Khan*[5], and Mayne's Hindu Law p. 450, para 348,

1. (1934) 68 M.L.J. 104.
2. (1907) 6 C.L.J. 362 at 368.
3. (1890) I.L.R. 14 Bom. 597.
4. (1898) I.L.R. 23 Bom. 372.
5. (1902) I.L.R. 29 Cal. 583.

Somappa v. Nagi Reddy.

Cl. 2). Can Linga Reddi be held then to have been sued as a *kartha* and represented the other member of the family although he was not described in the plaint as such? The answer to this question is furnished by several decisions of the Privy Council which have been subsequently followed in a well discussed judgment of a Division Bench of the Lahore High Court and in a Full Bench decision of this Court. The first decision of the Privy Council to which reference may be made was in *Nanomi Babuasin* v. *Modhun Mohun*[1] where their Lordships observed as follows:

"Their Lordships do not think that the authority of *Deendyal's case*[2] bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All that the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale".

This was undoubtedly a case where the debt was incurred by a father, but the principle of that decision was subsequently applied by their Lordships to the case in *Daulat Ram* v. *Mehr Chand*[3], where the debt was incurred by a managing member of the family who did not happen to be the father. As this case was attempted to be distinguished on the ground that it was a case of a mortgage and not that of a promissory note, I would advert to and examine that distinction later; but it is clearly an authority for the proposition that even when all the members of a joint Hindu family have not been made parties to a suit, the entire family estate is, when the debt is incurred by a managing member or members, bound by the act of the latter and can pass at the sale in execution of a decree although he or they may not have been described to be such or stated to have been sued in their representative capacity. It would not be so when the mortgage is effected or a debt is incurred for a purpose not binding on the family; but in order to test the correctness of the decision of the lower Courts, it must be assumed in the present case that the debt was of a nature that would bind the family of which Linga Reddi and the respondent were members. If a debt is therefore assumed or found to have been incurred for the family necessity by a manager who was not the father (or for a

1. (1885) L.R. 13 I.A. 1: I.L.R. 13 Cal. 21 (P.C.).
2. (1877) L.R. 4 I.A. 247: I.L.R. 3 Cal. 198 (P.C.)
3. (1887) L.R. 14 I.A. 187 : I.L.R. 15 Cal. 70(P.C.).

Somappa v. Nagi Reddy.

purpose that was not immoral or illegal when the father happens to be the managing member) in a subsequent litigation to which the other members were parties, it would have to be held that the managing member was sued in a representative capacity in the first litigation and that the whole of the family was bound by the decree passed therein. The only thing that the other members or the sons, as the case may be, can insist, as observed by their Lordships in the above decision, is that an opportunity may be afforded to them to contest their liability. If this is all, it is being given to them in the present litigation.

This and other Privy Council decisions were referred to in a judgment of the Lahore High Court and discussed by Tek Chand, J., in *Jai Kishen* v. *Ram Chand*[1]. The head-note of that judgment is sufficiently clear and reads as follows:

"A decree passed against the managing member of an undivided Hindu family in respect of a liability incurred within the scope of his authority is enforceable against the interest of the junior members in the family property, even though they had not been made parties to the suit, but such members are not precluded from contesting the authority of the manager, of the nature of the debt, and this they may do either in the course of execution proceedings or in a suit of their own. There is no presumption that a debt contracted by the manager of a Hindu family was contracted for family purposes and this fact must be proved by evidence. The mere circumstance that it had not been disclosed in the course of proceedings in the original suit against the managing member that the debt had been raised for family necessity, or that the decree does not show on the face of it that the judgment-debtor had been sued in his capacity as manager is not fatal to the right of the decree-holder to proceed against the entire family property. It is not the frame of the suit or the form of the decree which is conclusive of the matter; the essential point is whether in fact the debt, which is the basis of the decree, had been raised by the judgment-debtor within the scope of his authority as the manager and for the purposes of the family. This question of fact can be determined finally only after the junior members have had proper opportunity of being heard, either in the execution proceedings or in a separate suit specially brought for the purpose. But if after hearing the junior members, the finding is that the debt satisfies the "touchstone of necessity" and is, therefore, binding on them, their interest in the property will be held to have passed at the sale, as effectively as if they had been made parties to the original suit."

This question came up for decision before a Full Bench of this Court in *Vadlamannati Venkatanarayana Rao* v. *Gottumukkula Venkata Somaraju*[2]. The facts of that case briefly were that *A* who constituted a member of a joint family with his sons *B* and *C* purchased on behalf of the joint family a

1. A.I.R. 1935 Lah. 1.
2. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).

Somappa *v.* Nagi Reddy.

certain property which was then subject to a mortgage. Subsequent to the purchase the mortgagee brought a suit to enforce the mortgage and impleaded *A* as the purchaser of the equity of redemption; *A* represented the joint family in the suit. There was a decree for sale and in execution of the decree the mortgagee purchased the property. He subsequently brought a suit for the recovery of possession of the property purchased by him and to this suit he impleaded not only *A* who had, as already stated, represented the family in the previous suit but his sons *B* and *C* as well. He also claimed mesne profits in that suit. On the plea raised by *B* and *C* that they had ceased to have any interest in the property by virtue of a partition under which the property had fallen to *A's* share they were exonerated. It however transpired that in that partition *A* had taken the property not only for himself but for himself as well as for a minor son *D* with whom he was joint at the time when the partition was effected. The suit was decreed and the mesne profits were ordered to be ascertained. The decree for mesne profits was ultimately passed on the 3rd April, 1935. Two months later *A* died and in February, 1936, an application was filed on behalf of the decree-holder to recover the amount by sale of the other properties, in *D's* hands. *D* resisted the same on the ground *inter alia* that the properties in his hands could not be rendered liable in execution, firstly, as there had been a partition between him and his father *A* and secondly as the execution was being sought on the basis of the decree which was obtained against his father only. The partition alleged by *D* was found against him. On the second point the Full Bench held that the properties of the joint family in *D's* hands should be, in spite of the fact that he was not a party to the suit or to the decree, proceeded against in execution. It may be remembered, however, that this was so held not only on the ground that *A* happened to be the father of *D* but also on the ground that *A* was the *kartha* of the family of which *D* was a member. It was held by the Full Bench that when the suit related to joint family property and the person sued upon was either the father or the eldest member, that is, the accredited head of the family, it must be presumed that he was sued in his representative capacity and he need not have been described as such in the pleadings and that it was not necessary that the decree should have been passed against him specifically as such. It was also held that since the liability was declared to be a family liability

Somappa v. Nagi Reddy.

every item of the joint family property was bound to satisfy the same. It may also be added here that although the three cases of the Privy Council on which reliance was placed by Venkatasubba Rao, J., who wrote the leading judgment in that case, related to immovable property, the principle of representation affirmed in that decision was held to apply "to other transactions as well." The decree for mesne profits which was being enforced against *D* was after all a decree for money.

On the basis of these authorities it would seem to follow that in a case where it can be made out that a person against whom the decree was passed occupied a representative capacity at the time, as Linga Reddi did, and that the debt for which the decree was passed was one for family necessity, as the debt incurred by him must be, for the present, assumed, the property belonging to the other members should be, on that assumption, held liable although they were not *eo nomine* parties to the suit. If this is the correct position, the decision of the lower Courts in disallowing the questions in regard to the binding nature of the debt and the respondent's liability to discharge the same from being gone into, would be apparently wrong.

It has been, however, contended by learned counsel for the respondent that although Linga Reddi was the *kartha* of the family at the time when the decree in O. S. No. 166 of 1932 was passed, yet as the suit had not been brought on the basis of the original consideration but on the basis of the promissory note itself and the other members of the family were not impleaded in that suit as parties, the decree should be found to have been passed against him (that is, Linga Reddi) in his individual capacity and the entire family property of which he and his nephew were owners, could not be made liable in satisfaction of the decree. During the course of his arguments learned counsel for the respondent tried to base this contention partly on the ground of waiver by the plaintiff in not basing his claim in O. S. No. 166 of 1932 on the original consideration against the other members of the family and partly on the ground that a decree on the basis of the promissory note could only be passed against the maker or those who were parties to the note and that unless the promissory note was on the face of it found to have been executed on behalf of the joint family (which it was not) a decree against Linga Reddi cannot be

Somappa *v.* Nagi Reddy.

held to have been passed in a representative capacity and the property belonging to the junior member of the family (that is, the respondent) could not be made liable. I do not think there is any force in either of these contentions. As for the question of waiver, it was never alleged by any one in this litigation that the decree-holder had waived his right, if any, to recover the decree amount from the family property. That would be a question of fact but it cannot be inferred merely from Bhimakka's omission to implead the other members of the family in O. S. No. 166 of 1932. As for the other contention, reliance was placed by learned counsel for the respondent on the decision in *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[1], and on the Full Bench decision in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[2]. The question to decide in the Full Bench case was whether in a suit by an indorsee of a promissory note, persons other than those who were parties to the promissory note could be made liable. The promissory note in that case was found to have been executed by the managing member of a joint Hindu family but the promisee was held, in view of the words of the indorsement, not to have transferred the debt for which the promissory note was executed but the promissory note only. On these findings, the answer given by the Full Bench to the above mentioned question was in the negative. But this was because the indorsee was held not entitled to sue on the debt which was transferred to him but merely on the promissory note which was. An indorsee could not, in the circumstances, sue on the basis of the original debt, but the case of a payee is different. The suit in O. S. No. 166 of 1932 was by the promisee himself and the question whether he was the owner of the debt apart from the promissory note does not arise. Moreover the question whether the property belonging to the other members of the family could be made liable in execution of the decree passed against the maker of the promissory note or those who were parties to the same did not arise for consideration in that case, and was not considered. This would be clear from the following observation that was made in that judgment:

"The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the

1. (1934) 68 M L.J. 104.

2. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

Somappa v. Nagi Reddy.

family or by the father for his own purposes, provided that they are not incurred for illegal or immoral purposes, does not affect the principle involved."

The decision in *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[1], does undoubtedly proceed on the basis that the question of the binding character of the debt against the other members of the family cannot be, at least in cases when they are not the sons or descendants of the judgment-debtor, gone into in execution proceedings, but this was on the basis of the decision in *Viraragavamma* v. *Samudrala*[2], which was, in view of the Privy Council decisions, considered by the Full Bench in *Vadlamannati Venkatanarayana Rao* v. *Gottumukkula Venkata Somaraju*[3], to be obsolete. It is true that the facts of the case in *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[1], as well as of *Viraragavamma* v. *Samudrala*[2], were similar to the facts of the present case, but the objection was being raised, as pointed out by Mr. Ramaswami Aiyangar in the last of the two cases, to the attachment and not as here after the property had been sold by the Court. This may make some difference although I very much doubt if it should. At all events, I see no justification for the reservation made by the learned judges to cases where the other members of the family happen to be the sons or descendants of the judgment-debtor. If it was on the theory of representation the members other than sons or grandsons must be held to stand in the same position and to be similarly represented by the *kartha*. It may be that the Hindu father may have greater powers than an ordinary managing member, but so far as the question of liability on the promissory note was concerned, they stood in the same position. And sons or other descendants are not always bound by the debt incurred by their father or ancestor, that is, where the debt is illegal or immoral. In any case in view of the Full Bench decision in *Vadlamannati Venkatanarayana Rao* v. *Gottumukkula Venkata Somaraju*[3], the authority of the decisions in *Veeraragavamma* v. *Samudrala*[2], and *Lakshmana Chettiar* v. *Muthu Chellia Goundan*[1], must be found to have been considerably shaken. I find no reason for drawing a distinction between a debt raised on the security of a promissory note or of a mortgage after the decree is passed.

1. (1934) 68 M.L.J. 104.
2. (1885) I.L.R. 8 Mad. 208.
3. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).

The liability of the other members of the joint Hindu family must be, in both cases, determined by Hindu law and not by the reason that the *kartha* had executed a promissory note in one case and a mortgage deed in the other. Why should a distinction be drawn between various decrees and why should the liability of the other members of a joint Hindu family be determined in cases of some and not in cases of others, it is not quite easy to follow.

I must, therefore, hold that there is no merit in the contention that in a suit on a promissory note when the liability of persons other than the maker had not been alleged or determined, a creditor would be debarred for ever from enforcing the liability imposed by Hindu law as against the other members of the family of which the maker of the promissory note was the *kartha* or the head. The frame of the suit or questions relating to adjectival law or even considerations based on commercial convenience to be found in the Negotiable Instruments Act should not be allowed to prevail against the substantive law or to decide the point finally whether the other members of the family would or would not be liable for a debt incurred by the manager. A decree may be passed against a manager or a *kartha* alone who happens to be the maker of the promissory note even in cases where a suit is brought on the basis of a promissory note; but once a decree has been obtained, the question whether the judgment-debtor was liable individually or was also representing the other members of the family of which he was the *kartha* should be left to be determined in appropriate proceedings and the power of the creditor to get the liability of persons other than the judgment-debtor declared subsequently should not be taken away or held to have been impliedly adjudicated against him simply because he brought the suit against the maker in the first instance. This would contravene the principle enunciated by their Lordships of the Privy Council and by the various High Courts in cases some of which only have been noticed by me.

It was wrong to suggest that an auction purchaser in a case like this was trying to go behind the decree. He is not, first of all as contended by learned counsel for the respondent, standing in the shoes of the decree-holder. If at all, he stands in the shoes of the judgment-debtor whose right, title and

Somappa v. Nagi Reddy.

interest he has purchased and the questions whether the judgment-debtor could alienate the entire family property in discharge of the particular debt or whether the whole of it could have been sold in execution would depend upon the nature of the debt and the position which the judgment-debtor occupied at all relevant times. If the decree-holder succeeds in establishing that the debt was incurred for a family necessity and that the judgment-debtor did represent the family at the time when the debt was incurred and at the time when the suit was brought against him, the share of the other members in the family property must be held equally bound to discharge the debt incurred by the *kartha* of the family. In my view, a decree obtained on the basis of a promissory note against a person who is the manager or *kartha* of the family would be executable against the family property of the other members provided the necessary conditions are established; and it is on those points that the auction purchaser was not allowed to adduce any evidence. The decisions of the lower Courts in preventing him from establishing the fact which would have justified the sale of the property claimed by the plaintiff are consequently incorrect and must be set aside.

The appeal is, therefore, accepted and the case sent back to the trial Court for a full enquiry in the light of the observations contained in this order. This is an old case and must be expedited. The plaintiff will pay the costs of this appeal. The costs of the subordinate Courts will be costs in the cause.

(Leave to appeal is granted).

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

China Kondayya v. Ramalinga Reddi.

Vallur China Kondayya (deceased) and others. *Appellants** (*Respondents 1 to 7 and 11 and nil*)

v.

Sidavarapu Ramalinga Reddi (deceased) and others. *Respondents* (*Petitioner and Respondents 9, 10 and 12 and nil*).

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 23—*Purchase of land by decree-holder in execution sale set aside—Net profits on land before the*

* A. A. O. No. 240 of 1939. 14th August, 1941.

date of setting aside—Whether purchaser accountable to judgment-debtor for the profits.

China Kondayya *v.* Ramalinga Reddi.

Act IV of 1938 is an expropriatory measure and the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act or by necessary implication therefrom. There is no express provision that the judgment-debtor should be entitled to the profits of the land the sale of which is set aside under S. 23 and it does not seem that any such provision can be read into the Act by necessary implication from its terms.

Appeal against the order of the District Court of Nellore dated 10th March, 1939, in E. P. No. 16 of 1939 (in O. S. No. 29 of 1936 on the file of the Sub-Court, Nellore).

P. Satyanarayana Rao for Appellants.

K. Umamaheswaram for Respondents.

The Court delivered the following

Wadsworth, J.

JUDGMENTS. *Wadsworth, J.*—The only question arising in this appeal is one under S. 23 of the Madras Act IV of 1938. The first respondent obtained a decree against the appellants in March, 1936 and in execution of that decree a sale of the appellants' property was held on 22nd November, 1937. The property was purchased by the decree-holder who on 18th February, 1938, got possession of one item with which we are now concerned. Act IV of 1938 came into force on the 22nd March, 1938 and thereafter the judgment-debtors filed an application under the Act to set aside the sale and to scale down the decree. The sale was set aside on the 7th November, 1938 and the decree was scaled down. The judgment-debtors then applied for re-delivery of the property and claimed that the profits on the land should be adjusted towards the decree as scaled down. On objection they gave up this claim to profits, stating that they would prosecute it in separate proceedings. The decree-holder then sought to execute the amended decree by the sale of the same property once more. By way of objection to this execution petition the judgment-debtors asked the Court to give credit to the amount of the profits enjoyed by the decree-holder during the interval between the delivery in February, 1938 and the re-delivery and asked that these profits be treated as realizations towards the revised decree. This application has been rejected and hence this appeal.

It will be quite clear that the claim to an adjustment of the profits towards the decree cannot be entertained unless it is provided by the terms of Act IV of 1938 or by necessary

China Kondayya v. Ramalinga Reddi.

Wadsworth, J.

implication therefrom. The sale held in execution of the unamended decree was a perfectly legal sale and the possession of the decree-holder as purchaser in execution of that decree was rightful possession. There can be no question, therefore, of restitution under the Civil Procedure Code, either by the express provisions of S. 144 or on the general principle that the Court will not permit injustice and will not permit a decree-holder to retain profits to which he was not lawfully entitled. The argument is however that the last words of the first clause of S. 23 of Act IV necessarily imply that a judgment-debtor shall have a right to the profits on the land during the interval between the delivery under the sale and the re-delivery after its cancellation. The words are, "and thereupon the sale shall be deemed not to have taken place at all." It is argued that, if the sale is deemed not to have taken place at all, then the purchaser was in possession of properties to which he must be deemed not to have been entitled and was enjoying profits which must be deemed to have been properties belonging to the judgment-debtor. The argument is reinforced by the further contention that, when the sale is set aside, the decree though amended, is revived and interest thereon will run up to the date on which further execution takes place and the decree is satisfied, and it is contended that it is not fair that the decree-holder should get both interest on his decree and the profits on the land of which he should be deemed not to have been the purchaser. This argument has a certain plausibility when the decree-holder is the purchaser but it cannot apply when the purchaser is a stranger. If a stranger buys lands in execution of a decree which is subsequently set aside under S. 23 at the instance of an agriculturist, the purchaser gets no interest on the money which he has paid. All he gets is a refund of the actual sum and there is no equitable reason for requiring the purchaser to forego the profits of the land which has been taken from him and in lieu of which he gets the bare sum which he has paid without interest thereon. Although the words "thereupon the sale shall be deemed not to have taken place at all" might be read as having the consequence that the person who purchases the land would be deemed to have had no right thereto, that is not the only meaning which those words could have had. It is no doubt true that, if these last words had been omitted, any third party purchaser from the Court auction

China Kondayya v. Ramalinga Reddi.

Wadsworth, J.

purchaser would lose his title when the latter's sale was set aside. But the Legislature may well have thought it desirable to make this matter clear and this may well have been the reason for putting in the words "thereupon the sale shall be deemed not to have taken place at all". It is pointed out that in the analogous section relating to sales of movable properties, S. 22, though there is no cancellation of the sale, that which the decree-holder is required to refund is merely the excess over his decree as scaled down and not any interest thereon. It would therefore not appear to have been the intention of the Legislature to deprive the decree-holder-purchaser of the profits which his purchase has earned in the interval between the original execution of the decree and the cancellation of the sale.

A more formidable argument against the appellants is derived from S. 24 which provides for the consequences of the setting aside of a sale under S. 23. This section provides that a purchaser shall be entitled to an order for repayment of any purchase money paid by him against the person to whom it has been paid. It is silent on the subject of interest and it is silent on the subject of profits. The natural inference is that the purchaser gets back his money without interest and that he does not incur any liability for profits. As we have often had occasion to point out, Act IV of 1938 is an expropriatory measure and the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act or by necessary implication therefrom. There is no express provision that the judgment-debtor should be entitled to the profits on the land the sale of which is set aside and it does not seem to me that any such provision can be read into the Act by necessary implication from its terms.

A further objection has been raised that even if the appellants were entitled to claim profits as against the decree-holder, that claim would have to be agitated in a separate proceeding and could not be put forward as an objection to execution, the profits not being ascertained as yet and, by the very nature of the claim, the profits not being a claim arising in execution of the decree, but a claim based on the statutory assumption that the sale in execution has not taken place at all, it would appear that this objection is also valid.

In the result, therefore, the appeal is dismissed with costs.

China Kondayya v. Ramalinga Reddi.

Patanjali Sastri, J.

Patanjali Sastri, J.—I own to some doubt on the question whether a purchaser of immovable property whose sale is set aside under S. 23 of Madras Act IV of 1938 is accountable for the profits received by him before the sale is set aside. The last words of the first paragraph of S. 23, namely, "thereupon the sale shall be deemed not to have taken place at all", would *prima facie* seem to import that the purchaser obtained no title at any time to the property and that his possession of it from the start was without any right. The consequence of this, it is arguable, must be that he is accountable for the profits received by him from the property of which he was in possession without any right or title. On the other hand, there is force in the argument for the respondents, that, when the Legislature made express provision in S. 24 for the consequences to follow upon a sale being set aside under S. 23, it has omitted to provide expressly for the payment by the purchaser of the net profits received by him. The question is by no means free from difficulty but having regard to the considerations adverted to in the judgment of my learned brother I agree, on the whole, though not without some hesitation, with the view expressed by him.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE HORWILL.

P. V. R. R. V. R. Veerappa Chettiar and another. ... *Petitioners* (Petitioners)*

v.

V. AR. V. VR. Sivagami Achi ... *Respondent (Respondent).*

Veerappa Chettiar v. Sivagami Achi.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Appellate decree after Act came into force confirming original decree—Subsequent application to original Court under S. 19—Competence.

Whether a decree of the appellate Court was passed in the first instance or in modification or reversal or confirmation of the decree of the original Court nevertheless it would be a decree passed after the commencement of Act IV of 1938 and cannot be amended under S. 19 of the Act. It cannot be said that the decree of the original Court when it is confirmed in appeal is still the decree to be executed. The pendency of an appeal suspends the finality

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* A. A. O. No. 14 of 1940 (converted into C. R. P. No. 1738 of 1941). 10th October, 1941.

Veerappa Chettiar *v.* Sivagami Achi

of the decree of the original Court and before a final decree is passed on appeal, all the relief which a party is entitled to and which would have been given by the original Court had Act IV of 1938 been in existence on the date on which it passed the decree should be urged before the appellate decree is passed. An application under S. 19 of the Act to the original Court is incompetent when the decree of such Court has been confirmed on appeal after the coming into force of the Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Devakottai dated 16th November, 1939 and made in I. A. No. 636 of 1939 in O. S. No. 240 of 1934.

V. Ramaswami Aiyar for Petitioners.

T. M Krishnaswami Aiyar and *T. K. Sundararaman* for Respondent.

The Judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This civil miscellaneous appeal, which was later converted into a civil revision petition, arises out of an application filed under S. 19 of the Madras Agriculturists' Relief Act for scaling down a debt due by the petitioner in respect whereof a decree was passed on 18th September, 1935, by the Sub-Court of Devakottai and confirmed by the High Court on 28th February, 1939. The learned Subordinate Judge dismissed the application on the ground that though the petitioners are agriculturists within the meaning of the Act, they are not entitled to the benefits thereunder because they have been assessed to property or house tax within two years immediately preceding 1st October, 1937, within the meaning of S. 3, Cl. (*c*) of the Act. This view is challenged by the petitioners as unsound. But the learned counsel for the respondent-decree-holder submits that the dismissal of the application could be sustained on the ground that the application under S. 19 was incompetent and the Subordinate Judge of Devakottai had no jurisdiction to grant any relief thereon. His contention is that S. 19 of the Act does not apply to decrees passed after the commencement of Madras Act IV of 1938, namely, 22nd March, 1938, and the appellate decree in this case was passed after the said date, that is, on the 28th February, 1939, that the said decree has become final and that if the petitioners wanted any relief under the Act, they should have made the application to the appellate Court before the decree was passed by that Court. In support of this contention

Veerappa Chettiar v. Sivagami Achi. — Venkataramana Rao, J.

he relied on the recent decisions of this Court reported in *Kotayya* v. *Venkata Punnayya*[1], and *Kannabhiran Pillai* v. *Govindaswami Pillai*[2], and *Ramaswami Udayar* v. *Ramanathan Chettiar*[3]. Apart from authority, according to the plain language of S. 19, it would not apply to a decree passed after the commencement of the Act. In *Kotayya* v. *Venkata Punnayya*[1], our learned brothers, Wadsworth, J., and Patanjali Sastri, J., took this view with reference to a decree passed by a trial Court after the commencement of the Act. In that case the suit was brought on 3rd January, 1938, and a decree was passed on 18th April, 1938. Between these dates the Act came into force, that is, on 22nd March, 1938. Though the written statement in that case was filed on 30th January, 1938, the learned Judges held that it was the obvious duty of the petitioner to make an application to the Court before the passing of the decree claiming relief under the Act and as he had omitted to do so, the decree must be deemed to have become final. The reason is thus stated by Patanjali Sastri, J., at page 204:

"All available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree. .... It may be laudable to rehabilitate agriculturists by a compulsory scaling down of their debts but it could be no part of this object to condone, and thereby encourage, their laches in the conduct of legal proceedings. On the other hand, having regard to the expropriatory nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion, reading the Act as a whole, that the word 'decree' in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act."

This principle was extended by our learned brother Wadsworth, J., to a case where a trial Court dismissed the suit but on appeal that decision was reversed by the appellate Court after the Act came into force (Vide *Kannabhiran Pillai* v. *Govindaswami Pillai*[2]). He observed thus:

"At the time when this application was made there was a good deal of difference of opinion on the question whether a decree passed after the Act came into force could be scaled down. That doubt has, I hope, been finally set at rest by our decision reported in *Kotayya* v. *Punnayya*[1]. In the light of that decision, it must be held that the application to the lower Court to scale down the appellate Court's decree under S. 19 was not the proper procedure."

1. (1940) 2 M.L.J. 202. 2. (1940) 2 M.L.J. 473.
3. (1941) 1 M.L.J. 6.

Veerappa Chettiar v. Sivagami Achi.
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Venkataramana Rao, J.

In *Ramaswami Udayar* v. *Ramanathan Chettiar*[1], the above principle was extended also to a case where a decree of the trial Court was modified in appeal after the passing of the Act. That was a decision of a Bench and the learned Judges Wadsworth and Patanjali Sastri, JJ., remarked thus:

"We have held that S. 19 of Madras Act IV of 1938 has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings and if he does not urge it he must be taken to have waived it. We see no reason to apply a different principle to proceedings in appeal of which the affected party has had notice."

In *M. K. Srinivasa Aiyangar* v. *Balasubramania Pirandar*[2], the question again came up with reference to a decree passed by the District Munsif before the commencement of the Act which was confirmed by the Subordinate Judge before the commencement of the Act and which decree was again confirmed by the High Court in second appeal after the commencement of the Act. The appellate decree was passed by our learned brothers Burn and Lakshmana Rao, JJ. When the civil revision petition came up for hearing in the first instance before Wadsworth, J., he referred it to a Bench on the ground that there was a reservation in the judgment of the appellate Court that the judgment-debtor might avail himself of the provisions of the Agriculturists' Relief Act, though the decree did not contain any reservation in that behalf. In the course of the reference Wadsworth, J., expressed the view that the principle laid down in the above cases should be applied even to a case where a decree has been confirmed by the appellate Court. He observed thus:

"I do not think that it makes any difference, whether the decree is a reversing one or an affirming one."

When the matter came up before the Bench, Burn and Lakshmana Rao, JJ., they allowed the civil revision petition observing thus:

"Decrees passed after the commencement of Madras Act IV of 1938 cannot be amended under S. 19 of that Act (Vide *Kotayya* v. *Venkata Punnayya*[3]). The order of the learned District Munsif is therefore wholly without jurisdiction."

It is thus clear that whether the decree of the appellate Court was passed in the first instance or in modification or reversal or confirmation of the decree of the original Court, nevertheless it would be a decree passed after the commencement of the

1. (1941) 1 M.L.J. 6. 2. C.R.P. No. 1667 of 1939.
3. (1940) 2 M.L.J. 202.

Veerappa Chettiar *v.* Sivagami Achi.

Venkata ramana Rao, J.

Act and cannot be amended under S. 19 of the Act. If we may say so with respect, we entirely agree with this view as it follows from the plain language of the section. But Mr. Ramaswami Aiyar would contend that though this view may be correct in so far as a decree was passed in the first instance by the appellate Court or the original Court's decree was modified or reversed by it, it would not apply to a case where the appellate Court merely confirms the original Court's decree; in the latter case according to him it would only leave the decree of the original Court standing and the only decree to be executed. He further contends that in view of the interpretation placed by Madhavan Nair, J., in *Gangaraju* v. v. *Ramayya*[1], on the language "a Court which passed a decree" in S. 19 as meaning even in the case of a decree of the appellate Court the Court of first instance, the application to the Sub-Court in this case was competent. He also contends that, when the Act came into force, his client had a right to apply to the Sub-Court under S. 19 of the Act, that he was not obliged to make an application to the appellate Court, that the debt could have been scaled down by the original Court before the appeal was decided and therefore the said right could not be lost by reason of the confirmation of the decree in appeal. The question is whether these contentions are tenable. Our Court has throughout followed the view taken by Sir John Edge in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*[2]:

"In my opinion the effect of S. 579 of the Code (1882) (corresponding to O. 41, r. 35, of the Civil Procedure Code, 1908) is to cause the decree of the appellate Court to supersede the decree of the Court below even when the decree of the appellate Court is one which merely affirms that decree below and does not reverse it or modify it. In my opinion the only decree that can be amended is the decree to be executed; and the decree to be executed is the decree of the appellate Court, and not the decree of the Court below."

It is this view that was followed in *Manavikrama* v. *Unniappan*[3], and later affirmed by the Full Bench in *Pichuvayyangar* v. *Seshayyangar*[4], which has since been followed. I may point out that this view was later approved by the Privy Council (vide *Brij Narain* v. *Tejlal Bikram Bahadur*[5]). As Bhashyam

1. (1939) 1 M.L.J. 329: I.L.R. (1939) Mad. 520.
2. (1888) I.L.R. 11 All. 267 (F.B.).
3. (1891) 2 M.L.J. 23: I.L.R. 15 Mad. 170.
4. (1894) 5 M.L.J. 39 : I.L.R. 18 Mad. 214 (F.B.).
5. (1910) 20 M.L.J. 587: L.R. 37 I.A. 70: I.L.R. 32 All. 295.

Veerappa Chettiar *v.* Sivagami Achi.

Venkataramana Rao, J.

Aiyangar, J., explained in *Kristnama Chariar* v. *Mangammal*[1]:

"When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance."

The contention that the decree of the original Court when it is confirmed in appeal is still the decree to be executed is thus opposed to principle. In regard to the argument based on the decisions in *Gangaraju* v. *Ramayya*[2] and the decisions which followed it, they are distinguishable because the decrees passed by the appellate Court in those cases were before the passing of the Act. We therefore think it unnecessary to go into the correctness of the said decisions which was canvassed during the course of the argument.

We shall now deal with the contention raised by Mr. Ramaswami Aiyar that his client is not obliged to make an application to the appellate Court. It is no doubt true that before the appeal is decided an application to the trial Court under S. 19 is competent, but if before the application is disposed of, the decree is passed by the appellate Court, the latter decree becomes final and the application to the lower Court becomes infructuous. Even if the debt has been scaled down before the appeal is decided, it is the duty of either party to bring that fact before or at the hearing of the appellate Court either by way of appeal or otherwise so that the appellate Court might pass the appropriate decree. As pointed out in *Muthuswami Aiyar* v. *Kalyani Ammal*[3], the authority of an appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the time of its judgment. It is entitled to pass such a decree as would be in accordance with any later enactment which came into operation subsequent to such date. To avoid anomalies and multiplicity of proceedings a party ought to make the application to the appellate Court for the relief he is entitled to under an enactment which came subsequent to the passing of the decree of the original Court and get the necessary relief in accordance with that enactment. The pendency of the appeal

1. (1902) I.L.R. 26 Mad. 91.
2. (1939) 1 M.L.J. 329: I.L.R. (1939) Mad. 520.
3. (1916) I.L.R. 40 Mad. 818 at 822.

Veerappa Chettiar *v.* Sivagami Achi.

Venkataramana Rao, J.

suspends the finality of the decree of the original Court and before a final decree is passed by it, all the relief which a party is entitled to and which would have been given by the original Court had the later enactment been in existence on the date on which it passed the decree should be urged before the appellate decree is passed, because once a decree is passed as pointed out by the Privy Council in *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao*[1], it is not open to a Court to amend or review a decree except under S. 152 or O. 46, r. 1, Civil Procedure Code. And the relief under the Act cannot be brought under any of those sections. Therefore the party runs the risk of losing the benefit under the Act if he does not urge before the appellate Court the plea which the new enactment gives him or if he has already obtained a decree in the first Court, he fails to bring it to its notice.

We are of opinion that the application to the lower Court was incompetent and on this ground the dismissal of the application was proper. In this view we think it unnecessary to into the correctness of the other questions raised and considered by the learned Subordinate Judge.

In the result the civil revision petition fails and is dismissed, but as the respondent did not raise any objection to the maintainability of the application in the lower Court, we direct each party to bear his own costs both here and in the Court below.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

[Reference on a difference of opinion between Wadsworth and Somayya, JJ.]

Boya Chinna Papanna .. *Prisoner* (Accused 1).*

Chinna Papanna, *In re.*

Evidence Act (I of 1872), Ss. 24 and 27—Criminal Procedure Code (V of 1898), *S.* 162—*Accused's statement to police officer—Prosecution witnesses corroborating details of preparation for the offence—Statement of accused whether voluntary—Burden of proof.*

An accused made a statement to a police officer while under arrest which led to the discovery of certain incriminating articles. The statement was

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1. (1899) 10 M.L.J. 221: L.R. 27 I A. 197: I.L.R. 24 Mad. 1 at 10 (P.C.).

* R. T. No. 59 of 1941 and
Crl. Appeal No. 233 of 1941. 23rd July, 1941.

Chinna Papanna, *In re.*

retracted later on. On the question whether the statement was voluntarily made and was admissible in evidence,

Held, by Horwill, J., on the reference: The confession was voluntary, and with the additional corroboration of disinterested witnesses on the side of prosecution the truth of the statement was proved beyond doubt.

When voluntary confessions are made to a police officer they are admissible if they satisfy the conditions laid down in S. 27 of the Evidence Act, despite the provisions of S. 162, Criminal Procedure Code.

Trial referred by the Court of Sessions of the Kurnool Division for the confirmation of the sentence of death passed upon the said prisoner in C. C. No. 7 of 1941 on 14th March, 1941, and appeal by the prisoner against the sentence.

N. T. Ragunathan for Prisoner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

[This case originally came on for hearing on 6th June, 1941, before *Wadsworth and Somayya, JJ.*]

The Court delivered the following

Wadsworth, J.

JUDGMENTS. *Wadsworth, J.*—The appellant has been sentenced to death for the murder of Papanna on the night of 6th November, 1940. As the learned Sessions Judge observes, the case against the appellant depends substantially on his own confessional statement, corroborated by the recovery of incriminating articles as a result of that statement. The main question is whether this statement was rightly admitted and made the basis of his conviction, having regard to the provisions of Ss. 24 and 27 of the Indian Evidence Act.

Papanna was murdered when he was asleep at night and no one saw it being done. The complaint mentioned seven suspects, including the appellant and his co-accused, but this was evidently mere guess-work. The Sub-Inspector arrived on the 7th and on the 8th he secured the evidence of P.W. 7 that on the night of the murder as he was coming home from the fields he had seen the two accused sitting on the sluice of the tank (some distance from the place of the murder) and had spoken to them and that the appellant had an axe, while the second accused had a spear. The witness saw nothing suspicious in their appearance or conduct. Apparently as a result of this information, the Sub-Inspector (who appears to have taken no action on the vague suspicions in the complaint) deputed constables to arrest the two accused. Those constables are not witnesses. On the morning of the 9th, when the Sub-Inspector was at the chavadi with the village munsif and others, the appellant was

Chinna Papanna, *In re.* — Wadsworth, J.

produced by the constables and was formally arrested and questioned by the Sub-Inspector. In response to these questions he is alleged to have at once confessed that he and the second accused had murdered Papanna and that he had thrown his axe into the tank and had hidden his blood-stained clothes in a pot in his house. He then produced the blood-stained clothes from their hiding place and the axe from the water of the tank. As was to be expected, the weapon bore no certifiable trace of blood, but the clothes were stained with human blood.

After these recoveries, the constables produced the second accused (who has been given the benefit of the doubt by the lower Court). He was also arrested and questioned and stated that he had hidden his spear in the fodder in his manger. This was produced and was found to be blood-stained, but the Imperial Serelogist could not say whether or not it was stained with human blood.

On the 9th, the Sub-Inspector also secured the evidence of P. W. 8, who has deposed that on the night of the crime he met the two accused at about mid-night, coming away from the fields, armed with an axe and a spear. He said nothing about what he had seen till the police examined him.

The Sub-Inspector in cross-examination denied that he had told either of the accused that he would be taken as an approver, denied that he told the second accused that the appellant had confessed and repudiated a suggestion that the accused were arrested on the 6th along with others and compelled to confess. Before the committing Magistrate, the appellant stated that his nose bled and that his clothes thus became stained, but he denied having produced those clothes from his house. He also asserted that he had been detained since the 7th afternoon and had been beaten by the police in order to make him confess, but that he had made no statement. The second accused also denied having produced the spear and asserted that he had been beaten. In the Sessions Court the appellant added that P. Ws. 7 and 8 were false witnesses and that he never had the axe.

On this evidence it is contended that there is a serious doubt as to the voluntary nature of the appellant's confessional statement, which the prosecution ought to have removed by positive evidence; and that in any case this confession is retrac-

Chinna Papanna, *In re.* — Wadsworth, J.

ted and is substantially uncorroborated. The argument is that something must have preceded the confessions and that the prosecution have not discharged the duty laid upon them of proving that the confession was not induced in an objectionable manner. It seems to me that this argument overlooks the nature of the appellant's own statements. He has not alleged that he was induced to confess by violence or promises. His case was that though he was beaten he did not confess at all and did not produce the incriminating articles. It is true that the Sub-Inspector was asked questions which seem to suggest that the confessions were improperly induced, but these suggestions are difficult to reconcile with the appellant's own denial that he made the statements and produced the articles. Two witnesses have corroborated the police evidence that the confessions were voluntary. There is no evidence to support the assertions that the accused were arrested on the 7th, nor does this seem likely. There is no evidence that the accused were beaten. There can be no doubt that the appellant did produce the blood-stained clothes. There is only his own assertion as to the way in which they came to be stained with blood and this explanation is inconsistent with the fact that they were hidden. There is no explanation of the circumstance that he produced the battle-axe from the water of the tank. The appellant having contented himself with a complete denial of the incriminating statements and conduct, I do not think that it was incumbent on the prosecution to let in further evidence of the absence of threats, promises or inducements leading to the confessions.

In my opinion the appellant has been rightly convicted and sentenced. But as my learned brother has taken a different view of the evidence, the case will have to go before a third Judge.

Somayya, J.

Somayya, J.—I regret that I have felt compelled to differ. The appellant has been convicted of the offence of murder and sentenced to death by the Sessions Judge of Kurnool. Two persons were charged and tried for the offence; the appellant who was the first accused was convicted and the second accused was acquitted.

The appellant is said to have murdered one Papanna of Ulindakonda, Kurnool District on the night of 6th November,

Chinna Papanna, *In re.*

Somayya, J.

1940 when he was sleeping alone in his field which is about 1½ miles from the village. The deceased went to the field to watch over the harvested korra crop and while asleep, he was undoubtedly killed by some one. The question is "was it the appellant that did so".

Enmity between the appellant and the deceased was alleged; the Judge finds that no enmity has been proved and the learned Public Prosecutor has not challenged this finding before us.

The conviction rests solely on the retracted confession of the appellant which it is said is corroborated by the evidence of two witnesses, P. W. 7 and P. W. 8 and by the discovery of some property as the result of the confession.

P. W. 3, the son of the deceased, discovered his father dead after mid-night and informed his mother P. W. 4. Then a complaint Ex. B was made to the village munsif at about 2 A.M.; the report of the village munsif was despatched at about 5 A.M. and reached the Kurnool Taluk Police Station at 10-30 A.M. The Sub-Inspector reached the village at 2-30 P.M. the same day. He got some information from P.W. 7 on the 8th and deputed his constables to fetch the two accused. On the 9th he examined P. W. 8 and on the same day, the appellant was brought before the Sub-Inspector and when questioned in the presence of P. W. 9 and P.W. 10, the appellant is said to have straightaway confessed his crime. The confessional statement Ex. D was written by P.W. 9. The second accused was also brought before the Sub-Inspector on the same day; in fact, the constables had been asked on the 8th to secure the second accused also. When the second accused appeared he was questioned by the Sub-Inspector and he is also said to have at once confessed and given a statement Ex. E. Ex. D was recorded at 9 A.M. and Ex. E at 12 noon.

Exhibit D runs as follows:

"At the instigation of Obigadu, son of Boya Thimmappa, Hanumanthagadu, son of Boya Chinna Mari Yankata and I cut and killed the deceased Boya Ullam Papanna four days ago now, on the night of Wednesday, while he was sleeping near the korra sheaves, in the field. I cut and killed him with the battle axe while, Hanumanthagadu cut and killed him with the spear. I threw away my battle axe in the waters of the tank (or lake) at the terminal (last) sluice, on my return trip. It is blood-stained. The

Chinna Papanna, *In re.*

Somayya, J.

white angi and the white dhoti which I had then worn were stained with blood. I have concealed that dhoti and angi in an empty mud pot, in my house in which water is boiled. I shall get them and deliver to you."

After recording Ex. D a search was made of the appellant's house and the appellant is said to have produced from a pot inside the house a white angi, a (coat) and a white dhoti (cloth); these were said to contain blood marks. Then they proceeded to the tank mentioned in Ex. D; the appellant is said to have produced the battle axe from underneath the water. This was at 11 A.M. (D. 2). After the searches and recovery of the articles evidenced by Ex. D. 1 and Ex. D. 2, the party returned to the chavadi and all of them remained there till 12 noon when the second accused was produced. When questioned he gave the statement Ex. E which runs as follows:

"At the instigation of Boya Obigadu, Boya Chinna Papigadu and I, together, cut and killed four days ago now, on the night of Wednesday. I cut and killed with my screw-spear and Chinna Papigadu cut and killed with a battle axe. (I have concealed my spear amidst (fodder) rubbish in the manger, inside my house. It is blood-stained. I shall produce it). Chinna Papigadu threw away his battle axe that night, on our return trip in the waters, of the pond (tank or lake)."

After recording Ex. E, a search was made for the spear, the second accused produced a spear from his house and Ex. E. 1 was recorded at 1 P. M., evidencing this search. Then both the first and second accused were charged with the offence of murdering Papanna. Before the Committing Court, both the accused retracted their confessions. The appellant said that he had no motive to kill the deceased, that the police beat him severely and asked him to confess. He denied that the axe was his. As regards the blood-stained cloths, he said that owing to excessive heat, his nose had bled and the cloths had become blood-stained in consequence. At the trial in the Sessions Court, the accused adhered to the statements which they gave in the Committing Court. The Judge acquitted the second accused on the ground that the admissible portion of Ex. E did not amount to a confession. As regards the appellant he held that the confession contained in Ex. D was voluntary and that though it is a retracted confession, it is corroborated by the recovery of M. Os. 9, 10 and 11 and by the evidence of P. Ws. 7 and 8. The appellant's explanation for blood stains on M. Os. 9 and 10 was rejected on the ground that it was inconsistent with Ex. D. The Judge then referred to the evidence of P.W. 7 and P.W. 8 that the appellant was seen in the

Chinna Papanna, *In re.*

Somayya, J.

vicinity of the field where the deceased met his death on the night of the 6th and that the first accused had been armed with a battle axe. On this evidence he convicted the appellant of the offence of murder of Papanna and sentenced him to death.

It is urged in appeal that it is unsafe to convict a person on the basis of a retracted confession, that in this case there was no motive proved for the appellant to kill the deceased, that P.W. 7 himself stated that there was nothing unusual in villagers going about with a battle axe when going in nights to watch their fields, that even if his evidence is accepted as true, there is nothing suspicious about the appellant's conduct on the previous night, that the evidence of P.W. 7 and P.W. 8 should not be accepted on the ground that their statements were available only on the 8th and 9th, that is, two and three days after the occurrence. It is also urged that there are enough indications in the evidence to show that the confession was not voluntary.

Taking the evidence of P. W. 7 and P. W. 8 first, the evidence of P. W. 8 was available only on the 9th, that is, on the day of the confession. Three days had elapsed and it is unsafe to rely upon the evidence which is given so late. The same remarks apply to P. W. 7 whose statement was available only on the 8th. Two days had elapsed. Neither of them had stated to any one what they had seen on the night of the 6th even though they knew that the deceased was murdered on the night of the 6th. Their conduct is inconsistent with their having seen the appellant armed with a battle axe on the night of the 6th anywhere near the scene of occurrence. I think it is unsafe to accept the evidence of P. W. 7 or P. W. 8.

Before I go to Ex. D, we must see what happened on the 7th and 8th. P. W. 11, the Sub-Inspector of Police, Kurnool Taluk Station came to the village on the 7th at about 2-53 P. M. In Ex. B, the wife of the deceased gave the names of seven persons as suspects. Among these are accused 1 and 2. After P. W. 11 arrived in the village, he did not take any steps to verify if these men were in the village nor even to visit the house of any of the seven persons mentioned in Ex. B. The village munsif who was examined as P. W. 9 was asked about it and he said:

"Till the arrival of the Sub-Inspector I did not take any steps to verify

Chinna Papanna, *In re.*

Somayya, J.

if these seven men were in the village. The Sub-Inspector was in the village on the 7th and 8th. Neither he nor I visited the houses of any of the seven men named in Ex. B on the 7th or 8th."

The Public Prosecutor conceded that as the Sub-Inspector was not asked in chief examination to deny what the village munsif stated, we must take it that the statement of the village munsif is true. It is said by the learned Public Prosecutor that merely on the ground that the names of these persons were given as suspects in Ex. B, their houses could not be searched. True, but that is no explanation why, as the village munsif says, steps were not taken to see whether these people were even in the village or why their houses were not even visited. According to the prosecution, what put the Sub-Inspector of Police ultimately on to the accused 1 and 2 is the statement given by P. W. 7 on the 8th. P. W. 7 stated that he saw accused 1 and 2 on the night of the 6th, the first accused with a battle axe and the second with a spear. It is this information that evidently led the Sub-Inspector of Police to take action against these accused and to depute two constables to fetch them. It is strange that with the information given by P.W. 7 the Sub-Inspector did not think it worth while to search the houses of the first or second accused but contented himself with merely deputing two constables to fetch them. He says:

"Till I deputed the constables on the 8th to arrest accused 1 and 2, I did not take any steps to apprehend any of the seven persons mentioned in Ex. B or to search their houses. I did not attempt to search the houses of accused 1 and 2 even after deputing constables on the 8th to get them. I had no reason to believe that accused 1 and 2 would confess. I thought I had no sufficient grounds to search their houses though I had decided to arrest them."

This is a curious answer. If he had sufficient grounds to arrest them, it is difficult to understand his statement that he had not sufficient grounds to search their houses. The way in which the accused are said to have confessed the moment they appeared before the Sub-Inspector and what went before lead me to suspect that everything was known to the police and that the whole thing was merely a farce of having a confession first and a search immediately thereafter to bring the case within S. 27 of the Evidence Act. The appellant is first produced at 9 A.M. Immediately he makes a confession, Ex. D. Then the first search is made and that is recorded at 10 o'clock. At 11 o'clock the second search was made which led to the

Chinna Papanna, *In re*, — Somayya, J.

recovery of the battle axe. At 12 noon, the second accused is produced and he confesses immediately. Then the search of his house is made and the search report was prepared at 1 P. M. to show the recovery of the spear in consequence of information contained in Ex. E. If the prosecution evidence is true, I cannot understand why even after Ex. D in which the second accused was very clearly implicated, his house was not searched. The searches in connection with Ex. D were finished at 11 A.M. Then as P. W. 10 states in cross-examination, the party returned and were simply sitting until 12 noon when the second accused was brought. P. W. 10 says:

"When we returned from the tank to the chavadi we did not expect the second accused to be produced. Still we stayed on there although we had nothing specific to wait for."

There is another point taken by the appellant. It is said that the confession itself is not admissible under S. 24 of the Evidence Act. That section runs thus:

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The rule in England as stated in Taylor on Evidence is this (12th edition, 872):

" Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made . . . . . The rule which excludes confessions not shown to have been made 'voluntarily' is a rule of policy. It is not that the law presumes such statements to be untrue, but that owing to the danger of receiving such evidence, Judges have thought it better to reject it."

In *Ibrahim* v. *The King*[1], the Judicial Committee observed:

"It has long been established as a positive rule of English Criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

In India, however, the matter is put more elaborately in S. 24. One question that arises under S. 24 is whether it

1. (1914) A.C. 599 at 609.

Chinna Papanna, *In re.*

Somayya, J.

is really on the prosecution to prove that the circumstances mentioned in S. 24 do not exist or whether it is upon the accused to prove that the making of the confession was caused by inducement, threat or promise. It is no doubt true that the burden of proving facts which are specially within the knowledge of a person may be thrown upon him but having regard to the well-known principle of criminal jurisprudence recognised in *Ibrahim* v. *The King*[1], I have no reason to doubt that what the Indian Legislature attempted to enact more elaborately in S. 24 of the Evidence Act is that a Court must be satisfied before admitting a confession that it is free from all taint. The wording of S. 24 is *if it appears to the Court* to have been caused by inducement, threat etc., a confession is irrelevant. It is not "if it is proved to have been caused by inducement, threat or promise." As pointed out in *Emperor* v. *Panchkowri Dutt*[2], the Indian Legislature has deliberately used the expression "if the making of the confession appears to the Court" and not "if it is proved to the satisfaction of the Court." Therefore, if the Court has any reason to doubt the free and voluntary nature of the confession, then it is for the prosecution to prove that it was made without any of the inducements, threats or promises mentioned in this section. It is not as if there is less need for protection to an accused person in India than in England. Yet in England, the burden lies undoubtedly on the prosecution to prove that the confession was voluntary before it is admitted. I have no reason to think that the standard is less strict in India. As I said before, the Legislature seems to have endeavoured to enact the same rule in a more elaborate manner.

It is said that in this case the appellant set up the story that he was beaten by the police and that if it was true, there would have been some marks of violence on the person of the accused. As regards the argument that the accused has not proved that he was beaten, it is as in most of such cases impossible to expect him to be able to prove to the satisfaction of the Court that he was belaboured or that there are any of the infirmative circumstances mentioned in S. 24. Then it is said that what was suggested to the Sub-Inspector during the cross-examination was that some inducements were held out to

1. (1914) A.C. 599 at 609.
2. (1924) I.L.R. 52 Cal. 67 at 82.

Chinna Papanna, *In re.*
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Somayya, J.

the appellant in order to induce him to confess and not that he was beaten. P.W. 11 was asked whether he did not tell either of the accused that he would be taken as an approver if he confessed and he was also asked whether it was not true that accused 1 and 2 were arrested even before the 9th and compelled to make a confessional statement. There is enough suggestion in this second sentence that they were compelled and what is mentioned in the accuseds' statement is only an elaboration of what is taken down as compelled in the cross-examination of P.W. 11. There is nothing in the evidence of P. W. 10 to advance the case of the prosecution. There are enough materials in this case to raise a very serious doubt in my mind about the free and voluntary nature of Ex. D. I apply therefore the rule enunciated in *Emperor* v. *Panchkowri Dutt*[1], and hold that it was the duty of the prosecution to have satisfied the Court that none of the circumstances mentioned in S. 24 exist in this case and the evidence falls far short of it. On the other hand, all the circumstances point to the conclusion that very much more should have happened than what is admitted by the prosecution.

Lastly there is the fact that the accused retracted the confession and the question is whether it is safe to convict him on the strength of the retracted confession. Necessity of corroboration in a case of this kind, is recognised by all the authorities and was not seriously questioned by the Public Prosecutor. It is said that in this case the corroboration is to be found in the evidence of P.W. 7 and P. W. 8 and in the discovery of M. Os. 9, 10 and 11. It is unnecessary to go into this question fully in the view that I have taken on the other points. But there seems to be some force in the appellant's contention that what was discovered by reason of the information given in Ex. D ought not to be treated as corroboration of the statement made in Ex. D and that even if as P. W. 7 and P. W. 8 say, the first accused was carrying a battle axe which it was very common for every villager to do then, there is nothing suspicious in that act and that again would not be a corroboration of Ex. D.

I would reverse the conviction and sentence and direct the appellant to be set at liberty.

1. (1924) I.L.R. 52 Cal. 67.

Chinna Papanna, *In re.*

Somayya, J.

Before leaving this case, I should say that the question whether S. 27 of the Evidence Act has been altogether abrogated by S. 162 of the Criminal Procedure Code ought to be set at rest by the Central Legislature without leaving the matter in a state of confusion. It is enough to point out that the Lahore High Court by a majority held that it was repealed and the local Legislature interfered in the matter. The Allahabad High Court has also held that S. 162 abrogates S. 27 of the Evidence Act. I am very strongly in favour of this view. Two decisions of the Madras High Court have been brought to my notice in which it has been held that S. 27 still stands in spite of S. 162, Criminal Procedure Code and this view has been taken by the Nagpur and Patna High Courts. It is obviously very unsatisfactory to leave the matter in this state. Advantage might be taken of this opportunity to examine the whole law of confessions and amend S. 24 so as to make it clear that before a confession is allowed to go in, the prosecution must prove that it is voluntary.

[On the appeal being posted before a third Judge, the Court delivered the following Judgment:]

Horwill, J.

Horwill, J.—The appellant was convicted of an offence punishable under S. 302, Indian Penal Code, by the Sessions Judge of Kurnool and sentenced to death. On a difference of opinion between Wadsworth and Somayya, JJ., the appeal has been posted before me.

The facts of the case have been stated in the judgments of my learned brothers and the main question that I have been asked by the learned advocate for the appellant to consider is whether the confession made by the appellant was made voluntarily. On this point Wadsworth, J., held that it was and Somayya, J., that it was not.

The wife of the deceased person had no information as to who had committed the murder, but because of past enmity she suspected seven persons, and amongst them were the two persons who were accused in the lower Court. No definite material was forthcoming for a day and a half or so that was sufficient to warrant the arrest of either of them; but on the 8th of November, the offence having taken place on the night of the 6th, P.W. 7 told the Sub-Inspector that he had seen the two accused together on the night of offence, the appellant armed with a battle axe and the other accused with a spear. As the

Chinna Papanna, *In re.*

Horwill, J.

deceased man seemed to have had his head battered in with blows from an axe and to have been stabbed with a spear, the Sub-Inspector sent two constables on the night of the 7th to arrest the accused; and they were brought to the Sub-Inspector the following morning. He then had with him the village Magistrate and the President of the Panchayat Board to assist him in his investigation. The Sub-Inspector immediately questioned the appellant, who told him that he and the other accused had committed this offence and that he had thrown the axe with which the offence was committed into a certain tank and that the blood-stained clothes which he was wearing on the night of the offence had been placed in a pot inside his house. The learned advocate for the appellant contends that it was not sufficient for the prosecution to let in evidence of the questions put and the answers of the appellant; but that they were bound to show by all evidence possible that the confession was made in circumstances from which it could be conclusively deduced that the statement was voluntary. Particular reliance has been placed on a decision of the Privy Council reported in *Ibrahim* v. *The King*[1], in which it has been said:

> "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".

Our own Evidence Act does not put the matter in the same way. S. 21 makes admissions relevant and says that they may be proved as against the person who makes them. S. 24 deals with an admission which amounts to a confession and adds a proviso to the ordinary rule that an admission can be proved against the person who makes it by laying down that:

> "A confession made by an accused person is irrelevant if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient to give the accused person grounds . . . . for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature . . . ."

This wording suggests that unless it appears to a Court that an inducement, threat, or promise was held out by a person in authority, a confession would be relevant under S. 21 of the Indian Evidence Act without any formal proof of the voluntary nature of the statement.

1. (1914) A.C. 599.

Chinna Papanna, *In re.*

Horwill, J.

It has certainly not been the practice of the Courts of this Presidency to require from the prosecution formal evidence that the statement was voluntary. There is always cross-examination on this point and the accused is always questioned by the Court about his confession. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the evidence which would lead it to suspect that the confession was not voluntary. However, this discussion whether formal proof by the prosecution of the voluntary nature of the confession is necessary is an academic one, because P. W. 9 has set out the circumstances under which the accused was questioned; he says that:

"A policeman brought accused 1 to the Sub-Inspector about 9 A.M. We had gathered there casually... After arresting the first accused, the Sub-Inspector asked him 'what do you know of the death of Vullam Papanna?'"

The accused's confession seems to have been an answer to that question. This is very much what happened in the Privy Council case above referred to (*Ibrahim* v. *The King*[1]), where the officer who was the superior of the soldier charged, said to him "why have you done such a senseless act?" to which the accused replied:

"Some three or four days he has been abusing me. Without a doubt I killed him."

That statement was held to be a voluntary one; and I see no reason for holding that the statement in the present case was not made voluntarily. It is probably true that the Sub-Inspector preferred obtaining information from the accused rather than by searching his house; but that does not in any way cast any doubt on the voluntary nature of the confession made.

It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. I do not believe this to be the case. A man who has committed a grave crime—unless he is a hardened offender—has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction, fear of them will act in restraint of his natural impulse to confess.

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1. (1914) A. C. 599.

Chinna Papanna, *In re.*

Horwill, J.

At the moment of his arrest, the ordinary accused feels that the game is up and that it is futile to attempt to try to conceal his guilt any longer. Even in cases in which no confession of the accused is tendered in evidence, because it does not lead to any discovery, a perusal of the records frequently shows that some sort of a confessional statement is made. There is nothing in the evidence in this case which suggests that the appellant was detained and questioned for a considerable time before he made his statement. The evidence is in fact to the contrary.

That voluntary confessions made to a police officer are admissible if they satisfy the conditions laid down in S. 27 of the Evidence Act—despite the provisions of S. 162, Criminal Procedure Code—has been held consistently by this Court over a long course of years. If the statement made by the appellant was voluntary—as I hold it was—there can be little doubt of the truth of his confession. As a result of it the axe was found in a tank, and it is unlikely that it would have been found had it not been for the confession. Further, certain clothes stained with human blood were found in the house of the appellant, which he said in his confession were worn by him at the time of the murder. The evidence of P.Ws. 7 and 8 is also corroborative of the confessional statement; for they saw the two accused persons on the night of offence not far from the scene of offence, armed with instruments similar to those with which the appellant says they committed the murder. The medical evidence shows that such weapons could have caused all the injuries found on the body of the deceased.

P. Ws. 7 and 8 are unconnected either with the appellant or with the deceased; and it is difficult to believe that they would be willing to say that they saw the accused armed with an axe and a spear respectively near the scene of offence on the night when the offence was committed unless they had actually seen them. If it were customary for witnesses to come forward at the very first opportunity and tell the police that they had seen something connected with the murder, then the value of the evidence of P. Ws. 7 and 8 would be seriously diminished by their failure to inform the police at the earliest opportunity. P.W. 7 waited a day or so before he told the Sub-Inspector what he knew and then probably spoke only because he was questioned, whilst P. W. 8 probably did not come forward with information until after the appellant had

made his confession. Unfortunately, witnesses are almost always unwilling to speak and thereby risk the enmity of the accused and his friends and put themselves to great inconvenience unless they are personally interested. There is nothing improbable in this evidence of these witnesses. They are absolutely disinterested and so there is no reason why their evidence should not be accepted.

I therefore agree with Wadsworth, J, that the appellant was properly convicted of the offence with which he was charged.

A strong plea has been made for the modification of the sentence; but I do not find any circumstances that extenuate the crime of the appellant. The murder was apparently a deliberate one, committed in cold blood while the deceased was lying in his field. The side of his head was crushed by repeated blows with a weapon such as the axe used by the appellant, which shows that these blows must have been delivered while the deceased was lying on the ground. The conviction and sentence are therefore confirmed and the appeal dismissed.

K. C. *Conviction and sentence confirmed and Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Reddi Mallayya .. *Petitioner* (Plaintiff)*

v.

Pedda Mallayya and others .. *Respondents (Defendants 2, 1, 3 to 9).*

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Pronote in favour of A *the brother of in* B *1931 when they were undivided—Fresh note of 1933 in favour of* B *in discharge of the earlier one—Partition between* A *and* B *in 1932—Note assigned in 1937 to* A, *who sued on it—If suit can be dismissed on failure of* A *to produce the earlier note—Scaling down—Principles.*

The plaintiff sued on a note executed by the second defendant in favour of the plaintiff's brother the first defendant on 14th April, 1933, which was assigned to the plaintiff on 2nd August, 1937. It was found that the second defendant was an agriculturist. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour of the plaintiff himself at a time when the family of the plaintiff and first defendant was undivided, the partition being in 1932. The lower appellate Court found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and that in the absence of

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* C. R. P. No. 253 of 1940. 7th November, 1941.

proof of the documents necessary in order to ascertain the original principal no decree could be given against the second defendant. On revision,

Held, that no doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents (Error in report of C. R. P. No. 331 of 1939 in *Suryanarayana* v. *Viswanadham*, (1940) 2 M.L.J.N.R.C. 27, pointed out). But as the suit note itself was executed in favour of the first defendant in discharge of an earlier note executed in favour of the plaintiff, the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. As the first note was executed in favour of the plaintiff as representing the joint family and the second one was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition it could not be said that the creditors were the same in the two transactions. If the note of 1931 had been assigned to plaintiff before it was discharged by the note of 1933 there would be a renewal in favour of the same creditor but no such case was pleaded. Accordingly the suit ought not to be dismissed solely for the reason that plaintiff had not produced the materials necessary to scale down the debt but must be decreed as scaled down under S. 9 of the Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the District Court of Anantapur in A.S. No. 25 of 1939, preferred against the decree of the Court of the District Munsif of Anantapur in O. S. No. 231 of 1937.

P. Chandra Reddi for Petitioner.

E. Venkataramana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who is the petitioner here, sued on a note executed by the second defendant in favour of the plaintiff's undivided brother, the first defendant, on the 14th April, 1933, which was assigned to the plaintiff on the 2nd August, 1937. The trial Court found that the second defendant was an agriculturist and scaled down the debt on the basis of the suit note under S. 9 of Act IV of 1938. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour of the plaintiff himself at a time when the family was undivided, the partition being in 1932. On these facts, the learned District Judge in appeal found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and in the absence of proof of the documents necessary in order to ascertain the original principal,

no decree could be given against the second defendant. The appeal was therefore allowed and the suit dismissed with costs.

An attempt has been made to support this judgment by reference to a short note of the case of *Suryanarayana* v. *Viswanadham* (C. R. P. No. 331 of 1939) found at page 27 of the Notes of Recent Cases in (1940) II M.L.J. The short note states:

"Where a creditor becomes entitled to a promissory note belonging to a joint Hindu family at a partition with his other coparceners and fresh promissory notes are executed in his own favour by the debtor, he cannot content himself with producing the promissory notes executed in his favour alone and is bound to produce, if available, the promissory notes anterior to the date of partition as also the account books of the joint family, to enable the debtor to establish a claim to relief under Madras Agriculturists' Relief Act."

As I was a party to the decision in question which, if correctly reported, would be very difficult to reconcile with other decisions of the same Bench, I have sent for the original judgment in the case and find that the brief report bears little or no relation to the actual judgment. What we decided in the judgment was that the lower Court ought not to have refused permission to summon from the plaintiff's custody earlier promissory notes or accounts which tend to prove that the suit can be traced back to the earlier notes in favour of the same creditor or one of whom this creditor is the legal representative. We expressly stated that nothing was said about the effect of the partition in the creditor's family but we confined ourselves to holding that the lower Court was wrong in shutting out evidence regarding documents executed before this partition.

It will be clear that the actual judgment in this case gives no support whatever to the position taken up by the learned District Judge. No doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt, the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents. But, in the present case, we have the suit note executed in favour of the first defendant in discharge of an earlier note executed in favour of the plaintiff. The fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. And if the first note was executed in favour of

Mallayya v. Mallayya

the plaintiff as representing the joint family and the second note was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition, it could not be said in view of the decision in *Ramasubbier* v. *Rama Aiyar*[1], and other similar cases that the creditors were the same in the two transactions. No doubt it might be possible for the second defendant to plead and prove that the note of 1931 was assigned by the plaintiff to the first defendant before it was discharged by the note of 1933, in which case there would clearly be a renewal in favour of the same creditor; but no such case was pleaded and no attempt seems to have been made by the second defendant to require the plaintiff to produce the earlier note and the earlier note was, so far as our information goes, irrelevant for the purpose of scaling down the debt. That being so, it seems to me that the learned District Judge was grievously in error in dismissing the suit solely for the reason that the plaintiff had not produced the materials necessary to scale down the debt. I am also of opinion that the error of the learned District Judge is one which justifies interference in revision.

In the result, therefore, I allow the revision petition with costs throughout and restore the decree of the trial Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

C. Ethiraja Mudaliar .. *Appellant** (*Defendant*)

v.

N. Murugesa Mudaliar and others .. *Respondents* (*Plaintiffs*).

Ethiraja Mudaliar v. Murugesa Mudaliar

Madras Estates Land Act (I of 1908), Ss. 3 (5), 77-A and 112—Proceedings initiated by one co-sharer without joining others—Validity.

The term 'landholder' in Ss. 77-A and 112 of the Madras Estates Land Act must have the same meaning as under S. 3 (5) and in the case of a divided family it is not open to the elder brother to represent his minor brother and act as his guardian without being appointed as such under the Guardians and Wards Act and it is not competent for one co-sharer to initiate proceedings to exercise the power of sale under Ss. 111 and 112 without joining the other co-sharer.

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1. (1941) 1 M.L.J. 39.

* S. A. Nos. 346 to 356 of 1939. 4th September, 1941.

Under S. 3 (5) the Collector can recognise one person as a landholder if there is more than one landholder, only if there is a dispute between the landholders and not where the dispute is raised only by a ryot.

Need for amendment of S. 3 (5) in the interests of the landholders and ryots pointed out.

Appeals against the decrees of the District Court of Chingleput in A. S. Nos. 36 to 46 of 1937 preferred against the decrees of the Court of the Deputy Collector of Trivellore Division in S. S. Nos. 606 to 616 of 1935.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Respondents.

The Court delivered the following

JUDGMENT.—This is a batch of appeals arising out of suits filed by the tenants of Zamin Devaranjeri village, Ponneri Taluk under S. 112 of the Madras Estates Land Act for raising the attachment of the holdings effected by the appellant. Several grounds were alleged in the plaint of which three require notice:

(1) There was no proper exchange of patta and muchilika between the plaintiff and the defendant for the fasli 1343 and there was no proper tender of patta. Therefore the attachment proceedings were not proper and valid.

(2) It is not competent for the appellant to initiate the proceedings for sale under the Estates Land Act on the ground that he was not the sole proprietor of the village and that there were other co-sharers who ought to have joined in the proceedings.

(3) The merais claimed in the demand notice were not legally enforceable.

The defendant in the written statement urged that there were valid pattas and muchilikas in force, that he was competent to take proceedings under the Estates Land Act and bring the holdings of the tenants to sale and that the merais were legally enforceable.

The Deputy Collector who tried these suits held that pattas and muchilikas were exchanged in some cases and tendered in other cases and therefore he would hold that there was exchange of pattas and muchilikas continuing in force and that though the defendant had a brother, Kesava Mudaliar, he was only a minor and that the defendant was competent to take

Ethiraja Mudaliar v. Murugesa Mudaliar.

proceedings without joining his brother. With regard to the merais he held some of them enforceable and some not.

Appeals were preferred against these decisions in the various suits. The learned District Judge of Chingleput reversed the decisions and disposed of the suits on two grounds *viz.*, (1) that the managing member of a joint undivided Hindu family was not competent to tender a patta without his undivided brother being also a party to the tender and (2) that he would not be competent to exercise the right of sale under the Estates Land Act without his brother joining in the proceedings.

When these appeals were argued before me I wanted to find out what were the various pattas which must be deemed to be in force in the several suits, on the strength of which the learned District Judge came to the conclusion which he arrived at. In the course of the hearing, the deposition of D.W. 3 was brought to my notice in which reference was made to a suit for partition in the family of the defendant and the appointments of receiver or receivers in that suit. As the suit was one on the file of this Court (C. S. No. 307 of 1928), I caused the papers to be produced, as without reference to them it would not be satisfactory to dispose of these appeals. On a reference to them I found that the suit was one for partition of the joint family properties instituted by the defendant against his father Venugopala Mudaliar and his undivided brother Kesava Mudaliar. There was a preliminary decree for partition in and by which all the properties of the joint family including the suit village were directed to be partitioned and each of the parties was held entitled to 1/3rd share therein. There was a final decree subsequently in the same suit in which the properties including the suit village were partitioned in two equal shares because at that time the father was dead. So far as the suit village is concerned, the appellant herein and Kesava Mudaliar were each given one half share in it. One Kumariah was appointed a receiver in that suit and thereafter one Panchakshara Mudaliar was appointed. These facts establish that the assumption on which the learned District Judge decided, *viz.*, that the parties were members of a joint Hindu family, was wrong. Therefore the question arises as to whether one co-sharer can tender a patta without the consent of the other. On a reference to the evidence in the suits I find

that some pattas were tendered by the receiver and muchilikas in his favour executed by the tenants, and that subsequent to the partition suit, pattas were tendered in some faslis by the appellant and refused by the tenants. On these facts the question which naturally arises is whether the patta tendered by the receiver could not be said to be continuing in force if no patta was subsequently exchanged between the parties. Mr. K. Rajah Aiyar's contention is that the pattas issued by the receiver must be deemed to be in force if no subsequent pattas were issued or if the pattas were issued such pattas are held to be invalid. But specific attention was not directed to this aspect of the matter in the lower Courts and the learned Deputy Collector simply stated that there were valid pattas issued in force without specifically adverting to the evidence in the case. If the matter had rested there, I should have set aside the finding of the learned District Judge and remanded the suits for re-hearing. There was another question in the case, namely whether the proceedings initiated by the defendant in bringing the holdings of the tenants to sale were valid, and if they were not valid whether the tenants had not the right to set aside the attachment under S. 112 of the Estates Land Act. The learned District Judge gave a decision against the appellant and decreed the suits. Therefore this question arises pointedly for consideration.

Mr. Rajah Aiyar contends that Kesava Mudaliar being a minor it would be competent on the part of the appellant alone to take proceedings and at any rate he must be deemed to have done so as the guardian of Kesava Mudaliar. It cannot be said that the appellant can be the legal guardian of Kesava Mudaliar in view of the Full Bench decision in *Chennappa* v. *Onkarappa*[1]. But however, I find in 1936 that so far as Kesava Mudaliar is concerned, his name was registered as represented by the appellant herein as his legal guardian. In that case it might be that apart from the Full Bench decision, for the purpose of the Estates Land Act it would be competent for the appellant to tender a patta or initiate proceedings for sale on behalf of his brother as his guardian. That question, however, does not fall to be decided in these suits because proceedings were taken before 1936. Mr. Rajah Aiyar relied on the Common Law rule in England whereby one co-sharer can

1. (1939) 2 M.L.J. 884: I.L.R. (1940) Mad. 358 (F.B.).

Ethiraja Mudaliar v. Murugesa Mudaliar.

distrain the tenants on behalf of the other co-sharer for arrears of rent. The said rule cannot be relied on in the face of the provisions of the Estates Land Act by which the question has to be decided. Under Ss. 77 (a) and 111 of the Act it will be competent for the landholder to proceed against the ryot for the recovery of arrears of rent by the sale of his holding. Both the sections use the expression 'landholder' but the singular would include the plural. If there is more than one landholder we must read in the section for the expression 'landholder' 'landholders'. If there is more than one landholder, particularly in this case where the landholder's interest is vested in several sharers, it would not be competent for one landholder to exercise the power of sale or initiate proceedings in regard thereto without the other landholder or landholders being made parties to such proceedings. Mr. Rajah Aiyar pointed out several inconveniences and anomalies which might result by adopting this view. I have to construe the provisions of the statute as they are. Such anomalies have to be met by an amending legislation. I must point out in this connection that in such cases as the present there apparently appears to be no provision by which one of the co-sharers can get himself recognised as a landholder within the meaning of S. 3 (5) of the Act. Taking this specific case the Full Bench of the Madras High Court has held in *Chennappa* v. *Onkarappa*[1], that none but a father or mother can be the natural guardian of his or her minor child and therefore unless the appellant gets himself appointed as guardian of his brother under the Guardians and Wards Act he cannot act for his brother. The plain language of S. 3 (5) indicates that the Collector can recognise one person as a landholder if there is more than one landholder only if there is a dispute. Mr. Jagadisa Aiyar contends that it is open to the Collector to register a person as a landholder even if there is no dispute between the landholders, but the dispute raised was only by a ryot and he relied upon a decision in *Sona Alaga Kudunban* v. *Sivarama Aiyar*[2]; in support of this contention. The case does not lay down any such proposition. The facts are entirely different. To hold in favour of the contention urged by Mr. Jagadisa Aiyar would be against the plain language of the section which says that the dispute

1. (1939) 2 M.L.J. 884: I.L.R. (1940) Mad. 358 (F.B.).
2. (1915) 29 I.C. 31.

Ethiraja Mudaliar v. Murugesa Mudaliar.

must be between the landholders. At any rate the section needs an amendment in the interests of the landholders and ryots.

In the result on the view I have taken, namely, it is not competent for the appellant to initiate the proceedings to exercise the power of sale under Ss. 111 and 112 of the Estates Land Act, I dismiss these appeals. But in the circumstances of the case I direct each party to bear his own costs.

K. S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

The Tirumalai Tirupati Devasthanams Committee represented by its Commissioner. *Appellant** (*Plaintiff—Appellant*)

v.

The Tirupati Municipal Council represented by its Commissioner. *Respondent* (*Defendant—Respondent*).

Commissioner, Tirupati Devasthanams v. Commissioner, Tirupati Municipal Council.

Madras District Municipalities Act (V of 1920), S. 82, Cl. (2)—Cost of constructing compound walls—If can be taken into consideration in fixing the annual value of the premises for taxation.

Having regard to the purpose and intendment of the Madras District Municipalities Act and of the proviso to Cl. (2) of S. 82, compound walls form part of the building and the cost of constructing the compound walls should also be taken into consideration in fixing the annual value of the premises for purposes of assessment.

Appeal against the decree of the District Court of Chittoor in A. S. No. 163 of 1937 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 146 of 1936.

V. Govindarajachari for Appellant.

N. Gopala Menon and *C. S. Govindaswami* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent, the Municipal Council of Tirupati, assessed the electric power house owned by the appellant. This building is not ordinarily let, and hence the respondent proceeded to fix the annual value under the proviso to S. 82, Cl. (2) of the District Municipalities Act. Under this proviso, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building less a deduction for depreciation. In fixing the "estimated present cost of erecting the building" the respondent took the cost of

* S. A. No. 53 of 1939. 9th September, 1941.

Commissioner, Tirupati Devasthanams v. Commissioner, Tirupati Municipal Council

constructing the compound walls as well. This is objected by the appellant on the ground that the compound walls are not included in the word 'building' in S. 82 of the Act and that 'a compound wall' is not a building by itself as defined in S. 3, Cl. (3) of the Act.

S. 82 runs thus:

"(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, (in the case of buildings only) of ten per centum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatsoever:

Provided that—

(*a*) in the case of

(*i*) any Government or railway building, or

(*ii*) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the chairman, be estimated, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost;

(*b*) machinery (and furniture) shall be excluded from valuations under this section."

It is urged that in Cl. (1) of S. 82 the word 'building' is used so as to exclude even the site on which it stands and also the adjacent premises occupied as appurtenances thereto. The argument is that unless the expression 'compound wall' comes within the words 'other adjacent premises occupied as an appurtenance thereto, its value cannot be taken into consideration and that compound walls cannot be called adjacent premises. But in S. 82, Cl. (1) the Legislature is laying down a rule of single assessment for the building, site, and the adjacent premises, unless the latter are owned by a different owner. Where for instance, the superstructure is owned by one and the land by another, the building proper alone should be valued and the owner of the building assessed. The site and the adjacent premises will be valued under other provisions and the owner thereof assessed in respect of them. In all other cases, the building, the site and the adjacent premises form a single unit of taxation. The word 'building' is defined by S. 3, Cl. (3) as including:

". . . . a house, out-house, stable, latrine, shed, hut, wall (other than a boundary wall not exceeding eight feet in height) and any other such structure . . . ."

Under this definition, 'building' includes a wall other than a boundary wall which is less than eight feet in height. So, a compound wall which is more than eight feet in height is a building by itself though there may be no building inside.

Commissioner, Tirupati Devasthanams v. Commissioner, Tirupati Municipal Council.

The present compound wall is less than eight feet in height. Therefore, it is not a building by itself under S. 3, Cl. (3). But the question for decision is whether in valuing a building under S. 82, Cl. (2) proviso, the respondent can include the money spent on the compound walls which are less than eight feet in height and not whether the compound walls constitute a building by themselves even though there is no structure inside. I do not see why the compound walls should not be considered part of the building. A parapet wall is certainly included in the word 'building'. Why the money spent on compound walls should be excluded from the valuation of 'building' it is difficult to see. Existence of compound walls certainly enhances the letting value of the building in cases of buildings which are ordinarily let.

The decision of the Calcutta High Court in *Corporation of Calcutta* v. *Binoy Krishna Bose*[1], which is relied on by the appellant deals with a case of compound walls with no building inside; and these walls were sought to be assessed. That decision does not throw any light on the present question. Another decision of the Calcutta High Court relied upon is that of In the matter of *Corporation of Calcutta* v. *Jogeswar Laha*[2]. The question was whether a detached wall built of masonry is not a 'masonry building' as defined by S. 3, Cl. (25) of Bengal Act III of 1899.

The term 'building' was not defined in the then Calcutta Act but the term 'masonry building' was defined as 'any building other than a hut'. The Judges held that the term 'building' does not include a wall, that is, that a detached wall is not a building. They took care to say this on page 488:

"We think the latter view is correct and that 'building' in the Act does not include 'wall'. The wall in question is a detached wall *and cannot be said to form part of any building,* and it must be understood that the opinion we express in this judgment is confined to a detached wall such as we understand that to be to which this case refers."

I have underlined the above wording.

It must be noticed that there was no building at all inside the wall or walls. This decision appears to be against the

1. (1910) 12 Cal. L.J. 476. 2. (1903) 8 C.W.N. 487.

Commissioner, Tirupati Devasthanams v. Commissioner, Tirupati Municipal Council.

appellant. Compound walls cannot be said not to form part of the building. A compound wall is part of the building and is not a detached wall.

If the building is one which is ordinarily let, the gross annual rent at which the building may reasonably be expected to let less a deduction of ten per cent. for repairs is the annual value. If such a building has compound walls, the letting value is certainly higher than that of a building with no compound walls. There is no reason why if in the case of buildings ordinarily let, the compound walls are taken into consideration, they ought to be left out in the case of buildings which are not ordinarily let.

Both the advocates rely on the way in which the word 'building' or 'house' is explained in different decisions.

I do not consider that any useful purpose is served by adverting to these cases. Each case depends on the particular statute in which the word occurred. Thus in *Khirode Chandra* v. *Saroda Prosad*[1], the question was what all are comprised in the term 'house' in the Partition Act. Compound walls would according to this decision be part of the 'house'. The compound walls of a house or building would certainly pass to the purchaser when the building is sold unless they are reserved.

No doubt whatever is built should not be taken to be a building by itself—a detached wall for instance. But even there, the particular statute may define a building so as to include a mere wall. Under the Madras District Municipalities Act, S. 3, Cl. (3), it is conceded that a detached wall (which is not a compound wall less than eight feet high) would be a building.

Having regard to the purpose and intendment of the Act and of the proviso to Cl. (2) of S. 82, I hold that the compound walls are part of the building and the cost of constructing the compound walls should also be taken into consideration.

The second appeal fails and is dismissed with costs.

No leave.

K. S. —— *Appeal dismissed.*

[END OF VOLUME, 1941—II]

1. (1919) 7 I.C. 436.

GENERAL INDEX.

ADVERSE POSSESSION—Actual knowledge of person excluded if necessary—Forced absence from India—Whether good ground of exemption—Commencement of adverse possession .. 255

BRITISH NATIONALITY AND ALIENS ACT (1914) (4 AND 5; GEO. V C. (17). S. 2 (1) (*a*)— Effect .. 68

CHARGE—*See* T. P. ACT, S. 100.

CIVIL PROCEDURE CODE (V OF 1908); S. 11—Scope—Mortgagor adjudged insolvent—Suit by mortgagee to enforce his mortgage making Special Receiver a party—Application by Receiver in insolvency for setting aside mortgage as one without consideration—Both suit and application heard together—Suit decreed and application dismissed—Appeal only against order dismissing Receiver's application—Decree in the suit if operates as *res judicata* .. 932

———**S. 13**—Foreign judgment—Cochin subject—Change of domicil—Effect on jurisdiction of Cochin Court over the subject to pass decree executable in British Indian Courts—British Nationality and Status of Aliens Act (1914), (4 and 5 Geo. V. c. 17), S. 2 (1) (*a*)—Effect. 68

———**S. 20, Cl. (c)**—Suit for damages for breach of contract—Place where telegram accepting offer was received—Part of the cause of action if arises at such place .. 481

———**S. 35 and O. 7, r. 10**—Returning plaint for presentation to proper Court—No jurisdiction to make payment of costs to defendants a condition precedent to presentation in proper Court .. 450

———**S. 47**—Scope—Legal representative added in execution proceedings—If bound to set up his independent title—Right of separate suit to establish title—Not barred by S. 47 (F.B.). 622

———**S. 48**—Assignment of decree—Attachment of another decree by assignor—Assignee proceeding to execute attached decree—If assigned decree becomes barred under S. 48 .. 493

———**S. 55 (4)**—Security bond under—Surety—If entitled to be released from his bond at his pleasure .. 650

———**S. 60**—Applicability to allocation order under S. 60 of Presidency Towns Insolvency Act .. 845

CIVIL PROCEDURE CODE (V OF 1908)—*Contd.*

———**S. 60**—Principles of—Effect on power of insolvency Court under S. 60, Presidency Towns Insolvency Act .. 591

———**S. 60 (b)**—Tools of an 'artisan' meaning of—Musical instruments whether such 'tools' .. 671

———**S. 60 (m)**—Applicability—Sale of Hindu coparcener's interest in joint family property—If illegal want of specification of interest of coparcener—If vitiates sale .. 550

———**S. 64**—Execution—Attachment of property subject to a contract to sell—Rights .. 722

———**S. 66**—Sale by revenue Court in execution of rent decree—Suit for declaration that purchase was benami—If barred by S. 66, C. P. C. .. 717

———**S. 73**—Execution of decree—Application by transferee from rival decree-holder claiming rateable distribution—Recognition of transfer only after receipt of assets by executing Court—Sufficiency to entitle the transferee decree-holder to receive his rateable share .. 219

———**S. 73**—Rateable distribution—Creditor succeeding as heir and legal representative of debtor under Hindu law—Legal effect—Whether entitled to share in rateable distribution of assets realised in execution proceedings against him as such representative .. 1024

———**S. 80**—Acting *adhikari* attaching crops—Suit for recovery of excess amount collected by him as *adhikari* but filed after he ceased to be such public officer—Notice unler S. 80—Whether necessary .. 242

———**S. 100**—If applicable to orders of District Judge on appeal against Collector's decision for payment of rent in kind under S. 75, Madras Estates Land Act .. 529

———**S. 105**—Order of remand by first appellate Court—Party not aggrieved by order—Absence of appeal by—If bar to raising objection to jurisdiction of trial Court (F.B.). .. 47

———**S. 144**—Execution proceeding not pending—Party applying for stay of decree—Stay granted on condition of furnishing of security—Defendant choosing

CIVIL PROCEDURE CODE (V OF 1908)—*Contd.*

to deposit amount in Court—Interest cannot be granted on amount deposited on reversal of decree .. 768

———S. 145—Surety under—How far entitled to apply under S. 19 of Madras Act IV of 1938 for settling down his right .. 1010

———S. 146 and O. 21, r. 16—Transferee of decree which has not yet come into existence—Right to execute it after it is passed .. 631

———S. 152—Mistake or error in document—Mortgage deed—Mistake copied in the plaint and decree—Whether could be corrected .. 452

———O. 2, R. 3—Two contracts between same parties—Breach—Single suit—Effect of O. 2, r. 3 on limitation as to claim based on earliest breach of contract which could have been filed in Court of lower grade which re-opened earlier. .. 244

———O. 6, r. 17—Leave to amend written statement in appeal—Amendment introducing new and inconsistent case of *jus tertii* in suit for possession—Permissibility .. 442

———O. 7, r. 10—Returning plaint for presentation to proper Court—No jurisdiction to make payment of costs to defendants condition precedent to presentation in proper Court .. 450

———O. 21, r. 16—Circumvention by benami purchase—Effect on right of *Bona fide* purchaser for value from benamidar .. 601

———O. 21, r. 16—Scope .. 167

———O. 21, rr. 58, 90—Assignment of immovables by judgment-debtor—Attachment of property in execution—Sale—Application by assignee to set aside sale—Application on grounds both of irregularities in and lack of jurisdiction for sale—Application to be under r. 58 and not r. 90 (P.C.). .. 227

———O. 21, r. 63—Claim petition objecting to attachment 'not pressed and dismissed'—Subsequent suit for declaration—Limitation (F.B.) .. 936

———O. 21, r. 72—Court auction-sale of property—Decree-holder purchasing through a benamidar—Subsequent conveyance to decree-holder—Suit by latter for recovery of possession—Suit competent—Purchase voidable only and not void .. 943

———O. 21, r. 72—Purchase by decree-holder with leave to bid and set off—If operates as immediate satisfaction of decree—Liability of decree to be scaled down .. 682

———O. 21, r. 90—Application to set aside sale—Security demanded after admission of petition—Dismissal of petition on ground of security not having been furnished—Whether orders passed with jurisdiction .. 109

———O. 21, r. 90—Application to set aside sale on the ground only of material irregularities etc.—Dismissal—Appeal—New contention that sale was a nullity, based on allegations of fact not made in lower Court—Permissibility .. 550

———O. 21, r. 90—Sale of undivided share in the properties of judgment-debtor—Application to set aside by co-sharers—Application not sustainable .. 63

———O. 21, r. 93—Application for refund of poundage and interest on the purchase-money—Limitation .. 121

———O. 33—Suit for damages for slander—Application for leave to sue *in forma pauperis*—If can be summarily dismissed on the ground that the damages cannot exceed a certain sum—Referring plaintiff to Court of lower jurisdiction in such cases—Propriety .. 505

———O. 34, r. 6—Right to personal decree—Whether lost by order of absolute discharge in mortgagor's insolvency. 690

———O. 41, r. 10—Appeal—Order directing security to be furnished within a specified time—Security tendered in time—Rejection of appeal before testing—Propriety .. 291

———O. 44, r. 1—Applicability to memorandum of cross-objections in *forma pauperis* .. 187

———O. 45, rr. 7 and 8—Appeal to Federal Court—Admission—Procedure. .. 514

———O. 47, r. 1—Decision overlooking leading authority—How far ground for review .. 390

———O. 47, r. 1—First appeal heard by two Judges—Review application—Only one of the Judges available—If can be heard by him alone or only by a Bench of two Judges .. 644

———Sch. II—Rr. 8 and 15—Order under r. 8 cancelling reference—Arbitrator giving award in spite of it—Court setting aside order under r. 8 and passing decree on award—Validity of decree—Remedy .. 395

COMPANY—Bonus shares distributed by limited company in lieu of profits—If "dividend" (F.B.). .. 900

———Insurance company—Policy of insurance—Lapse of, on non-payment of

COMPANY—*Contd.*

premia for two years—Assignee of policy after lapse—Application by assignee to revive policy—Company agreeing to revive on payment of arrears and production of medical certificate by assignee—Arrears paid—Liquidation of company before production of certificate—If assignee can claim return of amount as a preferential creditor—Company if trustee for the amount .. 910

———Share-holder creditor—Right to arrange for set-off against future calls —Such creditor a director and managing agent—Not entitled to vote for resolution authorising set off .. 595

———Transfer of shares—When complete .. 571

———Winding up—Uncalled share money if assets—Preference share-holders—Right to be repaid out of unpaid ordinary share capital .. 94

COMPANIES ACT (VII OF 1913), S. 32 (5)—Default without wilful neglect—If punishable .. 487

———**Ss. 171 and 230-A (5)**—Claim application of creditor—Time granted to prove claim—Claimant's request for time to file separate suit— Time given —No action taken—Dismissal of claim—Later application for investigation of claim in the liquidation proceedings—Whether permissible .. 417

CONTRACT—Term that party is not entitled to be paid for work done if it was not check-measured or did not give satisfaction—Effect—*Quantum meruit* if applicable where party is not entitled to payment by reason of the term in the contract .. 469

CONTRACT ACT (IX OF 1872), S. 23—Consideration for promissory note, non-prosecution for cheating—Enforceability of the promissory note. .. 827

———**S. 23**—Mortgage by wife—Part of the consideration withdrawal of criminal prosecution for non-compoundable offence against her husband—Opposed to public policy and illegal—Debt really due from husband—Relevancy—Mortgagor's ignorance of criminal proceedings—If can validate the mortgage (P.C.) .. 726

———**S. 50**—Chit fund—Subscriber depositing money towards future instalments of subscription in a special savings bank account as sanctioned by the company conducting the chit—Liquidation of bank—Company to take the risk .. 908

———**S. 65**—Panchayat Board taking a loan without sanction of Local Government—Right of creditor to recover money lent under S. 65, Contract Act .. 216

COURT-FEES AND SUIT VALUATION—Co-mortgagee suing to recover his individual share in mortgage—Valuation for Court-fees and jurisdiction —If to be of full amount of mortgage or only plaintiff's share in it—Applicability of principle to charge .. 986

COURT-FEES—Memorandum of appeal against decree refusing to give a first charge on assets valued at Rs. 9,500 in respect of a debt of Rs. 19,000 decreed —Relief for first charge—Whether capable of valuation and liable to court-fee on its value .. 774

COURT-FEES ACT (VII OF 1870), Art. 1, Sch. II—Dismissal of pauper appeal on default by dispaupered appellant in paying the Court-fee and furnishing security for costs—Order, if 'decree'—Review application—Proper Court-fee payable (F.B.) .. 500

———**S. 7 (iv) (f)—Art. 17-B, Sch. II**—Administration suit—Court-fee to be paid on market value of property—Jurisdiction of Court should be gone into—Revision proper to correct error at early stage .. 962

CRIMINAL PROCEDURE CODE (V OF 1898), S. 88, Cl. 6 (d) and S. 488—Money realised by criminal Court by sale of properties attached in execution of maintenance order—Rejection of claim by third party—Subsequent suit—Government if necessary party—Scope of suits under S. 88, Cl. 6 (*d*) .. 510

———**S. 112**— Scope— Supplementary order—Validity .. 1036

———**S. 123**—Substantive sentence of imprisonment—If can be made to take effect on expiry of imprisonment imposed under S. 123, Criminal Procedure Code. .. 694

———**Ss. 145, 435 and 561-A**—Scope —Revision application against order under S. 145—Death of petitioner—Power to bring on record legal representative—When to be exercised .. 1047

———**S. 147**—Scope—Dispute regarding easement—Magistrate unable to decide rights of parties—Order of attachment under S. 146—Propriety .. 375

———**S. 195**—Defamation by person in the witness-box—Complaint—If to be filed by the Court in which the statement was made .. 618

———**S. 197**—Complaint against officer of Government— Necessity for previous sanction of Governor for taking cognizance of alleged offence .. 486

———**S. 247**—Illegal disposal of trial by a Bench of Magistrates—Rectification by re-trial not competent for the Bench. 1049

———**S. 250**—Order for compensation against complainant—Failure to call upon

CRIMINAL PROCEDURE CODE (V OF 1898)—*Contd.*

him to show cause why he should not pay compensation and to record reasons for directing compensation to be paid by complainant—Effect .. 1038

———S. 307—Reference by Sessions Judge—Charge against accused of dacoity—Evidence recorded—Charge to the jury—Sessions Judge not clearly asking the jury to return a verdict of not guilty—Verdict of "guilty" by jury—Circumstances showing no offence in the accused—Duty of Court and the jury in such circumstances .. 207

———Ss. 344 and 526 (8)—Appellant seeking Court's permission for moving High Court for transfer—Court's duty in the circumstances—Payment of day costs to prosecution not a proper order .. 854

———S. 350—Accused recalling witnesses not willing to examine all of them—Discretion of magistrate to examine all of them .. 401

———S. 407 (2) and S. 486 (2)—Appeal under S. 486 (1) against sentence under S. 480—District Magistrate if can direct the appeal to be heard by Subordinate Magistrate .. 852

———S. 488—Marumakkattayam Act, 1932—Infant son of married woman—Whether entitled to maintenance .. 254

———S. 540—Scope—Court's discretion to examine witnesses .. 787

CRIMINAL RULES OF PRACTICE R. 82.—Scope .. 156

CRIMINAL TRIAL—Commutation of sentence of death—Circumstances shown for lesser punishment—No need for recommendation to Government—Sessions Judge himself entitled to give lesser punishment .. 399

———Jurisdiction—Aggravating facts making offence one triable by a magistrate with higher powers—Effect on Magistrate's jurisdiction to try only the lesser offence .. 420

———Misjoinder of parties—Conviction if to be set aside—Presumption as to prejudice to accused .. 534

DEFENCE OF INDIA ACT (XXXV OF 1939)—Rules under R. 130-A, Cl. (*b*)—*Intra vires* the Central Government .. 1014

EVIDENCE ACT (I OF 1872), Ss. 24 and 27.—Criminal Procedure Code (V of 1898), S. 162—Accused's statement to police officer—Prosecution witnesses corroborating details of preparation for the offence—Statement of accused whether voluntary—Burden of proof. 1070

———S. 27—Practice—Hostile eye witness not examined by prosecution—Duty of Court .. 209

EVIDENCE ACT (I OF 1872)—*Contd.*

———S. 112—Claim by a married woman for maintenance of her children against stranger under S. 488, Criminal Procedure Code, alleging him to be either putative father—No proof of non-access with husband—Admission as to paternity by alleged putative father—Relevancy. 693

FEDERAL COURT—Leave to appeal to Privy Council—When granted. (F.C.) .. 33

FRAUD—Promissory note—Promisor in jail—Suit on forged duplicate note—Subsequent suit on real note—Fraud discovered later by promisor—Suit for cancellation of decree on forged note—When Court can set aside the decree .. 640

GOVERNMENT OF INDIA ACT (1935), S. 100 and Sch. VII.—List I. Entry 45 and List II. Entry 48—Madras General Sales Tax Act—If *ultra vires* .. 607

———S. 107—Provincial law with respect to matter in concurrent list—Repugnancy to existing Indian law—Non-reservation—Effect (F.B.) .. 41

———S. 306—Scope—Madras Hindu Religious Endowments Act—Notification of temple under—If act of Governor—jurisdiction of Court to quash arbitrary and illegal orders of Board .. 175

———List III, entry 7 and List II entry 21—"Succession and devolution" whether cover survivorship (F.C.). 12

GUARDIANS AND WARDS ACT (VIII OF 1890); Ss. 19 and 25—Scope—Mahomedan minor girl—Custody—Father and maternal grandmother—Rights .. 548

HINDU LAW—Adoption—Authority to adopt given by nearest *sapinda* expressed in general terms—Adoption in pursuance of—Validity (F.B.) .. 798

———Adoption by widow with valid authority from nearest *sapinda*—Improper motive in making adoption—If invalidates the adoption (F.B.) .. 803

———Adoption—Successive adoptions—Alienation by widow between death of first adopted son and before second adoption—Adopted son's right of suit to set aside—Whether postponed till death of the widow .. 134

———Conversion of Hindu parents and their minor son to Christianity—Subsequent reversion to Hinduism—If brings about reunion—Father incurring debt and executing mortgage after reversion to Hinduism but during minority of son—Liability of son .. 877

———Daughter in possession of property before death of her mother—Alienation to meet marriage expenses of grand-

HINDU LAW—*Contd.*

daughter—Purpose if binding—Adverse title if can be perfected after inheritance .. 406

———Debts — Pre-partition debts — Acknowledgment by father after partition—If can keep the debts alive against divided sons (F.B.) .. 311

———Debts—Trading family—Debt contracted for firm—Promissory note by manager—Endorsement of note by payee —"Debt" not transferred—Decree against manager personally — Executability against other members of the family, not parties to the suit .. 816

———Father's debts—Minor's share brought to sale by Official Receiver in insolvency—Pendency of partition suit by the minor—Whether sale of the minor's share proper—Undue delay in selling—How far in the circumstances excusable .. 951

———Impartible estates—Income in the hands of the holder—Mode of assessment to Income-tax (P.C.) .. 972

———Impartible estates — Origin and nature of right of maintenance of junior member (P.C.) .. 972

———Joint family—Coparcener—Decree against—Execution—Sale of share in part only of joint family property—Validity .. 550

———Joint family—Manager executing promissory note—Decree obtained on the note—Executable against property of other junior members also—Conditions to be established .. 1050

———Joint family—Manager—Mortgage by—Power of sale under S. 69, T. P. Act—If can be conferred .. 923

———Joint family—Promissory note executed by manager—Payment of interest after partition by one member—If starts fresh period of limitation against other divided members (F.B.) .. 883

———Joint family—Sham deed between two brothers—Parties named in deed as holders of specified shares in properties —Insufficient to constitute a severance in status (P.C.) .. 85

———Marriage—Money paid by bridegroom as condition of marriage, to the bride's father for making jewels for the bride is not bride price and marriage is not *asura* .. 770

———Partition deed unregistered and inadmissible in evidence—Effect on status and rights of parties .. 707

———Reunited Hindu family—If "undivided family" for purposes of Act IV of 1938. .. 304

———Succession—Brahmin widow dying leaving stridhana property—Succession —Illegitimate daughter, if excludes illegitimate son—Written statement whether could be amended in appellate Court so as to permit inconsistent case .. 442

———Religious endowment—Dedication —Bathing ghat on the banks of the Ganges—Absence of formal express dedication—Inference from history of institution and conduct of founder—Partial dedication—Right of founder's heirs to possession of the property. (P.C.) .. 1

HINDU RELIGIOUS ENDOWMENTS ACT (XX OF 1863)—Devasthanam Committee created under—Appointment of trustee by—If can be for a term of years or must be for life—Trustee whether servant of the Committee (F.B.) .. 35

HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937 (CENTRAL ACT XVIII OF 1937) as amended by Central Act XI of 1938, if affects succession to agricultural land and devolution by survivorship of non-agricultural land—Property, meaning of—Succession and devolution whether cover survivorship—Government of India Act, 1935, entry 7 of List III and entry 21 of List II—Crucial date to determine validity of enactment—Construction of terms of wide import in Act of Legislature with limited powers (F.C.) .. 12

———Widow's interest in husband's joint family property—Right of husband's creditors to proceed against .. 862

HUSBAND AND WIFE—Decree for maintenance in favour of wife—Subsequent resumption of cohabitation—Effect on enforceability of decree .. 263

INCOME-TAX ACT (XI OF 1922) —Subsequent losses in foreign business in same accounting year wiping out earlier profits—If changes the character of remittances out of available profits already made—Liability to assessment (F.B.) .. 890

———S. 2 (6-A)—Bonus shares distributed by limited company in lieu of profits to shareholders—If "dividend" (F.B.) .. 900

———S. 4 (2)—Scope—Money remitted from F. M. S. to a Rangoon firm in 1931 without assessee's consent and adjusted in 1932 towards dues by assessee to Rangoon firm—Objection raised by assessee and ultimate adjustment in 1935 as profits of assessee remitted to Rangoon and credited towards his dues—Assessability of the amount in respect of the year 1935-1936 (F.B.) .. 172

———S. 4, Cl. (3) (1)—Scope—Income endowed by Muslim for benefit of his own descendants—If exempt from

INCOME-TAX ACT (XI OF 1922)—*Contd.*
assessment as trust for public purpose (F.B.) .. 148

———Ss. 9, 8 and 12—Impartible estate governed by Mitakshara Law—Income in the hands of holder—Mode of assessment (P.C.) .. 972

———S. 16 (3) (a) (ii)—Applicability—Minor's property contributing to assets of the firm—If makes any difference (F.B.) .. 891

———S. 26 (2) (as amended in 1939)—Dissolved firm—If 'cannot be found' when all the members are alive and can be found (F.B.) .. 152

———S. 52—Agent if can present a return—Liability of such agent for making a false return .. 475

INSOLVENCY — Adjudication of Hindu father—Minor son's shares brought to sale in insolvency—Pendency of partition suit by minor—Effect .. 951

———Official Assignee—Incurring of costs—Whether as between himself and estate the Official Assignee to pay costs personally—Ordinary Court's jurisdiction limited in deciding the matter .. 110

———Practice—Creditor's petition for adjudication—Allegation of notice of suspension of payment made in petition and facts proving it set out in verifying affidavit—If sufficient compliance with law. 598

INSURANCE—Policy of insurance by Mahomedan—For benefit of children—Married Women's Property Act (III of 1874), S. 6—If applicable .. 740

LAND ACQUISITION ACT (I OF 1894)—Assessing value of property—Method of calculation of amount to be awarded as compensation .. 75

LANDLORD AND TENANT—Suit for ejectment and recovery of rent in Civil Court—Plea that Civil Court has no jurisdiction as concerned land was inam—Burden of proof .. 432

LEASE—Mortgagee by lessee of his interest—Mortgagee taking possession—Failure of lessee to make payments under the lease—Sale—Lessor cannot recover from Mortgagee as there is no privity of contract (P.C.) .. 53

———Stipulation that the lessee was to be paid the value of the building put up by him according to the market rate when lessor resumed possession—Computation of value—Mesne profits—Right to .. 711

LEGAL PRACTITIONER—Advocate an accused—If can appear for co-accused in the same case—Madras Criminal Rules of Practice, r. 82—Scope.. 156

LEGAL PRACTITIONER—*Contd.*

———Filing certificate of receipt of fees which he has not in fact received—Whether misconduct (F.B.) .. 663

LIBEL—*See* TORT—LIBEL.

LIMITATION ACT (IX OF 1908), Ss. 3 and 4—Two contracts between same parties—Breach—Cause of action separately maintainable in Munsif's Court which re-opened earlier—Single suit filed on the different causes of action in the Subordinate Judge's Court on re-opening date under Civil Procedure Code (V of 1908), O. 2, r. 3—Effect on limitation as to claim based on earliest breach of contract which could have been filed in the Munsif's Court .. 244

———S. 5—Application for excusing delay—What is "sufficient cause"—Analogy of S. 14 .. 873

———S. 6—Applicability .. 92

———S. 10—Nattukottai Chetti community—Stridhanam for bride—Deposit with a business firm—Deposit—Nature of period of limitation for recovery. .. 558

———Ss. 19 and 20—Open payment endorsed on promissory note insufficient as 'payment of interest as such' under S. 20—Sufficiency as acknowledgment under S. 19 of the subsistence of the debt. 848

———S. 19—Usufructuary mortgage—Mortgagors covenanting "if we commit default you shall bring property to sale, take principal and interest and pay earlier mortgagee if any debts incurred for benefit of the family have to be paid to him in respect of the property and pay the balance to us"—How far acknowledgment of earlier mortgage debts to save limitation .. 460

———S. 20—Part payment by mortgagor who has parted with the mortgaged property—If saves right of suit against the purchaser of the equity of redemption .. 913

———Ss. 20 and 21—Promissory note executed by managing member of a Hindu family when the family was joint—Payment of interest after partition by a member of the family—If starts a fresh period of limitation against the other divided members of the family. (F.B.) .. 883

———S. 20—Usufructuary mortgagee continuing in possession after final decree on mortgage—Receipt of profits—Sufficiency to start a fresh period of limitation for an application for execution of the decree .. 248

———Arts. 62 and 120—Applicability .. 222

———Art. 106—Applicability—Partnership for running a chit fund with the

LIMITATION ACT (IX OF 1908) —*Contd.*

partnership as stake-holder—Suit for dissolution and accounts—Limitation. 490

———**Art. 132**—Vendee executing a promissory note for balance of unpaid purchase money—Payment towards the note and endorsements of payments—Suit for enforcement of vendor's lien for unpaid balance twelve years after sale—Property in the meantime purchased by third person in execution of mortgage decree against vendee—Whether suit barred by limitation—Whether acknowledgments on the note could keep it alive .. 939

———**Art. 182**—Previous execution application—Order in 1931 directing fresh application to be filed against certain judgment-debtors—Final order on application on 30th March, 1933—Subsequent application for execution in March, 1935—If within time .. 493

———**Art. 182 (2)**—Appeal from order on execution petition—Death of appellant—Abatement for want of legal representative—Order of appellate Court dismissing the appeal on the ground of abatement of appeal—Starting point for limitation for fresh E. P. .. 66

———**Art. 185 (2)**—Claim of third party to attached property allowed and execution petition dismissed—Unsuccessful suit under O. 21, r. 63 by decree-holder and appeal thereon—If continuation of the execution or 'step in aid' of execution to save subsequent application for execution from bar of limitation. 754

———**Art. 182, Cl. 5**—"Final order"—Meaning—Unregistered execution petition returned with endorsement "direction not attended to"—If "final order"—Such petition re-presented with fresh execution petition—If to be deemed to be continuation or revival of earlier execution petition .. 1018

LOCAL AUTHORITIES LOANS ACT (IX OF 1914), S. 4—Panchayat Board taking a loan without sanction of Local Government as required by the rules—Effect on contract—Right of creditor to recover the amount lent under S. 65, Contract Act .. 216

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—Non-agriculturist surety—If entitled to claim discharge *pro tanto* with agriculturist principal debtor .. 751

———**Ss. 3 and 8**—Endorse of pronote—If "creditor"—Pronote partly for cash consideration and partly for interest due under a mortgage—Scaling down—Negotiable Instruments Act (XXVI of 1881), S. 120—If bar .. 808

———**S. 3 (v)**—"Creditor"—If includes persons beneficially entitled to the

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—*Contd.*

amount due—S. 8 explanation—Question of *benami* for creditor not open to debtor—Mortgage by son in renewal of pre-partition debt on promissory notes by father—Debtors if same .. 703

———**S. 3 (i)**—Reunited Hindu family—If "undivided Hindu family" for purposes of Act IV of 1938 .. 304

———**S. 3 (2), Proviso C and S. 20**—Usufructuary mortgagee of house bound to pay property tax under the contract—Tax realised from the owner of the property—Eligibility of mortgagee to apply for stay of proceedings in execution of decree against him .. 497

———**S. 3 (ii), Proviso D**—Debtors entitled to only a share in a *Shrotriam* the *jodi* payable on that share being less than Rs. 100—Whether excluded from the definition of "agriculturist" .. 164

———**S. 3 (ii), Proviso D**—Payment by *jenmi* of land revenue exceeding Rs. 500 part of which is in respect of land held under *Kanom* or as ryotwari pattadar—Effect .. 584

———**S. 3 (iii), Proviso and S. 8, Explanation**—Sole legatee under will executing in 1936 a promissory note in discharge of earlier pronotes executed by the testator who died in 1935—Scaling down .. 261

———**S. 4 (f)**—Applicability—Liability of surety for person in fiduciary relationship—If one arising out of breach of trust .. 1008

———**Ss. 7, 20 and 21**—Application by insolvent to Insolvency Court for declaration that he was insolvent and that his debts should be scaled down—Official Receiver not impleaded—Refusal of stay by the Official Receiver and sale by public auction—Validity of sale—Provincial Insolvency Act (V of 1920), Ss. 68 and 75 .. 698

———**Ss. 7, 8 and 9**—"Decree"—Preliminary decree on mortgage passed after Act came into force—If liable to be scaled down, on application preferred subsequently .. 359

———**Ss. 7, 8 and 4 (d)**—Scope. 653

———**Ss. 8, 9 and 19**—Decree debt—Renewal by promissory note—Another person binding himself jointly and severally with the judgment-debtor—Scaling down under the Act—Whether the other person could have his liability reduced because of his position analogous to that of a surety .. 340

———**Ss. 8, 9 and 10 (2) (ii)**—Endorsement of promissory note to vendor of immovable property in part payment of price—Suit on note—Endorser if precluded from eligibility to benefits of the Act by reason of S. 10 (2) (ii) .. 453

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—*Contd.*

———S. 8—Mortgages by *A* to *B*—Purchase of properties by *B* from *C* and assignment of mortgages to *C* towards sale price—*C* assigning his rights to *D*—Suit by *D* against the heirs of *A* and alternatively against the heirs of *B*—Decree against *B's* heirs only on the basis of covenants in the assignment deed—Application by *B's* heirs for scaling down—Nature of liability .. 360

———Ss. 8 and 9—Pronote in favour of a brother of *B* in 1931 when they were undivided—Fresh note of 1933 in favour of *B* in discharge of the earlier one—Partition between *A* and *B* in 1932—Note assigned in 1937 to *A* who sued on it—If can be dismissed on failure of *A* to produce the earlier note—Scaling down—Principles .. 1085

———Ss. 8 and 9—Scaling down—Basis of whether original principal even if debt is after October, 1932—Interpretation of S. 9 .. 795

———S. 8—Tripartite arrangement known as "havala"—If renewal of earlier debts—Scaling down .. 566

———S. 8, Explanation—S. (3) (ii)—Renewals by two out of three original debtors—Effect—Crucial date for determining whether debtor is 'agriculturist' .. 257

———Ss. 9 and 13—Applicability—Fresh debts or debts in discharge of earlier ones incurred after the commencement of the Act—Whether S. 9 or S. 13 applicable .. 307

———S. 10 (2) (iii) and Ss. 8 and 9—Debt due to public company carrying interest at less than 9 per cent. in renewal of earlier ones carrying interest at 12 per cent—If explanation to S. 8 can apply and make it a debt which can be scaled down .. 509

———S. 10 (2) (iii)—Mortgage in favour of public company—Interest at less than 8 per cent. but default interest at 12½ per cent. per annum—Decree on mortgage adopting 12½ per cent. interest—Effect on exemption under S. 10 (2) (iii) .. 388

———S. 10 (2)—Usufructuary mortgage in renewal of earlier simple mortgage—If liable to be scaled down—Clause in usufructuary mortgage that simple mortgage should be kept alive—Effect. .. 376

———S. 15—*Jodi,* whether rent—Person paying the amount whether tenant—Jurisdiction of Court to entertain the application under the Act .. 159

———S. 15—Scope—Mortgage by jenmi with possession and a lease back of the property to jenmi—Rent payable by jenmi, is not 'interest'—Mortgagee whether 'intermediary'—Right of mortgagor lessee to relief in respect of arrears of rent .. 351

———Ss. 15 (4) and 19—Relative scope .. 655

———S. 17—Extended period of limitation for recovery of rent—Availability against non-agriculturist tenants also. 604

———S. 19—Appellate decree after Act came into force confirming original decree—Subsequent application to original Court under S. 19—Competence. 1064

———S. 19—Decree of Bombay Province transferred to Court in Madras Presidency for execution—Interest payable under—Not liable to be scaled down—C. P. Code, S. 47 .. 295

———S. 19—Promissory note, dated 4th January, 1931 and letter of guarantee in respect of the note by others, dated 7th August, 1933—Compromise decree—Scaling down—Principles .. 658

———S. 19—Sale in execution of decree held prior to 1st October, 1937—Purchase by decree-holder with leave to bid and set off—If operates as immediate satisfaction of the decree by reason of O. 21, r. 72, C. P. Code—Liability of decree to be scaled down .. 682

———S. 19—Scaling down debt which is the subject-matter of appeal—Application for, to be filed before judgment—Proper procedure for enquiry into application (F.B.) .. 855

———S. 19—Surety under S. 145, Civil Procedure Code—If entitled to apply under S. 19 for scaling down his liability—Extent of right .. 1010

———S. 19, Proviso—Applicability—Preliminary mortgage decree affirmed by Privy Council—Application for scaling down—Privy Council if 'Court' and its decision if "decree" within S. 19, Proviso—Costs awarded by Privy Council—Adjustment under S. 19 and entering up of full satisfaction and dismissal of application for final mortgage decree—Revisability—Competency of Provincial Legislature to make laws affecting His Majesty's prerogative rights .. 125

———S. 23—Applicability .. 557

———S. 23—Applicability—Mortgagor assigning his rights subject to another usufructuary mortgage after the filing of a suit on the simple mortgage—Final decree and sale of some items of property in execution—Right of mortgagor and usufructuary mortgagee to have sales set aside under S. 23 ... 298

———S. 23—Foreign Decree—Sale in execution of properties in British India

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938)—*Contd.*

—If can be set aside under S. 23 of Act IV of 1938 .. 580

———S. 23—Not applicable to sales held after the Act came into force. 309

———S. 23—Purchase of land by decree-holder in execution sale set aside—Net profits on land before the date of setting aside—Whether purchaser accountable to judgment-debtor for the profits .. 1060

MADRAS BOARD OF REVENUE —Standing Orders—O. 15, Sub-r. (18) —Communal land—Not to be granted on darkhast—Revisional jurisdiction of Collector—Absence of jurisdiction of Civil Courts .. 564

MADRAS CITY MUNICIPAL ACT (IV OF 1919), S. 101 (b)—Building whose rents are utilised for upkeep of other buildings, not a "choultry" exempted from tax .. 544

MADRAS CITY POLICE ACT (III OF 1888), S. 47—Money found in the pockets of persons found to be guilty of betting on horse races in a gaming house—When liable to forfeiture. 397

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922)—Lease—Clause permitting sub-lease for certain purposes only—Sub-tenants erecting superstructure on land which was not one of the mentioned purposes—Suit for ejectment of sub-tenants—Whether sustainable .. 116

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), Ss. 48, 65 AND r. 22 (17)—Sale by co-operative society—Claim to the property by stranger—Dismissal of—Suit to set aside under r. 22 (17) without leave of Registrar—If maintainable .. 72

———S. 51—Proceedings under—"*Lis-pendens*"—If applicable .. 588

MADRAS DEBT CONCILIATION ACT (XI OF 1936), Ss. 7, 8 and 17—Board proceeding under S. 8—Conciliation not possible within twelve months —Debtor moving Board to dismiss application under S. 7 to enable him to file fresh application—Proper procedure—Lacuna in the Act pointed out .. 581

———Ss. 9 and 25—Dismissal of application for conciliation with permission to file fresh petition—Fresh petition in pursuance—Stay of execution of decree —If can again be granted .. 123

———S. 10 (1)—Creditor filing statement—Board calling for accounts—Order discharging the debt for failure to produce accounts—Propriety .. 170

———Ss. 10 (2), 14 and 18—Board passing orders without investigation of

MADRAS DEBT CONCILIATION ACT (XI OF 1936)—*Contd.*

competency of application and charges of fraud, etc., against debtor—Validity—Failure to frame schedule of creditors —Effect—Powers under S. 10 (2)—Abuse of—Pointed out .. 366

———S. 10 (2)—Creditor requesting Board to summon a mortgage-deed in the possession of his brother as evidence of his debt—Refusal by Board to summon document and order declaring the debt discharged for failure to furnish proper statement—Propriety .. 155

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 81 and 82—Vacant lands and buildings in possession of railway company—Assessment to property tax—Omission by Government to frame rules for computation —Effect on right of Municipality to levy the tax—Annual value—Computation based on capital value—Legality—Committee formed to fix capital value—Validity .. 189

———S. 82, Cl. (2)—Cost of constructing compound wall—If can be taken into consideration in fixing the annual value of the premises for taxation .. 1093

———S. 83—Premises rented out by owner and used for accommodating a school—If owner exempted from property tax .. 338

———S. 267-A—Owner of private market in a municipality—Not entitled to prevent municipality from opening a new market .. 347

———S. 306, Cl. (28)—Power of Municipal Council to make bye-laws for prohibition and regulation of advertisements in public streets and parks—If includes power to levy licence fee for advertisements .. 145

MADRAS ESTATES LAND ACT (I OF 1908)—Sale by revenue Court in execution of rent decree—Suit for declaration that purchase was benami—If barred by S. 66 of the Civil Procedure Code .. 717

———Ss. 3 (5), 77-A and 112—Proceedings initiated by one co-sharer without joining others—Validity .. 1088

———Ss. 6, Cl. (6) and 112—Ijaradar —Sale by, for arrears of rent, under S. 112—Sale of some lands and mortgage of other lands by ryot—Transferee recognised as ryot by accepting rent—Procedure under S. 146 not followed—If recognition enough—Transferee if a defaulter—Notice to transferee of sale —No notice of sale to transferor—Sale, if valid—No exchange of patta with transferee—If sale valid—Objection if can be taken in a civil Court—Auction sale by ijaradar and purchase by ijaradar

MADRAS ESTATES LAND ACT (I OF 1908)—*Contd.*

during period of ijara—Effect of—If purchase valid (F.B.) .. 79

———**S. 75**—Collector's decision for payment of rent in kind—Whether decree or order—Appeal only to District Judge —Absence of specific provision for further appeal to High Court—C.P. Code, S. 100—If applicable .. 529

———**S. 117**—Personal notice on defaulter of sale in execution of rent decree —If essential—S. 125 (before 1934 amendment) and S. 127—Scope .. 947

———**Ss. 124, 163 and 163-A**—Landlord purchasing at rent sale—Possession subsequently obtained—Suit for *mesne profits* against person in occupation between date of sale and obtaining of possession—Procedure under S. 163 alone will be available and claim in civil Court for a different remedy with enhanced period of limitation is untenable .. 781

———**Ss. 131, 189 and 213**—Fraudulent conspiracy to get improper decree—Payment made to avert sale—Suit for damages—Jurisdiction of Civil Court—Measure of damages .. 646

MADRAS GAMING ACT (III OF 1930), Ss. 3 and 4—House in which betting on horse race takes place—If 'common gaming house' under S. 3—Paraphernalia of betting found in the house—How far evidence .. 353

MADRAS GENERAL SALES TAX ACT (IX OF 1939)—First sales of goods manufactured in the Province—Tax on, is in the nature of excise duty and therefore *ultra vires* the Provincial Legislature .. 607

———**S. 15 (a)**—Failure to submit return—If should be "wilful" to constitute an offence .. 1045

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), Ss. 7 and 23—Dismissal of hereditary village headman without following the procedure prescribed—Remedy only by appeal to Collector and further appeal to Board of Revenue—No right of separate civil suit .. 577

———**Ss. 10 (2), 13 and 21**—Scope—Suit for declaration that a person has been appointed in contravention of S. 10 (2)—Jurisdiction of Civil Court. .. 439

———**Ss. 13 and 14 (1)**—Office of village blacksmith—Devolution by custom on minors—Suit for recovery of emoluments of office—Claim to mesne profits for more than three years before suit—Jurisdiction of Revenue Court—Limitation Act (IX of 1908), S. 6—Applicability .. 92

MADRAS HIGH COURT ORIGINAL SIDE RULES—O. 13, r. 14

MADRAS HIGH COURT ORIGINAL SIDE RULES—*Contd.*

(a)—Leave to sue in Parsi Chief Matrimonial Court in Madras—Appeal under O.S. Rules, O. 13, r. 14 (a)—If lies .. 935

———**O. 45, r. 1, Cl. (d)**—Scope—Moneys which ought to be in the hands of executors, administrators or trustees —If can be ordered to be paid into Court .. 378

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927) S. 76—Applicability—Compulsory renewal of kanom under Malabar Tenancy Act —If affected by S. 76 .. 424

———**Chap. VI-A** — Applicability—Temple in respect of which scheme has been framed—If can be notified under Chap. VI-A .. 175

MADRAS LAND ENCROACHMENT ACT (III OF 1905), S. 6—Assignment of site by Government after cancellation of previous lease to another —Right of assignee to sue previous lessee for possession in civil Court—Effect of S. 6 of Act III of 1905 .. 507

———**S. 9**—Penal assessment under—Sale of land for recovery—If prevails over prior encumbrances—Madras Revenue Recovery Act (II of 1864), S. 42 —Applicability .. 993

MADRAS LOCAL BOARDS ACT (XIV of 1920)—Order of surcharge by Examiner of Local Fund Accounts—Amount paid by President of Union Board—Suit for recovery after unsuccessful appeal to the Government—Jurisdiction of Civil Courts. (F.B.) 47

———**S. 159**—Power of president of Local Board to require owner or occupier of premises to remove encroachments .. 1034

———**S. 160 (3)**—Lease of site—Notice to quit after expiry of period of lease purporting to be one under S. 159 (1) instead of under S. 164 (2)—Lessee disregarding the notice—If offence .. 1042

———**Ss. 193 and 207**—Storing and selling firewood within Panchayat Board limits—No licence necessary .. 348

———**S. 199**—President of Panchayat Board paying in anticipation of sanction by Board amounts in excess of the scale to advocates engaged in a criminal case —Ratification of payments by Board—Effect—Surcharge order validity .. 403

———**S. 229**—Uttering offensive abuse against third person on the occasion of a demand for tax being presented to accused by a bill collector—Whether offence under S. 229 of Local Boards Act—"Molest"—Meaning .. 356

MADRAS LOCAL BOARDS ACT (XIV OF 1920)—*Contd.*

———**Sch. IV, r. 24**—Enhancement of tax—Notice if necessary .. 256

MADRAS PROHIBITION ACT (X OF 1937), S. 4 (1) (a)—Government of India Act, 1935, S. 107—Provincial law with respect to matter in Concurrent Legislative List—Repugnancy of, to existing Indian law—Non-reservation, effect—Act of Local Legislature prohibiting possession of dangerous drugs—Validity of—Conviction under Prohibition Act—Alteration of, to one under Abkari Act—Permissibility. (F.B.) 41

MADRAS REVENUE RECOVERY ACT (II OF 1864)—Death of registered proprietor before the date fixed for sale for recovery of arrears of revenue—Failure to serve notices of sale on the legal representatives—Effect on the validity of sale .. 1002

———**S. 42**—If applicable to recovery of penal assessment under Madras Land Encroachment Act (III of 1905), S. 9 .. 993

———**S. 59**—Period of six months for filing suit—Computation where application to Collector under Cl. 3 (3) of Madras Regulation VII of 1828 has been made (F.B.) .. 904

MALABAR LAW—Tarwad—Karnavan employed and living elsewhere—Karnavastri living in family house, plucking fruits from trees on the paramba and paying revenue or purappad due to *jenmi*—Mortgage by her—When binding .. 472

———Will—Incidents of *tavazhi* inconsistent with provisions in will—Inference .. 287

MALABAR TENANCY ACT (XIV OF 1930), S. 17—Right of kanomdar to call upon his immediate landlord for renewal—Property belonging to public temple—Madras Hindu Religious Endowments Act (II of 1927), S. 76—Necessity for sanction of lease or mortgage for over 5 years—Effect on right of renewal under Malabar Tenancy Act, S. 17 .. 424

———**S. 20 (5)**—"Landlord requires the holding *bona fide*"—Interpretation .. 455

MARRIED WOMEN'S PROPERTY ACT (III of 1874), S. 6—Applicability to policy of insurance effected in 1905 by a Mahomedan on his life for the benefit of his children—Trust—Release of their interest by the beneficiaries—Revokes the trust .. 740

MARUMAKATTAYAM ACT 1932—Infant son of married woman—Whether entitled to maintenance under Cr.P.C, S. 488 .. 254

MASTER AND SERVANT—Contract of service—Provision that appointment is 'permanent' and will not 'ordinarily' be terminated—Construction. 270

MORTGAGE—Covenant to redeem after paying mortgagee's money—If personal covenant to pay—Suit on mortgage—If sustainable .. 447

———Lessee's mortgage of interest in property for lesser term—Mortgagee's entry into possession—Lessee's failure to make payments under lease—Sale—Claim by lessor to recover balance from mortgagee—No privity of estate or contract between mortgagee and lessee (P.C.) .. 53

———Suit on a mortgage by deposit of title deeds impleading subsequent mortgagee of the property—Suit mortgage found to require registration and invalid for want of it—Plaintiff given a money decree only—Order for sale of property and adjudication as to subsequent mortgage—Propriety (P.C.) ..894

MORTGAGE SUIT—Final decree—Oral agreement prior to preliminary decree pleaded—Agreement not relating to execution but attacking decree—Legality of .. 344

MOTOR VEHICLES ACT (IV OF 1939), Ss. 3 and 112—Expiry of driving licence and renewal after ten days as from date of expiry—Driving without licence in the interval—Offence .. 1040

———**S. 123 (1)**—Transport vehicle used on the public road without permit—Liability of driver .. 349

MUSSALMAN WAKF ACT (XLII OF 1923), Ss. 3 and 10—Default in discharge of duties relating to wakf under the Act—Proper Court to try the offence .. 541

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 120—Effect on application to scale down debt on pronote .. 803

PARSI MARRIAGE AND DIVORCE ACT (III OF 1936), Ss. 29 (3) and 47 (b)—Wife obtaining leave to sue in the Parsi Chief Matrimonial Court in Madras (High Court)—Application by husband under O. 13, r. 14 (a) of the Original Side Rules for revocation of leave—Remedy by way of appeal under the Act—Inapplicability of Original Side Rules .. 935

PARTITION—Widow—Suit by her for share in properties of late husband—Children made formal defendants—Decree determining children's shares although suit not framed as administration suit—Validity (P.C.) .. 233

PARTNERSHIP ACT (IX OF 1932), S. 69 (2)—Registration of firm subsequent to filing of suit—If can cure the defect and make suit maintainable .. 968

PENAL CODE (XLV OF 1860), S. 67—Imprisonment in default of payment of fine—Limits .. 446

———**S. 193**—Fabricating false evidence —Abetting the making of document—Document falsely evidencing discharge of a decree debt—Attestor punishable in the circumstances .. 746

———**Ss. 302 and 328**—Victim recovering from *dhatura* poison and then dying of pneumonia—Conviction of accused for murder—Propriety .. 661

———**S. 304 (2), para. 2**—Murder by causing bodily injury sufficient to cause death—Death 'likely' and 'not necessary' according to medical evidence—Whether in the circumstances conviction for murder sustainable .. 999

———**S. 407**—Scope—Act done in anticipation of statute which will make such act offence—Not an offence .. 748

———**S. 411**—Offence under—Sentence —Accused being member of criminal tribe—Whether makes any difference .. 253

PRACTICE—Amendment — Written statement—If can be amended in appellate Court so as to permit inconsistent case .. 442

———Appeal to Federal Court—Admission—Procedure—Civil Procedure Code (V of 1908), O. 45, rr. 7 and 8 .. 514

———Application in High Court for leave to sue as pauper for damages for slander—Summary dismissal on the ground that damages cannot exceed a certain sum and referring plaintiff to Court of lower jurisdiction—Propriety .. 505

———Costs—Assignee from decree-holder impleaded in appeal, actively supporting lower Court's decree—Liability for costs of appeal and of trial .. 119

———Decision of Privy Council declaring true principle of law, changing complexion of the case under appeal—New question not raised in pleadings or issues arising—Necessity to give parties opportunity to make good such new case (P.C.) .. 733

———Federal Court—Leave to appeal to Privy Council—When granted (F.C.) .. 33

———New point of law—Propriety of raising before Privy Council (P.C.) .. 972

———Set-off—Suit declaring lease to be fraudulent—Lessee continued in possession by order of Court pending suit

PRACTICE—*Contd.*

and directed to administer—Payment by him of Government revenue while so in possession—Right to recover—Whether can be subsequently agitated against rightful owner of property not having claimed a set off against mesne profits .. 866

———Small Cause Suit—Trial by Judge having jurisdiction to try it—Suit numbered as original suit—Whether still small cause—Right of appeal .. 537

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 38 —Application for retrial—Heard by two Judges—Judgment signed by another Judge also who did not hear—If vitiate judgment—Court hearing under S. 38—Not a Court of appeal—Transfer of shares—When complete .. 571

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17—Suit by creditor to set aside alienation by debtor before adjudication—Leave of insolvency Court—If necessary (F.B.) .. 684

———**S. 31**—One of the creditors prevented by fraud from having her share of the dividends—Distribution not proper—Remedy of payment by the other creditors towards making the amount to the unpaid creditor good .. 847

———**S. 60**—Allocation order—Payment for 34 months—Application for revoction —Civil Procedure Code, S. 60—Applicability of .. 845

———**Ss. 60 and 52**—Insolvent a public servant receiving salary of less than Rs. 100 per mensem—"Prospective order" for payment of a portion of salary to meet his debts—Validity—Salary after its receipt, if falls under S. 52—Discretion of Court to order after such receipt a portion to be paid for benefit of creditors—Civil Procedure Code (V of 1908), S. 60—Principles of—Effect .. 591

PRIVY COUNCIL—Leave to appeal to—When granted by Federal Court. (F.C.) .. 33

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 4, 9, 24 and 25—Scope—Petitioning creditor's right to apply for adjudication of debtor as insolvent questioned—Insolvency Court bound to decide the question .. 362

———**S. 16**—Petition by one creditor alleging the execution of a mortgage by the debtor within three months—Petitioner not proceeding with due diligence —Another creditor allowed to continue the proceedings long after three months from date of mortgage—Date of presentation of the petition by the first creditor whether available to base adjudication of debtor an insolvent .. 778

PROVINCIAL INSOLVENCY ACT (V OF 1920)—*Contd.*

———**S. 28 (2).**—*See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 17. (F.B.) .. 684

———**S. 28 (4)**—Construction—Decree for costs in insolvent's favour after date of adjudication—Transfer of decree for value—Transferee applying to Court to be recognised under O. 21, r. 16—Whether decree vested in Official Receiver because of adjudication on an earlier date —English and Indian law as to vesting during insolvency .. 834

———**Ss. 28 (6), 34, 44 and 47**—Mortgagees right to personal decree under O. 34, r. 6 of Civil Procedure Code (V of 1908)—Whether lost by order of absolute discharge in mortgagor's insolvency.. 690

———**S. 51**—Admission of petition—Crucial date—Date of acceptance of petition—Assets, realisation of—Sale of several lots under one proclamation—Sale not one and indivisible—'Benefit of execution'—Meaning of—Official Receiver—Right to interest .. 918

———**S. 53**—Transfer within two years of petition—Application to set aside—Principles .. 212

———**S. 54**—Fraudulent preference of creditor—Onus of proof on whom—Explanatory circumstances—Inference of Court regarding intent—How far legal. 810

———**S. 68**—Sale by Official Receiver of property of insolvent—Public auction—After sale invitation to creditors for offers of higher bids—Offers of higher bids—Not substantial—Original sale confirmed—Sale not irregular .. 382

———**Ss. 68 and 75**—Sale by Receiver pending application for scaling down—Validity .. 698

REGISTRATION ACT (XVI OF 1908), S. 17—Hindu Law—Partition deed unregistered and inadmissible in evidence—Effect on status and rights of parties .. 707

RELIGIOUS ENDOWMENT—*See* H. L. RELIGIOUS ENDOWMENT. (P.C.). 1.

RES JUDICATA—Applicability to execution proceedings—Order for sale in execution and proclamation—Claimant objecting to sale of item—Failure to substantiate at hearing—Final order for sale —Subsequent application to exclude property from sale—Barred by *res judicata.* 792

———Plea of—Claim suit under O. 21, r. 63, Civil Procedure Code (V of 1908) —Identical subject-matter essential—"Crops on land" and "land" not same subject-matter—Decree-holder cannot call himself representative of the judgment-debtors—Resistance by one creditor cannot be construed as on behalf of all creditors .. 784

REVISION—Administration suit.—Order or question of Court-fee—Revision proper to correct error at early stage. 962

SALE OF GOODS—C.I.F. contract —Printed form with type-written portion —Conflict—Construction — Contract for sale of goods to be delivered in two instalments—Wrongful refusal by buyer to take delivery of first instalment—Right of seller to cancel contract and claim damages .. 281

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Suit for declaration of title to and possession of office of *mahant*—Not maintainable without prayer for possession of *math* properties when plaintiff is not in possession of them (F.B.).. 463

STAMP ACT (II OF 1899), S. 19—Promissory note executed abroad—Suit thereon in British India—Need for affixing stamp and cancelling note—Procedure before endorsement of note .. 301

SUCCESSION ACT (XXXIX OF 1925), Ss. 142 and 150—Provision in will for purchase of house for plaintiff from a specific fund, a bank deposit for Rs. 14,000—Later provision for division in equal shares between plaintiff and his brothers of balance from outstandings realised after deduction of money spent for the purchase of the house—Testator drawing out bank deposit on maturity and buying property—Legacy to plaintiff, if adeemed—Nature of legacy, specific or demonstrative .. 678

SUIT VALUATION—Suit for partition by persons in joint possession—Valuation for purposes of jurisdiction .. 567

TORT—Libel—Suit for damages—Application for leave to sue as pauper—Dismissal on the ground that damages will not exceed an amount within the jurisdiction of a Court of lower grade—Propriety .. 505

———Libel—Suit for damages—Earlier criminal complaint and proceedings—Unconditional apology—Whether operates as accord and satisfaction of civil action. 674

———Nuisance—Suit for injunction—Averment of special damage to plaintiff to support his claim—Necessity .. 105

———Trade mark—Infringement—Name associated with particular goods—Use in

TORT—*Contd.*

connection with similar goods—Intention to deceive public—Injunction whether justified .. 435

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 6 (e) and 130—Sale of land set aside as vendor had no title—Right of vendee to recover purchase money—Whether "actionable claim," which is assignable or a mere "right to sue". 695

———**S. 41**—Applicability of principles to movables—*Y*, one of the judgment-debtors a surety—*Y* discharging decree and getting it transferred to his benamidar—*Bona fide* purchaser of decree for value from benamidar—Right to execute against *Y*—C.P. Code, O. 21, r. 16—Circumvention—Effect .. 601

———**S. 52**—*"Lis pendens"*—Applicability to proceedings under S. 51 of Madras Co-operative Societies Act (VI of 1932). .. 588

———**S. 53**—Alienation by debtor before his adjudication—Suit by creditor to set aside alienation—Leave of Insolvency Court if necessary—Presidency Towns Insolvency Act (III of 1909), S. 17 and Provincial Insolvency Act (V of 1920), S. 28 (2) (F.B.). 684

———**S. 53**—Alienation in favour of creditor—Consideration partly fictitious—Transaction when to be avoided in entirety—Setting aside fraudulent transfer—Burden of proof .. 99

———**S. 59**—Rule as to attestation of mortgage—If applicable to registered hypothecation bond of a fund in Court. .. 293

———**S. 69**—Applicability—Mortgagees power of sale without intervention of Court—If can be conferred by a mortgagor who is the manager of a joint Hindu family—Power of sale—If can be conferred on second mortgagee when first mortgagee was not given such power. 923

———**S. 82**—Suit on mortgage—First mortgagee purchasing part of hypotheca in execution of decree on later mortgage in his own favour—Liability of mortgagee to contribute .. 520

———**S. 100**—Charge—Words creating charge—Decree charging "movable and immovable property"—Words not vague—Charge enforceable .. 386

TRUST—Borrowing for—If all the trustees should actually sign the pronote. .. 587

———Failure of special trustee in possession of properties, charged with the performance of a charity in a temple—Right of general trustee of institution to perform the charity and recover the expenses from the special trustee and the properties charged .. 636

———Promissory note by manager of temple—Decree against the temple when can be passed .. 568

———Release of interest by beneficiaries—Revokes the trust .. 740

VILLAGE COURTS ACT (I OF 1889), Ss. 8, 73 and 74—Village Munsif's misconduct—Small Cause Judge reporting matter to District Judge—Recommendation of District Judge to the Collector for action being taken under S. 8—Removal of Village Munsif by Collector—Appeal to High Court—Appellant should have opportunity to show cause before recommendation to Collector by District Judge .. 428

WILL—Construction — Property bequeathed to wife and children—Wife and children, whether take as tenants in common—Wife representing children in prior litigation—Sale in execution of decree therein, if will bind children—Incidents of *tavazhi* inconsistent with provisions in will—Inference—Malabar law. .. 287

WORKMEN'S COMPENSATION ACT (VIII OF 1923), Ss. 3 (5), 10 and 22—Workman applying after six months time to Labour Commissioner—Application admitted but later on dismissed on the ground of delay in applying—Legality of disposal—Meaning and nature of "claim" in S. 10 .. 665

INDIA ACTS, 1941.

THE INSURANCE DEPOSITS (TEMPORARY REDUCTION) ACT, 1941.

ACT No. I OF 1941.

[3rd March, 1941.

An Act to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938.

WHEREAS, in consequence of conditions arising out of the present war, it is expedient to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INSURANCE DEPOSITS (TEMPORARY REDUCTION) ACT, 1941.

(2) It extends to the whole of British India.

Definition.

2. In this Act "insurer" means an insurer as defined in clause (9) of section 2 of the Insurance Act, 1938, except that it does not include a Mutual Insurance Company or a Co-operative Life Insurance Society to which Part IV of that Act applies.

Reduction of instalments of deposit.

3. (1) An insurer entitled to the benefits of this Act shall, subject to the provisions of section 5, be deemed in respect of any instalment of the deposit to be made by him under section 7 of the Insurance Act, 1938, which he was required to pay during the year commencing on the 1st day of January, 1940, or which he may be required to pay at any time after the end of that year and so long as this section continues to have effect, to have complied with the provisions of the said section 7 as to payment of instalments of deposits, if he has paid or pays in accordance with the provisions of that section not less than one half the total amount which would have been required by that section as the instalment, had the insurer not availed himself of the provisions of this Act.

(2) If an insurer entitled to the benefits of this Act, when paying an instalment of deposit, has, in respect of any instalment due during the year commencing on the 1st day of January, 1940, paid more than one half the total amount required by the said section 7 as the instalment, he may at his option have the amount of any such surplus payment appropriated to the payment of the next or any subsequent instalment of deposit required from him under the said section 7 read with sub-section (1) of this section.

(3) This section shall cease to have effect on the expiration of one year from such date as may be fixed, for the purposes of this Act, by the Central Government by notification in the official Gazette as the date of termination of the present hostilities.

Insurers entitled to the benefits of this Act.

4. An insurer shall be entitled to the benefits of this Act only if—

(*a*) he carries on life insurance business only, and

(*b*) the date on which he first assumed risk on any policy issued by him was earlier than the 3rd day of September, 1939, but not earlier than the 3rd day of September, 1929.

Cesser of title to the benefits of this Act.

5. (1) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in any year if in the preceding year his total premium income, including annuity considerations, as shown in the revenue-account prepared under the Insurance Act, 1938, exceeded rupees thirty thousand.

(2) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in respect of any future instalment—

(*a*) if after the 1st day of January, 1941, he declares any bonus or dividend at a rate higher than the rate at which such bonuses or dividends were last declared by him before the 3rd day of September, 1939, or

(*b*) if the proportion of his renewal premium income spent by him in payment of commission and other expenses including capital expenditure, determined in accordance with Rule 25 of the Insurance Rules, 1939, exceeds in any year the proportion as so determined for the accounting period ending on the 31st day of December, 1939.

Resumption of payment of instalments in accordance with Act IV of 1938.

6. (1) When section 3 ceases to have effect, or if before that date an insurer ceases under clause (*a*) or clause (*b*) of sub-section (2) of section 5 to be entitled to the benefits of this Act, instalments of deposits shall be paid in accordance with the provisions of section 7 of the Insurance Act, 1938 (except that no insurer shall be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act), until the last instalment required to be paid under the said section 7 has been paid, and the balance of the deposit then remaining unpaid in consequence of the reduced instalments authorised under this Act shall be paid by the insurer in such further instalments, of such amount and at such times, as the Central Government may direct.

(2) If while section 3 continues to have effect an insurer ceases in any year under sub-section (1) of section 5 to be entitled to the benefits of this Act, instalments of deposit in that year shall be paid by him in accordance with the provisions of section 7 of the Insurance Act, 1938, except that he shall not be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act, and the provisions of sub-section (1) of this section shall apply to the payment by such insurer of any balance of the deposit due from him which remains unpaid after the last instalment required to be paid under the said section 7 has been paid.

Saving in respect of delayed payments of instalments of deposits.

7. For the purposes of the Insurance Act, 1938, an insurer entitled to the benefits of this Act who has failed to pay before the 1st day of January, 1941, an instalment of deposit due in the year 1940 shall not be liable to any consequences on that account in respect of a failure to comply with the provisions of section 7 of the said Act as to deposits if before the 15th day of February, 1941, he has paid as such instalment not less than one half the total amount required by the said section 7.

Removal of difficulties.

8. If any difficulty arises in determining the amount payable as an instalment of deposit by an insurer under this Act, the matter shall be decided by the Central Government whose decision shall be final.

THE INDIAN MERCHANDISE MARKS (AMENDMENT) ACT, 1941.

ACT No. II OF 1941.

[*11th March, 1941.*

An Act further to amend the law relating to fraudulent marks on merchandise.

WHEREAS it is expedient further to amend the law relating to fraudulent marks on merchandise;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN MERCHANDISE MARKS (AMENDMENT) ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of section 2, Act IV of 1889.

2. In section 2 of the Indian Merchandise Marks Act, 1889 (hereinafter, in sections 3 to 9 inclusive, referred to as the said Act),—

(*a*) for clause (1) the following clauses shall be substituted, namely:—

'(1) "mark" has the meaning assigned to that expression in clause (*f*) of sub-section (1) of section 2 of the Trade Marks Act, 1940;

(1-A) "trade mark" means a "registered trade mark" as defined in clause (*j*) of sub-section (1) of section 2 of the Trade Marks Act, 1940, or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark:';

(*b*) in sub-clause (*e*) of clause (2), for the words "numeral, word or mark" the word "mark" shall be substituted.

Amendment of section 4, Act IV of 1889.

3. In section 4 of the said Act,—

(*a*) in sub-section (1), for the words "numerals, words or marks", in both places where they occur, the word "marks" shall be substituted;

(*b*) in sub-section (2), after clause (*b*) the following word and clause shall be added, namely:—

"and

(*c*) being the name or initials of a fictitious person or of a person not carrying on business in connection with goods of the same description."

Amendment of section 7. Act IV of 1889.

4. In section 7 of the said Act,—

(*a*) after the words "things to which a false trade description is applied" the following words shall be inserted, namely:—

"or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification";

(*b*) in clause (*a*), after the words "trade description" the following words shall be inserted, namely:—

"or that any offence against this section had been committed in respect of the goods".

Insertion of new section 7-A in Act IV of 1889.

5. After section 7 of the said Act the following section shall be inserted, namely:—

Penalty for tampering with, altering or effacing a mark applied in pursuance of section 12-A.

"7-A. If a person tampers with, alters or effaces a mark which has been applied to any goods to which it is required to be applied by notification made under section 12-A, he shall, unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to six months or with fine which

may extend to five hundred rupees, and, in the case of a second or subsequent conviction, with imprisonment which may extend to two years, or with fine, or with both."

Amendment of section 9, Act IV of 1889.

6. In sub-section (1) of section 9 of the said Act, after the words "any goods or things to which a false trade description is applied" the following words shall be inserted, namely:—

"or which, being required by notification under section 12-A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification."

Substitution of new section and heading for section 12 and heading in Act IV of 1889.

7. For section 12 of the said Act and the heading preceding that section the following section and heading shall be substituted, namely:—

"Stamping of Piece-goods, Cotton Yarn and Thread.

Stamping of piece-goods, cotton yarn and thread.

12. (1) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and, except when the goods are sold from the factory for export from British India, without being conspicuously marked on each piece with the name of the manufacturer, or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(2) Cotton yarn such as is ordinarily sold in bundles, and cotton sewing or darning thread, which have been manufactured, bleached, dyed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from those premises unless, in accordance with any rules made under section 20 of this Act, in the case of yarn the bundles are conspicuously marked with an indication of the weight of yarn in each bundle and the count of the yarn contained in the bundle and in the case of thread each unit is conspicuously marked with the weight of thread in the unit and the grist number and, except where the goods are sold from the factory for export from British India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchaser in India of the goods.

(3) If any person removes or attempts to remove or causes or attempts to cause to be removed for sale from such premises or sells or exposes or has in possession for sale any such piece-goods or any such cotton yarn or any cotton sewing or darning thread which is not marked as required by sub-section (1) and sub-section (2), every such piece and every such bundle of yarn and all such thread, and everything used for the packing thereof, shall be forfeited to His Majesty and such person shall be punished with fine which may extend to one thousand rupees."

Insertion of new heading and section 12-A in Act IV of 1889.

8. After section 12 of the said Act the following heading and section shall be inserted, namely:—

"Power to require goods to show indication of origin.

Power to require goods to show indication of origin.

12-A. (1) The Central Government may, by notification in the official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of British India and imported into British India, or which are made or produced within the

limits of British India, shall, from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced.

(2) The notification may specify the manner in which such indication shall be applied, that is to say whether to the goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary, that is to say whether on importation only, or also at the time of sale, whether by wholesale or retail or both.

(3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interests of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, nor without such inquiry as the Central Government may consider necessary.

(4) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the issue of a notification under this section as they apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.

(5) A notification under this section shall not apply to goods made or produced beyond the limits of British India and imported into British India if in respect of those goods the Chief Customs Officer is satisfied at the time of importation that they are intended for exportation whether after transhipment in or transit through British India or otherwise."

Amendment of section 20, Act IV of 1889.

9. In section 20 of the said Act, after sub-section (1) the following sub-section shall be inserted, namely:—

"(1-A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton sewing or darning thread shall be marked with the particulars required by that section."

Amendment of section 18, Act VIII of 1878.

10. In section 18 of the Sea Customs Act, 1878,—

(*a*) in clause (*e*),—

(i) for the words "the United Kingdom, British India and British Burma"," in both places where they occur, and for the words "the United Kingdom or in British India or in British Burma" the words "British India" shall be substituted;

(ii) in sub-clause (*ii*), for the words "in the same language and character as the name or trade mark" the words "in the English language" shall be substituted;

(*b*) in clause (*f*),—

(i) sub-clauses (*ii*) and (*iii*) shall be re-numbered as sub-clauses (*iii*) and (*iv*) respectively, and the following shall be inserted as sub-clause (*ii*), namely:—

"(*ii*) have not been conspicuously marked on each piece with the name of the manufacturer, exporter or wholesale purchaser in India of the piece, and," and

(ii) in sub-clause (*iv*) as so re-numbered, for the words and figures "Indian Factories Act, 1881" the words and figures "Factories Act, 1934" shall be substituted;

(*c*) after clause (*g*) the following clauses shall be added, namely:—

"(*h*) goods which are required by a notification under section 12-A of the Indian Merchandise Marks Act, 1889, to have applied to them an indication of the country or place in which they were made or produced, unless such goods show such indication applied in the manner specified in the notification;

(*i*) cotton yarn such as is ordinarily imported in bundles, if—

(i) the bundle containing such yarn has not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) such bundle has not been conspicuously marked with an indication of the weight and the count of the yarn contained in it, in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the yarn has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934;

(*j*) cotton sewing or darning thread, if—

(i) the units in which the thread is supplied have not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) if each unit has not been conspicuously marked with an indication of the weight of thread contained in it and the grist number in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the thread has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934."

Amendment of section 19-A, Act VIII of 1878.

11. In sub-section (3) of section 19-A of the Sea Customs Act, 1878,—

(*a*) for the words "British India", in both places where they occur the word "India" shall be substituted;

(*b*) for the words "and in the same language and character" the words "in the English language" shall be substituted.

Substitution of new section for section 478, Act XLV of 1860.

12. For section 478 of the Indian Penal Code the following section shall be substituted, namely: —

Trade mark.

'478. For the purposes of this Code, the expression "trade mark" includes a trade mark registered under the Trade Marks Act, 1940, and any mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark.'

Amendment of section 480, Act XLV of 1860.

13. In section 480 of the Indian Penal Code, for the words "are the manufacture or merchandise of a person whose manufacture or merchandise they are not" the following words shall be substituted, namely:—

"have a connection in the course of trade with a person with whom they have not any such connection".

THE PETROLEUM (AMENDMENT) ACT, 1941.

ACT NO. III OF 1941.

[*17th March, 1941.*

An Act further to amend the Petroleum Act, 1934.

WHEREAS it is expedient further to amend the Petroleum Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PETROLEUM (AMENDMENT) ACT, 1941.

Amendment of section 23, Act XXX of 1934.

2. For clause (*c*) of sub-section (1) of section 23 of the Petroleum Act, 1934, the following clause shall be substituted, namely:—

"(*c*) being the holder of a licence issued under section 4 or a person for the time being placed by the holder of such licence in control or in charge of any place where petroleum is being imported or stored, or is under transport, contravenes any condition of such licence or suffers any condition of such licence to be contravened, or".

THE BERAR LAWS ACT, 1941.

ACT NO. IV OF 1941.

[*17th March, 1941.*

An Act to extend certain Acts to Berar.

WHEREAS by orders made under the Indian (Foreign Jurisdiction) Order in Council, 1902, the provisions of certain Acts in force in British India have from time to time been applied to, and are now, by virtue of such application, in force in, Berar;

AND WHEREAS it is expedient that those and certain other Acts should be extended to, and be, by virtue of such extension, in force in, Berar:

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE BERAR LAWS ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Extension of certain Acts to Berar.

2. (1) The Acts specified in the First Schedule and so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws are hereby extended to, and shall be in force in, Berar; and in any enactment so extended any reference by whatever form of words to subjects of His Majesty shall be deemed to include a reference to Berari subjects of His Exalted Highness the Nizam of Hyderabad, and notwithstanding anything contained in clause (7) of section 3 of the General Clauses Act, 1897, any reference to British India shall be construed as a reference to British India and Berar.

(2) The Acts specified in the Third Schedule shall be amended in the manner set forth in the second column of that Schedule.

Cesser of application of certain Acts to Berar.

3. The application, if any, to Berar, made by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, of the Acts specified in the First Schedule, of so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws, and of the Indian Cotton Cess Act, 1923, shall cease to have effect:

Provided that all appointments, delegations, notifications, orders, bye-laws, rules and regulations, which have been made or issued under, or in pursuance of, any provision of any of the said Acts as applied to Berar by order under the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar.

Removal of doubt.

4. For the removal of doubt it is hereby declared that the Acts specified in the Fourth Schedule have ceased to have effect and are repealed in Berar.

THE FIRST SCHEDULE.

[*See* sections 2 (*1*) and 3.]

Acts Extended to Berar.

Year.	Number.		Short Title.
1850	XIX	..	The Apprentices Act, 1850.
1850	XXI	..	The Caste Disabilities Removal Act, 1850.
1855	XIII	..	The Indian Fatal Accidents Act, 1855.
1856	XI	..	The European Deserters Act, 1856.
1856	XV	..	The Hindu Widows' Re-marriage Act, 1856.
1860	XLV	..	The Indian Penal Code.
1864	III	..	The Foreigners Act, 1864.
1865	III	..	The Carriers Act, 1865.
1866	XXI	..	The Native Converts' Marriage Dissolution Act, 1866.
1867	XXV	..	The Press and Registration of Books Act, 1867.
1869	IV	..	The Indian Divorce Act.
1872	I	..	The Indian Evidence Act, 1872.
1872	III	..	The Special Marriage Act, 1872.
1872	IX	..	The Indian Contract Act, 1872.
1872	XV	..	The Indian Christian Marriage Act 1872.
1873	V	..	The Government Savings Banks Act, 1873.
1873	X	..	The Indian Oaths Act, 1873.
1874	IX	..	The European Vagrancy Act, 1874.
1875	IX	..	The Indian Majority Act, 1875.
1875	XVIII	..	The Indian Law Reports Act, 1875.
1876	IX	..	The Native Coinage Act, 1876.
1877	I	..	The Specific Relief Act, 1877.
1878	VIII	..	The Sea Customs Act, 1878.
1878	XI	..	The Indian Arms Act, 1878.
1879	XVIII	..	The Legal Practitioners Act, 1879.
1881	XXVI	..	The Negotiable Instruments Act, 1881.
1882	II	..	The Indian Trusts Act, 1882.
1882	XII	..	The Indian Salt Act, 1882.
1884	IV	..	The Indian Explosives Act, 1884.
1888	III	..	The Police Act, 1888.
1889	IV	..	The Indian Merchandise Marks Act, 1889.
1890	VIII	..	The Guardians and Wards Act, 1890.
1890	XI	..	The Prevention of Cruelty to Animals Act, 1890.
1891	XVIII	..	The Bankers' Books Evidence Act, 1891.
1898	V	..	The Code of Criminal Procedure, 1898.
1901	II	..	The Indian Tolls (Army) Act, 1901.
1903	VII	..	The Indian Works of Defence Act, 1903.
1903	XV	..	The Indian Extradition Act, 1903.
1904	VII	..	The Ancient Monuments Preservation Act, 1904.
1905	IV	..	The Indian Railway Board Act, 1905.
1906	III	..	The Indian Coinage Act, 1906.
1908	V	..	The Code of Civil Procedure, 1908.
1908	VI	..	The Explosive Substances Act, 1908.
1908	IX	..	The Indian Limitation Act, 1908.
1908	XIV	..	The Indian Criminal Law Amendment Act, 1908.
1908	XVI	..	The Indian Registration Act, 1908.
1909	IV	..	The Whipping Act, 1909.
1910	IX	..	The Indian Electricity Act, 1910.
1911	II	..	The Indian Patents and Designs Act, 1911.
1911	VIII	..	The Indian Army Act, 1911.
1912	IV	..	The Indian Lunacy Act, 1912.
1913	II	..	The Official Trustees Act, 1913.
1913	III	..	The Administrator-General's Act, 1913.
1914	III	..	The Indian Copyright Act, 1914.
1916	VII	..	The Indian Medical Degrees Act, 1916.
1917	II	..	The Motor Spirit (Duties) Act, 1917.
1917	XVIII	..	The Post Office Cash Certificates Act, 1917.
1918	XXII	..	The Bronze Coin (Legal Tender) Act, 1918.
1919	XII	..	The Poisons Act, 1919.
1920	V	..	The Provincial Insolvency Act, 1920.

Year.	Number.	Short title.
1920	XIV ..	The Charitable and Religious Trusts Act, 1920.
1920	XV ..	The Indian Red Cross Society Act, 1920.
1920	XLVII ..	The Imperial Bank of India Act, 1920.
1920	XLVIII ..	The Indian Territorial Force Act, 1920.
1920	XLIX ..	The Auxiliary Force Act, 1920.
1921	XVIII ..	The Maintenance Orders Enforcement Act, 1921.
1922	XI ..	The Indian Income-tax Act, 1922.
1922	XII ..	The Indian Finance Act, 1922.
1922	..	The Indian States (Protection against Disaffection) Act, 1922.
1923	IV ..	The Indian Mines Act, 1923.
1923	V ..	The Indian Boilers Act, 1923.
1923	VIII ..	The Workmen's Compensation Act, 1923.
1923	XXIII ..	The Legal Practitioners (Women) Act, 1923.
1924	VI ..	The Criminal Tribes Act, 1924.
1925	XXXIX ..	The Indian Succession Act, 1925.
1926	XI ..	The Promissory Notes (Stamp) Act, 1926.
1926	XVI ..	The Indian Trade Unions Act, 1926.
1926	XXI ..	The Legal Practitioners (Fees) Act, 1926.
1926	XXXVIII ..	The Indian Bar Councils Act, 1926.
1929	VII ..	The Trade Disputes Act, 1929.
1929	XIX ..	The Child Marriage Restraint Act, 1929.
1930	II ..	The Dangerous Drugs Act, 1930.
1930	III ..	The Indian Sale of Goods Act, 1930.
1930	XVIII ..	The Silver (Excise Duty) Act, 1930.
1930	XIX ..	The Indian Companies (Amendment) Act, 1930.
1930	XXIV ..	The Indian Lac Cess Act, 1930.
1931	..	The Indian Finance Act, 1931.
1931	..	The Indian Finance (Supplementary and Extending) Act, 1931.
1931	XVI ..	The Provisional Collection of Taxes Act, 1931.
1931	XXIII ..	The Indian Press (Emergency Powers) Act, 1931.
1932	IX ..	The Indian Partnership Act, 1932.
1932	XI ..	The Public Suits Validation Act, 1932.
1932	XII ..	The Foreign Relations Act, 1932.
1932	XIII ..	The Sugar Industry (Protection) Act, 1932.
1932	XXIII ..	The Criminal Law Amendment Act, 1932.
1933	II ..	The Children (Pledging of Labour) Act, 1933.
1933	VII ..	The Indian Finance Act, 1933.
1933	XVII ..	The Indian Wireless Telegraphy Act, 1933.
1933	XXVII ..	The Indian Medical Council Act, 1933.
1934	II ..	The Reserve Bank of India Act, 1934.
1934	VIII ..	The Khaddar (Name Protection) Act, 1934.
1934	IX ..	The Indian Finance Act, 1934.
1934	XI ..	The Indian States (Protection) Act, 1934.
1934	XIV ..	The Sugar (Excise Duty) Act, 1934.
1934	XVI ..	The Matches (Excise Duty) Act, 1934.
1934	XX ..	The Indian Carriage by Air Act, 1934.
1934	XXII ..	The Indian Aircraft Act, 1934.
1934	XXIII ..	The Mechanical Lighters (Excise Duty) Act, 1934.
1934	XXV ..	The Factories Act, 1934.
1934	XXXI ..	The Iron and Steel Duties Act, 1934.
1934	XXXII ..	The Indian Tariff Act, 1934.
1935	..	The Indian Finance Act, 1935.
1936	..	The Indian Finance Act, 1936.
1936	III ..	The Parsi Marriage and Divorce Act, 1936.
1936	IV ..	The Payment of Wages Act, 1936.
1936	XIV ..	The Geneva Convention Implementing Act, 1936.
1937	I ..	The Agricultural Produce (Grading and Marking) Act, 1937.
1937	VI ..	The Arbitration (Protocol and Convention) Act, 1937.
1937	..	The Indian Finance Act, 1937.

THE SECOND SCHEDULE

[*See* sections 2 (*1*) and 3.]

Acts partially extended to Berar.

Year.	Number.	Short title.
1843	V ..	The Indian Slavery Act, 1843.
1850	XII ..	The Public Accountants' Default Act, 1850.
1850	XXXVII ..	The Public Servants (Inquiries) Act, 1850.
1855	XXIV ..	The Penal Servitude Act, 1855.
1870	VII ..	The Court-fees Act, 1870.
1871	XXIII ..	The Pensions Act, 1871.
1881	XI ..	The Municipal Taxation Act, 1881.
1882	IV ..	The Transfer of Property Act, 1882.
1885	XIII ..	The Indian Telegraph Act, 1885.
1886	VI ..	The Births, Deaths and Marriages Registration Act, 1886.
1886	XI ..	The Indian Tramways Act, 1886.
1890	I ..	The Revenue Recovery Act, 1890.
1890	VI ..	The Charitable Endowments Act, 1890.
1890	IX ..	The Indian Railways Act, 1890.
1895	XV ..	The Crown Grants Act, 1895.
1897	III ..	The Epidemic Diseases Act, 1897.
1897	X ..	The General Clauses Act, 1897.
1897	XIV ..	The Indian Short Titles Act, 1897.
1898	VI ..	The Indian Post Office Act, 1898.
1899	II ..	The Indian Stamp Act, 1899.
1899	IV ..	The Government Buildings Act, 1899.
1913	VII ..	The Indian Companies Act, 1913.
1914	IX ..	The Local Authorities Loans Act, 1914.
1916	XV ..	The Hindu Disposition of Property Act, 1916.
1917	V ..	The Destruction of Records Act, 1917.
1918	II ..	The Cinematograph Act, 1918.
1920	X ..	The Indian Securities Act, 1920.
1920	XXXIX ..	The Indian Elections Offences and Inquiries Act, 1920.
1923	III ..	The Cotton Transport Act, 1923.
1923	XIX ..	The Indian Official Secrets Act, 1923.
1924	XIII ..	The Indian (Specified Instruments) Stamps Act, 1924.
1925	IV ..	The Indian Soldiers (Litigation) Act, 1925.
1925	XII ..	The Cotton Ginning and Pressing Factories Act, 1925.
1925	XIX ..	The Provident Funds Act, 1925.
1927	XVI ..	The Indian Forest Act, 1927.
1928	XII ..	The Hindu Inheritance (Removal of Disabilities) Act, 1928.
1929	II ..	The Hindu Law of Inheritance (Amendment) Act, 1929.
1930	XXX ..	The Hindu Gains of Learning Act, 1930.
1936	V ..	The Decrees and Orders Validating Act, 1936.

THE THIRD SCHEDULE.

[*See* section 2 (*2*).]

Acts Amended.

Name of Act.	Amendments.
The Code of Civil Procedure, 1908 (Act V of 1908).	In section 7 and in rule I of Order L in the Frst Schedule,— (*a*) after the figures "1887" the words and figures "or under the Berar Small Cause Courts Law, 1905" shall be inserted, and (*b*) for the words "under that Act" the words "under the said Act or Law" shall be substituted.

Name of Act.	Amendments.
The Indian Limitation Act, 1908 (IX of 1908).	In Article 161 of the First Schedule, the word "Provincial", in both places where it occurs, shall be omitted, and after the words "Small Causes", where they occur for the first time, the brackets and words "(other than a Presidency Small Cause Court)" shall be inserted.

THE FOURTH SCHEDULE.

[*See* section 4.]

Acts which have ceased to have effect and are repealed in Berar.

Year	Number.	Short title.
1841	XIX ..	The Succession (Property Protection) Act, 1841.
1847	XX ..	The Indian Copyright Act, 1847.
1860	IX ..	The Employers and Workmen (Disputes) Act, 1860.
1865	X ..	The Indian Succession Act, 1865.
1865	XXI ..	The Parsi Intestate Succession Act, 1865.
1881	V ..	The Probate and Administration Act, 1881.
1881	VI ..	The District Delegates Act, 1881.
1889	VII ..	The Succession Certificate Act, 1889.
1911	XII ..	The Indian Factories Act, 1911.
1912	V ..	The Provident Insurance Societies Act, 1912.
1912	VI ..	The Indian Life Assurance Companies Act, 1912.
1914	VIII ..	The Indian Motor Vehicles Act, 1914.
1919	X ..	The Excess Profits Duty Act, 1919.
1923	X ..	The Indian Paper Currency Act, 1923.
1926	XIX ..	The Indian Finance Act, 1926.
1927	V ..	The Indian Finance Act, 1927.
1928	XX ..	The Indian Insurance Companies Act, 1928.
1929	X ..	The Indian Census Act, 1929.
1933	XIII ..	The Safeguarding of Industries Act, 1933.
1935	..	The Criminal Law Amendment Act, 1935.
1936	I ..	The Italian Loans and Credits Prohibition Act, 1936.

THE ASSAM RIFLES ACT, 1941.

ACT NO V OF 1941.

[*17th March, 1941.*

An Act to provide for the regulation of and the maintenance of discipline in the Assam Rifles.

WHEREAS it is expedient to provide for the regulation of and the maintenance of discipline in the Assam Rifles;

It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE ASSAM RIFLES ACT, 1941.

(2) It extends to the whole of Assam and applies to all members of the Assam Rifles wherever they may be serving.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "active service" means service at outposts, or against hostile tribes or other persons in the field;

(2) "Commandant" or "Assistant Commandant" means a person appointed by the Central Government to be a Commandant or an Assistant Commandant of the Assam Rifles;

(3) "District Magistrate" includes a Deputy Commissioner, the Superintendent of the Lushai Hills, the Political Agent in Manipur and the Political Officer of the Sadiyai and of the Balipara Frontier Tracts;

(4) "rifleman" means a person appointed as such under section 4 after he has signed the statement in the Schedule in accordance with the provisions of sub-section (2) of section 4, and includes a rifleman appointed under the Assam Rifles Act, 1920, and a Military Police Officer appointed under the Eastern Bengal and Assam Military Police Act, 1912;

(5) "superior officer" means, in relation to any rifleman,—

(*a*) an officer of a higher class than, or of a higher grade in the same class as, himself, and

(*b*) any Assistant Commandant or Commandant;

(6) the expressions "reason to believe", "criminal force", "assault", "fraudulently" and "voluntarily causing hurt" have the meanings assigned to them respectively in the Indian Penal Code.

General superintendence and control of the force.

3. General superintendence and control of the Assam Rifles shall be exercised by such person or authority as the Central Government may appoint in this behalf, and, in the exercise of such superintendence and control, the person or authority so appointed shall be governed by such rules and orders as the Central Government may make in this behalf.

Appointment and discharge.

4. (1) The appointment of all riflemen shall rest with the Commandant.

(2) Before any person is appointed to be a rifleman, the statement in the Schedule shall be read and if necessary explained to him in the presence of a Magistrate, Commandant or Assistant Commandant and shall be signed by him in acknowledgment of its having been so read to him.

(3) A rifleman shall not be entitled to be discharged except in accordance with the terms of the statement which he has signed under this Act or under the Assam Rifles Act, 1920.

Classes and rank.

5. There may be all or any of the following classes of riflemen, who shall take rank in the order mentioned namely:—

(i) Subadars-Major.
(ii) Subadars,
(iii) Jemadars,
(iv) Havildars-Major,
(v) Havildars,
(vi) Naiks,
(vii) Buglers and riflemen;

and such grades in each class as the Central Government may from time to time direct.

Heinous offences.

6. A rifleman who—

(*a*) begins, excites, causes or joins in any mutiny or being present at any mutiny does not use his utmost endeavours to supress it, or knowing or having reason to believe in the existence of any mutiny does not without delay give information thereof to his Commanding or other superior officer; or

(*b*) uses, or attempts to use, criminal force to, or commits an assault on his superior officer, knowing or having reason to believe him to be such whether on or off duty; or

(c) shamefully abandons or delivers up any garrison, fortress, post or guard, which is committed to his charge or which it is his duty to defend; or

(d) in the presence of an enemy or of any person in arms against whom it is his duty to act, shamefully casts away his arms or his ammunition, or intentionally uses words or any other means to induce any other rifleman to abstain from acting against the enemy, or to discourage any other rifleman from acting against the enemy; or

(e) directly or indirectly holds correspondence with, or communicates intelligence to, or assists or relieves any person in arms against the State, or omits to discover immediately to his Commanding or other superior officer any such correspondence or communications coming to his knowledge; or

(f) directly or indirectly assists or relieves with money, victuals or ammunition, or knowingly harbours or protects, any enemy or person in arms against the State;

or who, while on active service,—

(g) disobeys the lawful command of his superior officer; or

(h) deserts or attempts to desert the service; or

(i) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave; or

(j) leaves his Commanding Officer, or his post or party, to go in search of plunder; or

(k) quits his guard, picquet, party or patrol without being regularly relieved or without leave; or

(l) uses criminal force to, or commits an assault on, any person bringing provisions or other necessaries to camp or quarters, or forces a safeguard, or breaks into any house or any other place for plunder, or plunders, destroys or damages any property of any kind; or

(m) intentionally causes or spreads a false alarm in action or in camp garrison or quarters;

shall be punished with transportation for life, or with imprisonment which may extend to fourteen years, or with fine which may extend to five hundred rupees, or with both such imprisonment and fine.

Other offences including acts prejudicial to good order and discipline.

7. A rifleman who—

(a) is in a state of intoxication when on or detailed for any duty, or on parade, or on the line of march; or

(b) strikes, or forces or attempts to force, any sentry; or

(c) being in command of a guard, picquet or patrol, refuses to receive any prisoner duly committed to his charge, or, whether in such command or not, releases any prisoner without proper authority or negligently suffers any prisoner to escape; or

(d) being deputed to any guard, picquet or patrol, quits it without being regularly relieved or without leave; or

(e) being in command of a guard, picquet or patrol, permits gambling or other behaviour prejudicial to good order and discipline; or

(f) being under arrest or in confinement, leaves his arrest or confinement before he is set at liberty by proper authority; or

(g) is grossly insubordinate or insolent to his superior officer in the execution of his office; or

(h) refuses to superintend or assist in the making of any field work or other military work of any description ordered to be made either in quarters or in the field; or

(*i*) strikes or otherwise ill-uses any rifleman subordinate to him in rank or position; or

(*j*) being in command at any post or on the march and receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person, or has committed any riot or trespass, fails, on proof of the truth of the complaint, to have due reparation made as far as possible to the injured person and to report the case to the proper authority; or

(*k*) designedly or through neglect injures or loses or fraudulently or without due authority disposes of his arms, clothes, tools, equipment, ammunition, accoutrements or other necessaries, or any such articles entrusted to him or belonging to any other person; or

(*l*) malingers, feigns or produces disease or infirmity in himself, or intentionally delays his cure, or aggravates his disease or infirmity; or

(*m*) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person; or

(*n*) commits extortion, or without proper authority exacts from any person carriage, porterage, or provisions; or

(*o*) designedly or through neglect kills, injures, makes away with, ill-treats or loses his horse, or any animal used in the public service;

or who, while not on active service,—

(*p*) disobeys the lawful command of his superior officer; or

(*q*) plunders, destroys or damages any property of any kind; or

(*r*) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave; or

(*s*) deserts or attempts to desert the service; or

(*t*) neglects to obey any battalion or other orders, or commits any act or omission prejudicial to good order and discipline, such act or omission not constituting an offence under the Indian Penal Code or other Act in force in Assam,

shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two hundred rupees, or with both.

Minor offences and punishments.

8. (1) A District Magistrate or a Commandant, or subject to the control of the Commandant, an Assistant Commandant, or subject to the control of the Commandant an officer not below the rank of a Jemadar commanding a separate detachment or an outpost or in temporary command at the headquarters of a District during the absence of the District Magistrate, Commandant and Assistant Commandant, may, without a formal trial, award to any rifleman below the rank of a Naik, who is subject to his authority, any of the following punishments for the Commission of any petty offence against discipline, which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to call for prosecution before a criminal Court, that is to say,—

(*a*) imprisonment in the Quarter Guard, or such other place as may be considered suitable, for a term which may extend to twenty-eight days when the order is passed by a District Magistrate or a Commandant or to seven days when it is passed by any other officer;

(*b*) punishment drill, extra guard, fatigue or other duty, not exceeding twenty-eight days in duration, with or without confinement to lines;

(*c*) forfeiture of pay and allowances for a period not exceeding twenty-eight days.

(2) Any of the punishments specified in sub-section (1) may be awarded separately or in combination with any one or more of the others, but no award or awards including imprisonment and confinement to lines shall exceed twenty-eight consecutive days.

Manner of imprisonment.

9. Any rifleman sentenced under this Act to imprisonment for a period not exceeding three months shall, when he is also dismissed from the Assam Rifles, be imprisoned in a civil jail, but when he is not also dismissed from the Assam Rifles he may, if the convicting Court or the District Magistrate so directs, be confined in the Quarter Guard or such other place as the Court or Magistrate may consider suitable.

Privileges of Commandants and Assistant Commandants.

10. A Commandant or Assistant Commandant shall be entitled to all the privileges which a police officer has under sections 42 and 43 of the Police Act, 1861, section 125 of the Indian Evidence Act, 1872, and any other enactment for the time being in force.

Members of the Assam Rifles to be deemed part of His Majesty's Army for certain purposes.

11. For the purposes of sections 128, 130 and 131 of the Code of Criminal Procedure, 1898, a Commandant, Assistant Commandant, Subadar-Major, Subadar or Jemadar of the Assam Rifles shall be deemed to be an officer, a Havildar-Major, Havildar or Naik shall be deemed to be a non-commissioned officer and a bugler or rifleman shall be deemed to be a soldier of His Majesty's Army,

Power of Central Government to make rules.

12. The Central Government may, as regards the Assam Rifles, make such orders and rules consistent with this Act, as it thinks expedient, relative to the several matters respecting which the Inspector General of Police, with the approval of the Provincial Government, may, as regards the Police Force, frame orders and rules under section 12 of the Police Act, 1861.

Cesser of Assam Act I of 1920 and of appointment of riflemen as police officers.

13. The Assam Rifles Act, 1920, shall cease to apply to the Assam Rifles and to riflemen, and all riflemen shall, on the commencement of this Act, cease to be police officers under the Police Act, 1861.

THE SCHEDULE.

STATEMENT.

[*See* sections 2 (4) and 4 (2).]

1. After you have served for four years in the first instance in the Assam Rifles you have the option of extending the term of your service in the Assam Rifles indefinitely, so long as the Commandant is satisfied with your services, or of claiming your discharge at any time, making your application through the officer to whom you may be subordinate, to a Commandant of the Assam Rifles or to the Magistrate of the District in which you may be serving; and you will be granted your discharge after two months from the date of your application, unless you are on active service or unless your discharge would cause the vacancies in the Assam Rifles to exceed one-tenth of the sanctioned strength. In either of the above cases you must continue to serve in the Assam Rifles until the objection is waived by competent authority or removed.

2. On your enlistment. appointment or training as a musician (piper, drummer, or bandsman), bugler, signaller, writer, soldier-clerk, havildar-compounder or as an artificer (armourer, mochi, carpenter, stone-mason, or motor driver) you must, in spite of the provisions of paragraph 1 above, serve in the Assam Rifles for eight years from the date of your enlistment or the completion of your training, as the case may be.

3. On your deputation for a specialist course at an Army Training Centre you must sign an undertaking, before leaving the battalion to proceed on the course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the four years following your attendance at the Army Training Course.

4. On your deputation to the Educational or Veterinary Course you must sign an undertaking, before leaving the battalion to proceed on the Course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the eight years following your attendance at the Course.

5. In the event of your re-enlistment after you have been discharged, you will have no claim to reckon for pension or any other purpose your service previous to your discharge.

Signature of rifleman in acknowledgment of the above having been read to him. ....

A. B.

Signed in my presence after I had ascertained that A. B. understood the purport of what he signed. ....

C. D.

Magistrate, Commandant or Assistant Commandant.

THE INDIAN RAILWAYS (AMENDMENT) ACT, 1941.

ACT No. VI of 1941.

[*17th March, 1941.*

An Act further to amend the Indian Raliways Act, 1890.

WHEREAS it is expedient further to amend the Indian Railways Act, 1890, for the purposes hereinafter appearing;

It is hereby enacted as follows;—

Short title.

1. This Act may be called THE INDIAN RAILWAYS (AMENDMENT) ACT, 1941.

Amendment of section 68, Act IX of 1890.

2. (1) Section 68 of the Indian Railways Act, 1890 (hereinafter referred to as the said Act), shall be renumbered as sub-section (1) of that section and in the said section as so re-numbered after the word "enter" the words "or remain in" shall be inserted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added namely:—

"(2) A railway servant when granting the permission referred to in sub-section (1) shall ordinarily, if empowered in this behalf by the railway administration, grant to the passenger a certificate that the passenger has been permitted to travel in such carriage upon condition that he subsequently pays the fare payable for the distance to be travelled."

Amendment of section 112, Act IX of 1890.

3. (1) Section 112 of the said Act shall be re-numbered as sub-section (1) of that section and in the sub-section as so re-numbered—

(*a*) in clause (*a*), for the words and figures "in contravention of section 68 any carriage on a railway" the words and figures "or remains in any carriage on a railway in contravention of section 68" shall be substituted; and

(*b*) after the words "shall be punished" the words "with imprisonment for a term which may extend to three months or" shall be inserted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added, namely:—

"(2) Notwithstanding anything contained in section 65 of the Indian Penal Code, the Court convicting an offender under this section may direct that the offender in default of payment of any fine inflicted by the Court, shall suffer imprisonment for a term which may extend to three months."

Amendment of section 113, Act IX of 1890.

4. In section 113 of the said Act,—

(*a*) for sub-section (3) the following sub-section shall be substituted namely:—

"(3) The excess charge referred to in sub-section (1) and sub-section (2) shall be a sum equivalent to the amount otherwise payable under those sub-sections, or eight annas, whichever is greater:

Provided that where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge shall be one-sixth of the excess charge otherwise payable calculated to the nearest anna, or two annas, whichever is greater:

Provided further that if the passenger has with him a certificate granted under sub-section (2) of section 68, no excess charge shall be payable.";

(*b*) in sub-section (4), for the words beginning with "the sum payable by him shall" and ending with "be paid to the railway administration" the following words shall be substituted, namely:—

"any railway servant appointed by the railway administration in this behalf may apply to any Magistrate of the first or second class for the recovery of the sum payable as if it were a fine, and the Magistrate if satisfied that the sum is payable shall order it to be so recovered, and may order that the person liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month. Any sum recovered under this sub-section shall, as it is recovered, be paid to the railway administration".

Insertion of new section 113-A in Act IX of 1890.

5. After section 113 of the said Act the following section shall be inserted, namely:—

Power to remove persons from railway carriage.

"113-A. Any person who, without having obtained the permission of a railway servant, travels or attempts to travel in a carriage without having a proper pass or ticket with him, or in a carriage of a higher class than that for which he has obtained a pass or purchased a ticket, or in a carriage beyond the place authorised by his pass or ticket, or who being in a carriage fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under section 69, may be removed from the carriage by any railway servant authorised by the railway administration in this behalf or by any other person whom such railway servant may call to his aid, unless he then and there pays the fare and the excess charge which he is liable to pay under section 113:

Provided that nothing in this section shall be deemed to preclude a person removed from a carriage of a higher class from continuing his journey in a carriage of a class for which he holds a pass or ticket:

Provided further that women and children, if unaccompanied by male passengers shall not be so removed except either at the station at which they first enter the train or at a junction or terminal station or station at the headquarters of a civil district and only between the hours of 6 A.M. and 6 P.M."

THE INDIAN FINANCE ACT, 1941.

ACT No. VII OF 1941.

[*31st March, 1941.*

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1941.

(2) It extends to the whole of British India.

Fixation of Salt Duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1941, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Excise Duty on Matches.

3. For section 4 of the Matches (Excise Duty) Act, 1934, the following section shall be substituted, namely:—

"4. The duty payable under section 3 shall be levied at the following rates, namely:—

(*a*) on matches in boxes or booklets containing on an average not more than eighty—

(*i*) if the average number is forty or less, at the rate of two rupees per gross of boxes or booklets,

(*ii*) if the average number is more than forty, but not more than sixty, at the rate of three rupees per gross of boxes or booklets, and

(*iii*) if the average number is more than sixty, at the rate of four rupees per gross of boxes or booklets;

(*b*) on all other matches, at such rate as the Central Government may prescribe."

Excise Duty on Mechanical Lighters.

4. In section 3 of the Mechanical Lighters (Excise Duty) Act, 1934, for the words "one rupee and eight annas" the words "three rupees" shall be substituted.

Import Duty on Artificial Silk Yarn and Thread.

5. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 47 (2), for the entry "25 per cent. *ad valorem* or 3 annas per lb., whichever is higher" in the fourth column, the following entry shall be substituted, namely:—

"25 per cent. *ad valorem* or 5 annas per lb., whichever is higher."

Inland Postage rates.

6. For the year beginning on the 1st day of April, 1941, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and Super-tax.

7. (1) Subject to the provisions of sub-sections (2) and (3)—

(*a*) income-tax for the year beginning on the 1st day of April, 1941, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate;

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1941, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939, increased—

(*i*) in the case of the rate applicable to a company, by a surcharge amounting to one-third of that rate, and

(*ii*) in the case of every other rate, by a surcharge for the purposes of the Central Government amounting to one-third of each such rate:

Provided that in the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1941, shall be the rates of super-tax specified in the proviso to clause (*b*) of sub-section (1) of section 7 of the Indian Finance Act, 1940, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate.

(2) In making any assessment for the year ending on the 31st day of March, 1942,—

(*a*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income;

(*b*) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922, the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1940, read with sub-section (1) of section 3 of the Indian Finance (No. 2) Act, 1940, on his total income the same proportion as the amount of such inclusions bears to his total income.

(3) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-section (2) of this section where applicable.

(4) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

Continuance of and rate of Excess Profits Tax.

8. (1) In sub-clause (*a*) of clause (6) of section 2 of the Excess Profits Tax Act, 1940, for the words and figures "31st day of March, 1941," the words and figures "31st day of March, 1942," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1941, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 6.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

(*See* section 7.)

Letters.

For a weight not exceeding one tola	One and a quarter annas.
For every tola, or fraction thereof, exceeding one tola	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first five tolas or fraction thereof	Nine pies.
For every additional two and a half tolas, or fraction thereof, in excess of five tolas.	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas.	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas.	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas.	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	

Parcels.

For a weight not exceeding forty tolas	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas.	Four annas."

THE PROTECTIVE DUTIES CONTINUATION ACT, 1941.

ACT NO. VIII OF 1941.

[*31st March, 1941.*

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect.

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect;

It is hereby enacted as follows:—

Short title. 1. This Act may be called THE PROTECTIVE DUTIES CONTINUATION ACT, 1941.

Amendment of the First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 17, and in Item No. 61 (5), and in Items Nos. 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25) and 63 (27), and in Item No. 74, for the entry or entries in the seventh column "March 31, 1941" the entry or entries "March 31st, 1942" shall be substituted.

Amendment of section 3, Act XIII of 1932.

3. In section 3 of the Sugar Industry (Protection) Act, 1932, for the figure "1941" the figure "1942" shall be substituted.

THE INDIAN TARIFF (AMENDMENT) ACT, 1941.

ACT No. IX OF 1941.

[*31st March, 1941.*]

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1941.

Amendments of the First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in Items Nos. 10 (1) and 11 (1), in the last column, for the figure "1941" the figure "1942" shall be substituted.

THE TYRES (EXCISE DUTY) ACT, 1941.

ACT No. X OF 1941.

[*31st March, 1941.*]

An Act to provide for the imposition and collection of an excise duty on tyres.

WHEREAS it is expedient to provide for the imposition and collection of an excise duty on tyres;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE TYRES (EXCISE DUTY) ACT, 1941.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "manufactory" means any premises wherein tyres are manufactured;

(*b*) "owner" includes any person expressly or impliedly authorised by an owner of a manufactory to be his agent in respect of the manufactory;

(*c*) "tyre" means a pneumatic tyre in the manufacture of which rubber is used, and includes the inner tube and the outer cover of such a tyre.

Imposition of and amount of duty.

3. (1) A duty of excise at the rate of ten per cent. on the value thereof shall be levied on all tyres manufactured in any manufactory in British India and issued out of such manufactory on or after the 1st day of April, 1941, and shall be payable by the owner of the manufactory.

(2) For the purposes of levying the duty imposed by sub-section (1) the Central Government may, by notification in the official Gazette, fix the values of tyres or of any class of tyres; and where no such value has been fixed the value of a tyre shall be deemed to be the wholesale cash price, less trade discount, for which a tyre of the like kind and quality is sold or is capable of being sold by a manufactory without any abatement or deduction whatever except the amount of the excise duty payable on it at the time of issue out of the manufactory.

Recovery of duty with penalty.

4. (1) If any duty payable under section 3 is not paid within the time fixed by a notice issued in accordance with any rules made in this behalf under this Act, it shall be deemed to be an arrear, and the authority to which such duty is payable may, in lieu thereof, recover any sum, not exceeding double the amount of the duty unpaid, which such authority may in its discretion think it reasonable to require.

(2) An arrear of duty, or any sum recoverable in lieu thereof under this section, shall be recoverable as an arrear of land-revenue and shall be recoverable in addition to, and not in substitution for, any other penalty incurred under this Act.

Issue from manufactory.

5. (1) No person shall issue any tyres out of any manufactory except in accordance with the provisions of rules made under section 8 regulating such issue, or, until such rules are made, in accordance with the general or special orders of the Central Government.

(2) Whoever contravenes any such rule or order shall be punishable with fine which may extend to one thousand rupees or to a sum double the amount of the duty on any tyres issued in contravention of such rule or order, whichever is greater.

Application of the provisions of Act VIII of 1878 to the duty on tyres.

6. The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duty imposed by sub-section (1) of section 3.

Power of Central Government to prohibit import.

7. The Central Government may, by notification in the official Gazette, prohibit absolutely, or with such exceptions as it thinks fit, the bringing of tyres into British India from the territory of any specified Indian State.

Power to make rules.

8. (1) The Central Government may, by notification in the official Gazette, make rules—

(*a*) imposing on owners of manufactories the duty of furnishing returns and keeping records and books, and prescribing the form of such returns, records and books and the particulars to be contained therein, and the manner in which the same are to be verified;

(*b*) regulating the issue of tyres out of manufactories;

(*c*) providing for the assessment and collection of the duty, the issue of notices requiring payment, the authority to whom the duty shall be payable and the recovery of arrears;

(*d*) authorising and providing for the inspection of manufactories; and

(*e*) generally for carrying into effect the provisions of this Act.

(2) Such rules may provide that any breach thereof shall be punishable with fine which may extend to five hundred rupees:

Provided that the breach of any rule made under clause (*b*) of sub-section (1) shall be punishable with the punishment provided for an offence against section 5.

THE EXCESS PROFITS TAX (AMENDMENT) ACT, 1941.

ACT NO. XI OF 1941.

[*31st March, 1941.*

An Act further to amend the Excess Profits Tax Act, 1940.

WHEREAS it is expedient further to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE EXCESS PROFITS TAX (AMENDMENT) ACT, 1941.

Amendment of section 2, Act XV of 1940.

2. In section 2 of the Excess Profits Tax Act, 1940 (hereinafter referred to as the said Act), after clause (16) the following clause shall be inserted, namely:—

"(16-A) 'ordinary share capital' has the meaning assigned to that expression in sub-section (8) of section 9;"

Amendment of section 4, Act XV of 1940.

3. Section 4 of the said Act shall be re-numbered as sub-section (1) of that section, and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) Where a chargeable accounting period falls partly before and partly after the end of March, 1941, the foregoing provisions of this section shall apply as if so much of that chargeable accounting period as falls before, and so much of that chargeable accounting period as falls after, the said end of March were each a separate chargeable accounting period, and as if the excess of profits of that separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period; and any apportionment required to be made by this sub-section shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period."

Amendment of section 7, Act XV of 1940.

4. To section 7 of the said Act the following provisoes shall be added, namely:—

"Provided that a deficiency of profits occurring in a chargeable accounting period beginning on or after the 1st day of April, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period beginning on or after the said 1st day of April, and a deficiency of profits occurring in a chargeable accounting period ending on or before the 31st day of March, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period ending on or before the said 31st day of March; and where owing to an insufficiency of profits for chargeable accounting periods ending on or before the said 31st day of March, or, as the case may be, beginning on or after the said 1st day of April, the whole or any part of the deficiency is applied otherwise than as aforesaid,—

(*a*) the application shall be treated as provisional only; and

(*b*) if it thereafter appears that there is no longer such an insufficiency as aforesaid, such adjustment shall be made as the Central Board of Revenue may by written order direct;

Provided further that where a chargeable accounting period falls partly before and partly after the end of March, 1941, the provisions of the preceding proviso shall apply as if so much of the chargeable accounting period as falls before, and so much of the chargeable accounting period as falls after, the said end of March, were each a separate chargeable accounting period, and as if the deficiency of profits of that separate chargeable accounting period were an apportioned part of the deficiency of profits occurring in the whole period; and any apportionment required to be made by this proviso shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period."

Amendment of section 17, Act XV of 1940.

5. In sub-section (1) of section 17 of the said Act,—

(*a*) in the first proviso, for the words "first proviso" the words "second proviso" shall be substituted;

(*b*) in the second proviso, for the word "modifications" the following words shall be substituted, namely:—

"refusal to make modifications or against any modifications."

Amendment of rule 1, First Schedule, Act XV of 1940.

6. In the first proviso to rule 1 of the First Schedule to the said Act, after the words "Provided that any sums" the brackets and words "(other than any interest paid by a firm to a partner of the firm)" shall be inserted and shall be deemed always to have been inserted.

THE DELHI RESTRICTION OF USES OF LAND ACT, 1941.

ACT No. XII OF 1941,

[*8th April, 1941.*

An Act to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes.

WHEREAS it is expedient to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE DELHI RESTRICTION OF USES OF LAND ACT, 1941.

(2) It extends to the Province of Delhi.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "agriculture" includes horticulture and the planting and upkeep of orchards;

(2) "building" has the same meaning as in clause (2) of section 3 of the Punjab Municipal Act, 1911;

(3) "Chief Commissioner" means the Chief Commissioner of Delhi;

(4) "Deputy Commissioner" means the Deputy Commissioner of Delhi and includes any authority, not being an officer employed by the Delhi Improvement Trust, appointed by the Chief Commissioner, by notification in the official Gazette, to perform all or any of the functions of the Deputy Commissioner under this Act;

(5) "place of worship" includes an *imambara, dargah, karbala* or *takya*;

(6) "prescribed" means prescribed by rules made under this Act;

(7) "road" means a metalled road maintained by the Central Government or by a local authority; and

(8) the expression "to erect or re-erect" in relation to any building has the same meaning as in clause (5) of section 3 of the Punjab Municipal Act, 1911.

Declaration of controlled area.

3. (1) The Chief Commissioner may, with the previous sanction of the Central Government, by notification in the official Gazette, declare any land adjacent to and within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(2) Not less than three months before making a declaration under sub-section (1) the Chief Commissioner shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that he proposes, with the previous sanction of the Central Government, to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made, and copies of every such notification or of the substance thereof shall be published by the Deputy Commissioner in such manner as he thinks fit at his office and in every revenue estate of which any part is included within the said boundaries.

(3) Any person interested in any land included within the said boundaries may, at any time before the expiration of thirty days from the last date on which a copy of such notification is published by the Deputy Commissioner, object to the making of the declaration or to the inclusion of his land or any part of it within the said boundaries.

(4) Every objection under sub-section (3) shall be made to the Deputy Commissioner in writing, and the Deputy Commissioner shall give to every person so objecting an opportunity of being heard either in person or by pleader, and shall after all such objections have been heard and after such further enquiry, if any, as he thinks necessary, forward to the Chief Commissioner the record of the proceedings held by him together with a report setting forth his recommendations on the objections.

(5) If before the expiration of the time allowed by sub-section (3) for the filing of objections no objection has been made, the Chief Commissioner may proceed at once to the making of a declaration under sub-section (1). If any such objections have been made, the Chief Commissioner shall consider the record and the report referred to in sub-section (4) and shall hear any parties applying to be heard and may either—

(*a*) abandon the proposal to make a declaration under sub-section (1), or

(*b*) make such a declaration in respect of either the whole or a part or parts of the land included within the boundaries specified in the notification under sub-section (2).

(6) For the purposes of sub-section (3) a person shall be deemed to be interested in land if he is a "person interested" as defined in clause (*b*) of section 3 of the Land Acquisition Act, 1894, for the purposes of that Act or, where the land is land occupied by or for the purposes of a mosque, *imambara, dargah, karbala, takya* or Muslim graveyard, if he is a Muslim.

(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

Plans of controlled areas to be deposited at certain offices.

4. (1) The Deputy Commissioner shall deposit at his office and at the office of the Municipal Committee, New Delhi, and at such other places as he considers necessary, plans showing all lands declared to be controlled areas for the purposes of this Act, and setting forth the nature of the restrictions applicable to the land in any such controlled area.

(2) The plans so deposited shall be available for inspection by the public free of charge at all reasonable times.

Restrictions on building, etc., in a controlled area.

5. No person shall erect or re-erect any building, or make or extend any excavation, or lay out any means of access to a road in a controlled area except with the previous permission of the Deputy Commissioner in writing.

Application for permission to build, etc., and the grant or refusal of such permission.

6. (1) Every person desiring to obtain the permission referred to in section 5 shall make an application in writing to the Deputy Commissioner in such form and containing such information in respect of the building, excavation or means of access to which the application relates as may be prescribed.

(2) On receipt of such application the Deputy Commissioner, after making such enquiry as he considers necessary, shall, by order in writing, either—

(*a*) grant the permission, subject to such conditions, if any, as may be specified in the order; or

(*b*) refuse to grant such permission.

(3) When the Deputy Commissioner grants permission subject to conditions under clause (*a*) of sub-section (2) or refuses to grant permission under clause (*b*) of sub-section (2), the conditions imposed or the grounds of refusal shall be such as are reasonable having regard to the circumstances of each case.

(4) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building, not being a dwelling house, if such building is required for purposes subservient to agriculture, nor shall the permission to erect or re-erect any such building be made subject to any conditions other than those which may be necessary to ensure that the building will be used solely for the purposes specified in the application for permission.

(5) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building which was in existence on the date on which the declaration under sub-section (1) of section 3 was made, nor shall he impose any conditions in respect of such erection or re-erection unless it involves the addition of one or more storeys to the building or the extension of the plinth area of the building by more than one-eighth of the original plinth area, or there is a probability that the building will be used for a purpose other than that for which it was used on the date on which the said declaration was made.

(6) If at the expiration of a period of three months after an application under sub-section (1) has been made to the Deputy Commissioner no order in writing has been passed by the Deputy Commissioner permission shall be deemed to have been given without the imposition of any conditions.

(7) The Deputy Commissioner shall maintain a register with sufficient particulars of all permissions given by him under this section and the register shall be available for inspection without charge by all persons interested and such persons shall be entitled to take extracts therefrom.

Right of appeal.

7. (1) Any person aggrieved by an order of the Deputy Commissioner under sub-section (2) of section 6 granting permission subject to conditions or refusing permission may within thirty days from the date of such order prefer an appeal to the Chief Commissioner.

(2) The order of the Chief Commissioner on appeal shall be final.

Compensation.

8. (1) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by an order—

(*a*) refusing permission to make or extend an excavation, or granting such permission but imposing conditions on the grant, or

(*b*) refusing permission to lay out a means of access to a road, or granting such permission but imposing conditions on the grant, or

(*c*) granting permission to erect or re-erect a building but imposing conditions on the grant.

(2) When an order has been made refusing permission to erect or re-erect a building any person who has exercised the right of appeal given by sub-section (1) of section 7 may, within three months of the date of the order of the Chief Commissioner, make to the Chief Commissioner a claim for compensation on the ground that his interest in the land concerned is injuriously affected by the said order:

Provided that no claim for compensation may be made under this sub-section in respect of any land situated in a controlled area adjoining a road which has been constructed after the commencement of this Act or which was not at the commencement of this Act a road within the meaning of clause (4) of section 2.

(3) On receipt of a claim under sub-section (2) the Chief Commissioner shall either proceed to acquire the land concerned under the Land Acquisition Act, 1894, or transfer the claim for disposal to an officer exercising the powers of a Collector under the said Act:

Provided that in case the Chief Commissioner decides to acquire the land, the claimant shall be entitled to be repaid by the acquiring authority the amount of expense which he may have properly incurred in connection with the preparation and submission of his claim for compensation under this section, and in default of agreement such amount shall be determined by the authority deciding the value of the land in the proceedings under the Land Acquisition Act, 1894.

(4) Nothing in this section shall be deemed to preclude the settlement of a claim by mutual agreement.

Compulsory acquisition.

9. If the Chief Commissioner decides to acquire the land under the Land Acquisition Act, 1894, then, notwithstanding anything contained in that Act,—

(*i*) proceedings under section 5-A of that Act shall not be required;

(*ii*) the notification under section 6 of that Act shall be published within six months from the date of institution of the claim, failing which the claim shall be transferred for disposal to an officer exercising the powers of a Collector under that Act;

(*iii*) the market value of the land shall be assessed as though no declaration under section 3 (1) had been made in respect of the area in which it is situated and no restrictions upon its use and development had been imposed, any compensation already paid to the claimant or to any of his predecessors in interest for injurious affection being deducted from the market value as so assessed.

Amount of compensation how determined.

10. (1) When a claim is transferred for disposal under section 8 or section 9 to an officer exercising the powers of a Collector under the Land Acquisition Act, 1894, such officer shall make an award determining the amount of compensation, if any, payable to the claimant.

(2) The amount of compensation awarded under sub-section (1) shall in no case exceed—

(*a*) the amount that would have been payable if the land had been acquired under section 9 or

(*b*) the difference between the market value of the land in its existing condition having regard to the restrictions actually imposed upon its use and development by the order refusing permission to erect or re-erect a building thereon, and its market value immediately before the publication under sub-section (2) of section 3 of the notification in pursuance of which the area in which it is situated was declared to be a controlled area,

and no compensation shall be awarded under sub-section (1)—

(*i*) unless the claimant satisfies the officer making the award that proposals for the development of the land which at the date of the application under sub-section (1) of section 6 are immediately practicable, or would have been so, if this Act had not been passed, are prevented or injuriously affected by the restrictions imposed under this Act, or

(*ii*) if and in so far as the land is subject to substantially similar restrictions in force under some other enactment which were so in force at the date when the restrictions were imposed under this Act; or

(*iii*) if compensation in respect of the same restrictions in force under this Act or of substantially similar restrictions in force under some other enactment has already been paid in respect of the land to the claimant or to any predecessor in interest of the claimant.

(3) The provisions of Parts III, IV, V and VIII of the Land Acquisition Act, 1894, shall so far as may be apply to an award made under sub-section (1) as though it were an award made under that Act.

Saving for other enactments.

11. Nothing in this Act shall affect the power of any authority to acquire land or to impose restrictions upon the use and development of land under any other enactment for the time being in force.

Prohibition of use of any land as a brick-field, etc., without a licence.

12. (1) No land within a controlled area shall be used for the purposes of a charcoal-kiln, pottery-kiln or lime-kiln and no land either within or outside a controlled area shall be used for the purposes of a brick-field or brick-kiln except under, and in accordance with the conditions of, a licence from the Chief Commissioner which shall be renewable annually.

(2) The Chief Commissioner may charge such fees for the grant and renewal of such licences and may impose such conditions in respect thereof as may be prescribed.

(3) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by the refusal of a licence under sub-section (1).

Offences and penalties.

13. (1) Any person who—

(*a*) erects or re-erects any building or makes or extends any excavation or lays out any means of access to a road in contravention of the provisions of section 5 or in contravention of any conditions imposed by an order under section 6 or section 7, or

(*b*) uses any land in contravention of the provisions of sub-section (1) of section 12,

shall be punishable with fine which may extend to five hundred rupees and, in the case of a continuing contravention, with a further fine which may extend to fifty rupees for every day after the date of the first conviction during which he is proved to have persisted in the contravention.

(2) Without prejudice to the provisions of sub-section (1), the Deputy Commissioner may order any person who has committed a breach of the provisions of the said sub-section to restore to its original state or to bring into conformity with the conditions which have been violated, as the case may be, any building or land in respect of which a contravention such as is described in the

said sub-section has been committed, and if such person fails to do so within three months of the order may himself take such measures as may appear to him to be necessary to give effect to the order, and the cost of such measures shall be recoverable from such person as an arrear of land revenue.

Trial of offences.

14. No Court inferior to that of a Magistrate of the first class shall try any offence punishable under this Act.

Protection of persons acting under this Act.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Savings.

16. Nothing in this Act shall apply to—

(*a*) the erection or re-erection of buildings upon land included in the inhabited site of any village as defined in the revenue records;

(*b*) the erection or re-erection of a place of worship or a tomb or cenotaph or of a wall enclosing a graveyard, place of worship, cenotaph or *samadhi* on land which is at the time a notification under sub-section (2) of section 3 is published by the Chief Commissioner occupied by or for the purposes of such place of worship, tomb, *samadhi*, cenotaph or graveyard;

(*c*) excavations (including wells) made in the ordinary course of agricultural operations;

(*d*) the construction of an unmetalled road intended to give access to land solely for agricultural purposes.

Power to make rules.

17. (1) The Chief Commissioner may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(*a*) the form in which applications under sub-section (1) of section 6 shall be made and the information to be furnished in such applications;

(*b*) the regulation of the laying out of means of access to roads;

(*c*) the fees to be charged for the grant and renewal of licences under section 12 and the conditions governing such licences.

(3) All rules made under this section shall be subject to the condition of previous publication, which publication shall be made in the official Gazette and in at least two newspapers printed in a language other than English; and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than two months from the date on which the draft of the proposed rules was published.

THE INSURANCE (AMENDMENT) ACT, 1941.

ACT No. XIII OF 1941.

[*8th April, 1941.*

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INSURANCE (AMENDMENT) ACT, 1941.

Amendment of section 2, Act IV of 1938.

2. In section 2 of the Insurance Act, 1938 (hereinafter referred to as the said Act),—

(*a*) In clause (5), for the words "an insurer" the words "an insurer or a provident society as defined in Part III", and for the words "the insurer" the words "such insurer or provident society" shall be substituted;

(*b*) in clause (9), for the words "to which the provisions of Part III apply" the words "as defined in Part III" shall be substituted.

Amendment of section 3, Act IV of 1938.

3. In section 3 of the said Act,—

(*a*) in the proviso to sub-section (1), for the words, brackets and figures "the expiry of one month from the commencement of the Insurance (Amendment) Act, 1940" the words "such date as may be fixed in this behalf by the Central Government by notification in the official Gazette" shall be substituted;

(*b*) in clause (*g*) of sub-section (2), for the word "one" the word "five" shall be substituted;

(*c*) in sub-section (4), to clause (*d*) the word "or" shall be added, and after clause (*d*) the following clause and words shall be added, namely:—

"(*e*) if, in the case of an insurer specified in sub-clause (*c*) of clause (9) of section 2, the standing contract referred to in that sub-clause is cancelled or is suspended and continues to be suspended for a period of six months,

and the Superintendent of Insurance may cancel the registration of an insurer if the insurer has failed to have the registration renewed";

(*d*) in sub-section (5), after the words, brackets, letter and figure "clause (*a*) of sub-section (4)" the words, brackets, letter and figure "clause (*e*) of sub-section (4), or because the insurer has failed to have the registration renewed" shall be inserted;

(*e*) in sub-section (5-*C*), after the word, brackets and figure "sub-section (4)" the words, brackets, letter and figure "clause (*e*) of sub-section (4), or because the insurer has failed to have his registration renewed" and after the word and figures "section 98" the words, brackets, figures and letter "or has his standing contract restored or has had an application under sub-section (4) of section 3-A accepted" shall be inserted.

Insertion of new section 3-A in Act IV of 1938.

4. After section 3 of the said Act the following section shall be inserted, namely:—

Renewal of Registration.

" 3-A. (1) An insurer who has been granted a certificate of registration under section 3 shall have the registration renewed annually for each year after that ending on the 31st day of December, 1941.

(2) An application for the renewal of a registration for any year shall be made by the insurer to the Superintendent of Insurance before the 31st day of December of the preceding year, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed one thousand rupees for each class of insurance business, but may vary according to the volume of business done by the insurer in India in each class of insurance business to which the registration relates.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(4) If an insurer fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as an application to the Court under sub-section (5-*D*) of section 3 has not been made, accept an application for renewal of the registration on receipt from the insurer of the fee payable with the application and such penalty, not exceeding

he prescribed fee payable by him, as the Superintendent of Insurance may require:

Provided that an appeal shall lie to the Central Government from an order passed by the Superintendent of Insurance imposing a penalty on the insurer.

(5) The Superintendent of Insurance shall, on fulfilment by the insurer of the requirements of this section, renew the registration and grant him a certificate of renewal of registration."

Amendment of section 4, Act IV of 1938.

5. In section 4 of the said Act,—

(*a*) in sub-section (1), for the words " a provident society to which Part III" the words "a provident society as defined in Part III" shall be substituted;

(*b*) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) Nothing contained in this section shall apply to any policy of the description known as a group policy, where the number of persons covered by the policy is not less than fifty or such smaller number as may be approved by the Superintendent of Insurance and a standard form of the policy has been certified in writing by the Superintendent of Insurance to be a policy of such description."

Amendment of section 5, Act IV of 1938.

6. In sub-section (3) of section 5 of the said Act, for the words "to which Part III applies" the words "as defined in Part III" shall be substituted.

Amendment of section 7, Act IV of 1938.

7. In sub-section (9-*A*) of section 7 of the said Act, after clause (*b*) the following words shall be added, namely:—

"and may charge the normal commission on such sale or on such investment."

Amendment of section 10, Act IV of 1938.

8. In section 10 of the said Act,—

(*a*) to sub-section (1) the following words, brackets and letters shall be added, namely:—

"and where the insurer carries on business of the class specified in clause (*d*) of that sub-section whether alone or in conjunction with business of another class, he shall, unless the Superintendent of Insurance waives this requirement in writing, keep a separate account of all receipts and payments in respect of each such sub-class of the class specified in clause (*d*) as may be prescribed in this behalf:

Provided that no sub-class of the class of insurance business specified in clause (*d*) of sub-section (1) of section 7 shall be prescribed under this sub-section if the insurance business comprised in the sub-class consists of insurance contracts which are terminable by the insurer at intervals not exceeding twelve months and under which, if a claim arises, the insurer's liability to pay benefit ceases within one year of the date on which the claim arose.";

(*b*) in sub-section (2), for the words "the excess of receipts over payments in respect of such business" the following words shall be substituted, namely:—

"all receipts due in respect of such business";

(*c*) in sub-section (3), the words and figures "save as provided in section 49" shall be omitted, and for the words "other than those of life insurance" the words "other than those of the life insurance business of the insurer" shall be substituted.

Amendment of section 11, Act IV of 1938.

9. In section 11 of the said Act,—

(a) in clause (c) of sub-section (1),—

(i) for the words "in respect of each class of insurance business carried on by him" the words, brackets and figures "in respect of each class or sub-class of insurance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments" shall be substituted; and

(ii) for the words "that class of insurance business" the words "that class or sub-class of insurance business" shall be substituted;

(b) in sub-section (2), for the words and figures "to which the Indian Companies Act, 1913, applies" the following shall be substituted, namely:—

"as defined in clause (2) of sub-section (1) of section 2 of the Indian Companies Act, 1913,".

Amendment of section 13, Act IV of 1938.

10. To section 13 of the said Act the following sub-section shall be added, namely:—

"(6) The provisions of this section relating to life insurance business shall apply also to any such sub-class of insurance business included in the class 'Miscellaneous Insurance' as may be prescribed under sub-section (1) of section 10; and the Superintendent of Insurance may authorise such modifications and variations of the regulations contained in Part I of the Fourth and Fifth Schedules and of the requirements of Part II of those Schedules as may be necessary to facilitate their application to any such sub-class of insurance business:

Provided that, if the Superintendent of Insurance is satisfied that the number and amount of the transactions carried out by an insurer in any such sub-class of insurance business is so small as to render periodic investigation and valuation unnecessary, he may exempt that insurer from the operation of this sub-section in respect of that sub-class of insurance business."

Amendment of section 15, Act IV of 1938.

11. In sub-section (1) of section 15 of the said Act,—

(a) for the words "within six months" the words and figures "in the case of the accounts and statements referred to in section 11 within six months and in the case of the abstract and statement referred to in section 13 within nine months" shall be substituted;

(b) the sentence beginning with the words "The Superintendent of Insurance may extend" and ending with the words "by a period not exceeding three months" shall be omitted.

Amendment of section 16, Act IV of 1938.

12. In sub-section (2) of section 16 of the said Act,—

(a) to clause (a) the words "as at the date of any balance-sheet so furnished" shall be added;

(b) in clause (b),—

(i) for the words "for each class of insurance business carried on by him, a revenue account" the following words, brackets and figures shall be substituted, namely:

"for each class or sub-class of insurance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments, a revenue account for the period covered by any account so furnished";

(ii) for the words "that class of business" the words "that class or sub-class of insurance business" shall be substituted;

(c) for clause (c) the following clause shall be substituted, namely:—

"(c) a separate abstract of the valuation report in respect of all business transacted in India in each class or sub-class of insurance business to which section 13 refers, prepared in the manner required by that section, and".

Amendment of section 17, Act IV of 1938.

13. In section 17 of the said Act, after the words "and such copies so sent" the words "shall be chargeable with the same fees and" shall be inserted.

Amendment of section 21, Act IV of 1938.

14. To sub-section (2) of section 21 of the said Act the following proviso shall be added, namely:—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of four months from the time when the Superintendent of Insurance made the order or declined to accept the return."

Amendment of section 22, Act IV of 1938.

15. In section 22 of the said Act, after the word "refers" the following shall be inserted, namely:—

"or an abstract of a valuation report furnished under clause (*c*) of sub-section (2) of section 16".

Omission of section 24, Act IV of 1938.

16. Section 24 of the said Act shall be omitted.

Amendment of section 26, Act IV of 1938.

17. To section 26 of the said Act the following sentence shall be added, namely:—

"All such particulars shall be authenticated in the manner required by that sub-section for the authentication of the matters therein referred to, and, where the alteration affects the assured rates, advantages, terms and conditions offered in connection with life insurance policies, the actuarial certificate referred to in clause (*f*) of the said sub-section shall accompany the particulars of the alteration."

Amendment of section 28, Act IV of 1938.

18. In section 28 of the said Act,—

(*a*) for sub-section (1) the following sub-sections shall be substituted, namely:—

"(1) Every insurer registered under this Act carrying on the business of life insurance shall every year, within thirty-one days from the beginning of the year, submit to the Superintendent of Insurance a statement showing as at the 31st day of December of the preceding year the assets held invested in accordance with section 27, and all other particulars necessary to establish that the requirements of that section have been complied with, and such statement shall be certified by a principal officer of the insurer.

(2) Every such insurer shall also furnish, within fifteen days from the last day of March, June and September, a statement certified as aforesaid showing as at the end of each of the said months the assets held invested in accordance with section 27.

(3) The Superintendent of Insurance may at his discretion require any insurer to whom sub-section (1) applies to submit before the 1st day of August in each or any year a statement of the nature referred to in sub-section (1), certified as required by that sub-section and prepared as at the 30th day of June.

(4) In the case of an insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance may, on application made by the insurer, extend the periods of fifteen and thirty-one days mentioned in the foregoing sub-sections to thirty days and sixty days, respectively.";

(*b*) sub-section (2) shall be re-numbered as sub-section (5).

Amendment of section 29, Act IV of 1938.

19. Section 29 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) The provisions of section 86-D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of an insurer being a company, if

the loan is one granted on the security of a policy on which the insurer bears the risk and the policy was issued to the director on his own life, and the loan is within the surrender value of the policy."

Amendment of section 33, Act IV of 1938.

20. In section 33 of the said Act,—

(*a*) in sub-section (1), for the words beginning with "appoint an auditor or actuary or both" and ending with "himself make such investigation" the following shall be substituted, namely:—

"order an investigation of the affairs of the insurer to be made by an auditor or actuary, or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor, or may himself make such investigation:

Provided that an auditor or actuary appointed for this purpose by the Superintendent of Insurance shall not be an auditor or actuary in the employ of the insurer.";

(*b*) to sub-section (2) the following proviso shall be added, namely:—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of three months from the date on which the Superintendent of Insurance intimates to the insurer his intention to take such action.";

(*c*) for sub-section (3) the following sub-section shall be substituted, namely:—

"(3) The results of any investigation made under this section shall be recorded in writing by the auditor or actuary appointed or by the Superintendent of Insurance, as the case may be, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the investigation is completed a copy of such record, or where both an auditor and an actuary have been appointed, of each such record, shall be furnished by the Superintendent of Insurance to the insurer and to the shareholders or the policy-holders who have sent a requisition for such an investigation."

Amendment of section 34, Act IV of 1938.

21. In section 34 of the said Act,—

(*a*) after the words "incidental to such investigation" the words, brackets and figures "including any expenses incurred before the making of an order by the Court under sub-section (2) of section 33" shall be inserted, and shall be deemed always to have been inserted; and

(*b*) to the section the following words shall be added and shall be deemed always to have been added, namely:—

" shall have priority over other debts due from the insurer, and shall be recoverable as an arrear of land-revenue".

Amendment of section 35, Act IV of 1938.

22. In sub-section (3) of section 35 of the said Act,—

(*a*) for the words "and certified copies of the following documents shall be furnished to the Central Government and shall" the following words shall be substituted, namely:—

"and certified copies, four in number, of each of the following documents shall be furnished to the Central Government, and other such copies shall";

(*b*) in the proviso, after the words and figures "sections 11 and 13" the following shall be inserted and shall be deemed always to have been inserted, namely:—

"of this Act or sections 7 and 8 of the Indian Life Assurance Companies Act, 1912".

Amendment of section 36, Act IV of 1938.

23. To section 36 of the said Act the following proviso shall be added, namely:—

"Provided that—

(*a*) no part of the deposit made by any party to the amalgamation or transfer shall be returned except where, after effect is given to the arrangement, the whole of the deposit to be made by the insurer carrying on the amalgamated business or the person to whom the business is transferred is completed,

(*b*) only so much shall be returned as is no longer required to complete the deposit last mentioned in clause (*a*), and

(*c*) while the deposit last mentioned in clause (*a*) remains uncompleted, no accession, resulting from the arrangement, to the amount already deposited by the insurer carrying on the amalgamated business or the person to whom the business is transferred shall be appropriated as payment or part payment of any instalment of deposit subsequently due from him under section 7 or section 98."

Amendment of section 37, Act IV of 1938.

24. In section 37 of the said Act,—

(*a*) for the words "where any business of one insurer is transferred to another" the words "where any business of an insurer is transferred" shall be substituted;

(*a*) for the words "the insurer to whom the business is transferred" the words "the person to whom the business is transferred" shall be substituted;

(*c*) for the words "furnish to the Central Government" the words "furnish in duplicate to the Central Government" shall be substituted;

(*d*) in clause (*b*), for the words "a declaration signed by every insurer concerned" the words "a declaration signed by every party concerned" shall be substituted;

(*e*) for clause (*c*) the following clause shall be substituted, namely:—

"(*c*) where the amalgamation or transfer has not been made in accordance with a scheme sanctioned by the Court under section 36—

(*i*) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(*ii*) certified copies of any other reports on which the scheme of amalgamation or transfer was founded."

Amendment of section 38, Act IV of 1938.

25. In sub-section (2) of section 38 of the said Act, for the words "together with" the word "and" and for the words "has been delivered" the words "have been delivered" shall be substituted.

Amendment of section 39, Act IV of 1938.

26. In section 39 of the said Act,—

(*a*) in sub-section (1), the words "not being an absolute assignee of the benefits under the policy" shall be omitted;

(*b*) to sub-section (4) the following proviso shall be added, namely:—

"Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy."

Amendment of section 41, Act IV of 1938.

27. In section 41 of the said Act,—

(*a*) in sub-section (1),—

(*i*) for the words "effect or renew" the words "take out or renew or continue" shall be substituted, and after the word "renewing" the words "or continuing" shall be inserted;

(*ii*) the following proviso shall be added:—

"Provided that acceptance by an insurance agent of commission in connection with a policy of life insurance taken out by himself on his own life shall not be deemed to be acceptance of a rebate of premium within the meaning of this sub-section if at the time of such acceptance the insurance agent satisfies the prescribed conditions establishing that he is a *bona fide* insurance agent employed by the insurer.";

(*b*) in sub-section (2), for the words "effecting or renewing" the words "taking out or renewing or continuing" shall be substituted.

Amendment of section 42, Act IV of 1938.

28. In section 42 of the said Act,—

(*a*) in sub-section (1), for the words "one rupee" the words "three rupees" and for the words "making an application under this section" the words "making an application in the prescribed manner" shall be substituted;

(*b*) in sub-section (3), for the words "a fee of one rupee" the following words shall be substituted, namely:—

"the prescribed fee which shall not be more than three rupees, and an additional fee of a prescribed amount not exceeding one rupee by way of penalty if the application for renewal of the licence does not reach the issuing authority before the date on which the licence ceases to remain in force";

(*c*) in sub-section (4),—

(*i*) in clause (*c*)—

(*a*) after the word "cheating" the following words shall be inserted, namely:—

"or forgery or an abetment of or attempt to commit any such offence";

(*b*) the following proviso shall be added, namely:—

"Provided that, where at least five years have elapsed since the completion of the sentence imposed on any person in respect of any such offence, the Superintendent of Insurance shall ordinarily declare in respect of such person that his conviction shall cease to operate as a disqualification under this clause;";

(*ii*) in clause (*d*), for the words "against an insurer or an assured" the words "against an insurer or an insured" shall be substituted;

(*d*) after sub-section (5) the following sub-section shall be added, namely:—

"(6) The authority which issued any licence under this section may issue a duplicate licence to replace a licence lost, destroyed or mutilated on payment of the prescribed fee which shall not be more than one rupee."

Amendment of section 43, Act IV of 1938.

29. In sub-section (1) of section 43 of the said Act the word "licensed", in both places where it occurs, shall be omitted.

Amendment of section 44, Act IV of 1938.

30. In section 44 of the said Act the words and figures "licensed under section 42" shall be omitted.

Amendment of section 45, Act IV of 1938.

31. In section 45 of the said Act,—

(*a*) for the words "was on a material matter and fraudulently made" the words "was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made" shall be substituted, and after the words "that the statement was false" the words "or that it suppressed facts which it was material to disclose" shall be added;

(*b*) the following proviso shall be added, namely:—

"Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

Amendment of section 47, Act IV of 1938.

32. In sub-section (1) of section 47 of the said Act, for the words "the insurer shall" the words "the insurer may" shall be substituted.

Amendment of section 48, Act IV of 1938.

33. In section 48 of the said Act,—

(*a*) in sub-section (1), for the words beginning with "shall be persons having the prescribed qualifications" and ending with "by the holders of policies of life insurance issued by the company" the following words shall be substituted, namely:—

"shall notwithstanding anything to the contrary in the Articles of Association of the company be elected in the prescribed manner by the holders of policies of life insurance issued by the company";

(*b*) sub-section (2) shall be re-numbered as sub-section (4) and the following shall be inserted as sub-sections (2) and (3), namely:—

"(2) Only and all persons holding otherwise than as assignees policies of life insurance issued by the company of such minimum amount and having been in force for such minimum period as may be prescribed shall be eligible for election as directors under sub-section (1), and only and all persons holding policies of life insurance issued by the company and having been in force at the time of the election for not less than six months shall be eligible to vote at such elections:

Provided that the assignment of a policy to the person who took out the policy shall not disqualify that person for being eligible for election as a director under sub-section (1).

(3) The Central Government may, for such period, or to such extent and subject to such conditions as may be specified by it in this behalf, exempt from the operation of this section—

(*a*) any Mutual Insurance Company as defined in clause (*a*) of sub-section (1) of section 95, in respect of which the Superintendent of Insurance certifies that in his opinion owing to the conditions governing membership of the company or to the nature of the insurance contracts undertaken by it the application of the provisions of this sub-section to the company is impracticable, or

(*b*) any company in respect of which the Superintendent of Insurance certifies that in his opinion the company, having taken all reasonable steps to achieve compliance with the provisions of this section, has been unable to obtain the required number of directors with the required qualifications."

Substitution of new section 49, Act IV of 1938.

34. For section 49 of the said Act the following section shall be substituted, namely:—

Restriction on dividends and bonuses.

"49. No insurer, being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, who carries on the business of life insurance or any other class or sub-class of insurance business to which section 13 applies, shall, for the purpose of declaring or paying any dividend to shareholders or any bonus to policy-holders or of making any payment in service of any debentures, utilize directly or indirectly any portion of the life insurance fund or of the fund of such other class or sub-class of insurance business, as the case may be, except a surplus shown in the valuation balance-sheet in Form

I as set forth in the Fourth Schedule submitted to the Superintendent of Insurance as part of the abstract referred to in section 15 as a result of an actuarial valuation of the assets and liabilities of the insurer; nor shall he increase such surplus by contributions out of any reserve fund or otherwise unless such contributions have been brought in as revenue through the revenue account applicable to that class or sub-class of insurance business on or before the date of the valuation aforesaid, except when the reserve fund is made up solely of transfers from similar surpluses disclosed by valuations in respect of which returns have been submitted to the Superintendent of Insurance under section 15 of this Act or to the Central Government under section 11 of the Indian Life Assurance Companies Act, 1912:

Provided that payments made out of any such surplus in service of any debentures shall not exceed fifty per cent. of such surplus including any payment by way of interest on the debentures, and interest paid on the debentures shall not exceed ten per cent. of any such surplus except when the interest paid on the debentures is offset against the interest credited to the fund or funds concerned in deciding the interest basis adopted in the valuation disclosing the aforesaid surplus."

Amendment of section 50, Act IV of 1938.

35. To section 50 of the said Act the following words shall be added, namely:—

"unless these are set forth in the policy."

Amendment of section 52, Act IV of 1938.

36. Section 52 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-sections shall be added, namely:—

"(2) On the expiry of the period of three years referred to in sub-section (1), or on the insurer's ceasing before such expiry but at any time after the commencement of the Insurance (Amendment) Act, 1941, to carry on business on the dividing principle, the insurer shall forthwith cause an investigation to be made by an actuary, who shall determine the amount accumulated out of the contributions received from the holders of all policies to which the dividing principle applies and the extent of the claims of those policy holders against the realisable assets of the insurer, and shall, before the expiration of six months from the date on which he is entrusted with the investigation, make recommendations regarding the distribution, whether by cash payments or by the allocation of paid up policies or by a combination of both methods, of such assets as he finds to appertain to such policy-holders; and the insurer shall, before the expiry of six months from the date on which the actuary makes his recommendations, distribute such assets in accordance with those recommendations.

(3) Where at any time prior to the commencement of the Insurance (Amendment) Act, 1941, an insurer has ceased to carry on business on the dividing principle, the insurer shall, before the expiration of two months from the commencement of that Act, report to the Superintendent of Insurance the measures taken or proposed by him for the distribution among holders of policies to which the dividing principle applies of the assets due to them; and the Superintendent of Insurance may either sanction such measures or refuse his sanction, and, if he refuses his sanction or if the insurer does not report to him as required by this sub-section, the provisions of sub-section (2) shall apply to the insurer forthwith."

Amendment of section 53, Act IV of 1938.

37. In section 53 of the said Act,—

(a) in sub-section (1), for the word "Chapter" the word "Act" shall be substituted;

(b) in sub-clause (ii) of clause (b) of sub-section (2), after the words "has continued such failure" the words "or having contravened any provision of this Act has continued such contravention" and after the words "notice of such failure" the words "or contravention" shall be inserted.

Amendment of section 69, Act IV of 1938.

38. In section 69 of the said Act,—

(*a*) in sub-section (1), for the words "the results of a distribution, amongst policies maturing for payment within certain time-limits, of certain sums" the following words shall be substituted, namely:—

"the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits";

(*b*) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Where after the commencement of the Insurance (Amendment) Act, 1941, a provident society is to be wound up in pursuance of this section, or, where, whether before or after the commencement of that Act, a provident society ceases to carry on business on the dividing principle, the provisions of sub-section (2) and sub-section (3) of section 52 shall, so far as may be, apply in like manner as they apply to an insurer ceasing to carry on business on the dividing principle."

Amendment of section 70, Act IV of 1938.

39. In section 70 of the said Act,—

(*a*) in sub-section (2),—

(*i*) in clause (*a*), after the words and figures "Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted;

(*ii*) to clause (*b*) the following words shall be added, namely:—

"the full address of the registered office of the society, the full address of the principal office of the society in British India, the name of the manager at such office, and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the society";

(*iii*) the word "and" at the end of clause (*c*) shall be omitted and after clause (*d*) the following word and clause shall be added, namely:—

"and

(*e*) the prescribed fee for registration being not more than two hundred rupees.";

(*b*) in sub-section (4),—

(*i*) in clause (*c*), after the word "requirement" the words "or having contravened any provision" and after the word "failure" in both places where it occurs, the words "or contravention" shall be inserted;

(*ii*) after the proviso the following proviso shall be added, namely:—

"Provided further that the Superintendent of Insurance may, without previous notice and without application to the Court for sanction,—

(*a*) cancel the registration of a provident society which has failed to have its registration renewed, or

(*b*) cancel on such terms and conditions as he thinks fit, the registration of any provident society which applies to him for such cancellation if he is satisfied that the society has ceased to carry on insurance business and that all its liabilities in respect of insurance policies are either satisfied or otherwise provided for.";

(*c*) after sub-section (4) the following sub-sections shall be added, namely:—

"(5) When a registration is cancelled the provident society shall not, after the cancellation has taken effect, enter into any new contracts of insurance,

but all rights and liabilities in respect of contracts of insurance entered into by it before such cancellation takes effect shall, subject to the provisions of section 88, continue as if the cancellation had not taken place.

(6) Where a registration is cancelled under clause (*b*) of sub-section (4), or because the society has failed to have its registration renewed, the Superintendent of Insurance may at his discretion revive the registration if the provident society, within six months from the date on which the cancellation took effect, makes the deposits required by section 73 or has had an application under sub-section (3) of section 70-A accepted, as the case may be, and complies with any directions which may be given to it by the Superintendent of Insurance."

Insertion of new sections 70-A and 70-B in Act IV of 1938.

40. After section 70 of the said Act the following sections shall be inserted, namely:—

Renewal of registration.

70-A. (1) Every provident society registered under this Act, or under the Provident Insurance Societies Act, 1912, shall have its registration renewed annually for each period of twelve months after that ending on the 30th day of June, 1942.

(2) An application for the renewal of a registration shall be made by the society to the Superintendent of Insurance before the 30th day of June preceding the period for which renewal is sought, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed two hundred rupees but may vary according to the volume of insurance business done by the society.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank or into any Government treasury, and the receipt shall be sent along with the application for renewal of the registration.

(4) If a provident society fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as he has taken no action under section 88 to have the society wound up, accept an application for renewal of registration on receipt from the society of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by the society, as he may require.

(5) The Superintendent of Insurance shall, on being satisfied that the society has fulfilled the requirements of this section, renew the registration and grant it a certificate of renewal of registration.

Supplementary information and reports of alterations in particulars furnished with application for registration.

70-B. (1) Every provident society registered under section 70 before the commencement of the Insurance (Amendment) Act, 1941, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance such particulars in addition to those already supplied for the purpose of obtaining registration as are required by sub-section (2) of section 70 of this Act as amended by the Insurance (Amendment) Act, 1941.

(2) Every provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance so far as it has not already done so the documents and information required by clauses (*a*) and (*b*) of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section.

(3) When any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section, or are to be furnished to the Superintendent of Insurance under

this section, the provident society shall furnish forthwith to the Superintendent of Insurance full particulars duly authenticated of such alteration."

Amendment of section 72, Act IV of 1938.

41. In section 72 of the said Act, the words "established after the commencement of this Act" shall be omitted.

Amendment of section 74, Act IV of 1938.

42. In sub-section (1) of section 74 of the said Act,—

(*a*) the words "established after the commencement of this Act" shall be omitted;

(*b*) in clause (*o*), after the words and figures "Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted.

Amendment of section 77, Act IV of 1938.

43. In section 77 of the said Act, for the words "shall have an office" the words "shall have in British India a principal office" shall be substituted.

Amendment of section 79, Act IV of 1938.

44. In section 79 of the said Act,—

(*a*) for the words "shall keep at its registered office" the words "shall keep at its principal office in British India" shall be substituted;

(*b*) for clauses (*a*) to (*d*) the following clause shall be substituted, namely:—

"(*a*) such registers in such form as may be prescribed;";

(*c*) clauses (*e*), (*f*) and (*g*) shall be re-lettered, respectively, as clauses (*b*), (*c*) and (*d*).

Amendment of section 82, Act IV of 1938.

45. In section 82 of the said Act,—

(*a*) in sub-section (1), for the words "and the statements referred to" the words "shall be printed and four copies of these and of the statements referred to" and for the words "within three months" the words "within six months" shall be substituted;

(*b*) in sub-section (3), before the words "The provisions of section 17" the following shall be inserted, namely:—

"The provisions of sub-section (2) of section 15 relating to the copies therein referred to shall apply to the returns referred to in sub-section (1) of this sub-section, and",

and to the sub-section as so amended the following shall be added, namely:—

"and the Superintendent of Insurance may exercise, in respect of returns made by a provident society and in respect of an investigation or valuation to which section 81 refers, the same powers as are exercisable by him under section 21 and section 22, respectively, in the case of an insurer."

Amendment of section 83, Act IV of 1938.

46. In section 83 of the said Act,—

(*a*) in sub-section (1), for the word "established" the word "registered", for the words "shall cause any new scheme which it proposes to put into operation" the words "shall cause any scheme which it proposes to put into operation for the first time" and for the words "that the scheme is sound" the words "that the rates, advantages, terms and conditions of the scheme are workable and sound", shall be substituted;

(*b*) in sub-section (3), for the words "and shall send the report of the actuary" the words, brackets and figures "and shall, before the expiration of six months from the commencement of the Insurance (Amendment) Act, 1941, send the report of the actuary" shall be substituted;

(*c*) in sub-section (4), for the words "it is actuarially sound" the words "the rates, advantages, terms and conditions are workable and sound" shall be substituted;

(*d*) for sub-section (5) the following sub-section shall be substituted, namely:—

"(5) If the rates, advantages, terms and conditions of any scheme are not reported by the actuary to be workable and sound, the Superintendent of Insurance shall give notice to the society prohibiting the scheme, and the society shall not after its receipt of such notice enter into any new contract of insurance under the scheme, but all rights and liabilities in respect of contracts of insurance entered into by the society before receipt of the notice shall, subject to the provisions of sub-section (6), continue as if the notice had not been given.";

(*e*) in sub-section (6), for the word "discontinued", in both places where it occurs, the word "prohibited" and for the word "discontinuance" the word "prohibition" shall be substituted.

Amendment ot section 85, Act IV of 1938.

47. In section 85 of the said Act,—

(*a*) in sub-section (1), for the words "invest all surplus assets in such securities" the following words shall be substituted, namely:—

"invest in such securities every increase that takes place in those assets and in that part of those assets which is held in cash as soon as practicable after the increase takes place and in any case within six months of its taking place",

and to the sub-section as so amended the following proviso shall be added, namely:—

"Provided that for the purpose of determining the amount to be invested under this sub-section, any deposit made in cash under section 73 shall be taken into account as if such cash were Government securities amounting at the market value of the securities on the date the deposit was made to the total deposited in cash.";

(*b*) after sub-section (4) the following sub-section shall be added, namely:—

"(5) The provisions of section 86-D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of a provident society being a company if the loan is one granted on the security of a policy on which the society bears the risk and the policy was issued to the director on his own life and the loan is within the surrender value of the policy."

Amendment of section 87, Act IV of 1938.

48. In section 87 of the said Act,—

(*a*) in sub-section (1), after the words "the principal office of a provident society" the words "or the principal office in British India of a society having its principal place of business or domicile outside British India" shall be inserted, and to the sub-section as so amended the following words shall be added, namely:—

"or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor";

(*b*) for sub-section (3) the following sub-section shall be substituted, namely:—

"(3) The results of any such inquiry shall be recorded in writing by the person making the inquiry, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the inquiry is completed, a copy of the record, or of each such record where more than one are made in the course of the same inquiry, shall be sent by the Superintendent of Insurance to the society concerned and shall be open to inspection by any member or policy-holder of the society.";

(c) after sub-section (3), as so substituted, the following sub-section shall be added, namely:—

"(4) All expenses of and incidental to any inquiry made by an auditor or actuary under sub-section (1) including any expenses incurred before the date on which the Superintendent of Insurance receives notice of an appeal under clause (e) of sub-section (1) of section 110 shall be defrayed by the provident society, shall have priority over other debts due from the society, and shall be recoverable as an arrear of land-revenue."

Amendment of section 88, Act IV of 1938.

49. In section 88 of the said Act,—

(a) in sub-sections (1), (3) and (4), after the words and figures "Indian Companies Act, 1913", the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby" shall be inserted;

(b) in sub-sections (1) and (3), for the words "that Act" the words and figures "the Indian Companies Act, 1913" shall be substituted.

Amendment of section 90, Act IV of 1938.

50. In section 90 of the said Act—

(a) to sub-section (1) the following proviso shall be added, namely:—

"Provided that if the Superintendent of Insurance is not satisfied that the assets of the society are sufficient to meet the costs of liquidation including the remuneration of the liquidator, he may decline to make such appointment, and in such a case the society shall itself appoint a liquidator who shall carry out the liquidation as if the winding up was being done by an order of the Court.";

(b) in sub-section (2), for the words "so appointed" the words "appointed by the Superintendent of Insurance under sub-section (1)" shall be substituted.

Amendment of section 91, Act IV of 1938.

51. In clause (d) of sub-section (1) of section 91 of the said Act, after the word "liquidation" the following shall be inserted, namely:—

"including the remuneration of the liquidator and any expenses incurred under clause (g) of this sub-section."

Amendment of section 92, Act IV of 1938.

52. To section 92 of the said Act the following sub-section shall be added, namely:—

"(13) The costs of the liquidation including the remuneration of the liquidator and any expenses incurred under clause (g) of sub-section (1) of section 91 shall, if the liquidator decides that they shall be payable out of the assets of the society, be payable in priority to all other claims".

Amendment of section 98, Act IV of 1938.

53. In section 98 of the said Act,—

(a) in sub-section (2), for the words "of twenty-five thousand rupees" the words "of not less than twenty-five thousand rupees", for the words "to twenty-five thousand rupees" the words "to not less than twenty-five thousand rupees", and for the words "equal to one-third of the gross premium" the words "equal to not less than one-third of the gross premium" shall be substituted, and shall be deemed always to have been substituted;

(b) after sub-section (2), the following sub-section shall be added, and shall be deemed always to have been added, namely:—

"(3) The provisions of sub-section (7) of section 7 shall apply in respect of a Mutual Insurance Company and a Co-operative Life Insurance Society as if for the words 'under the foregoing provisions of this section' the words and figures 'under the provisions of section 98' were substituted".

Amendment of section 100, Act IV of 1938.

54. In the proviso to section 100 of the said Act, the words "balance-sheet, revenue account and" shall be omitted and to the proviso as so amended the following words shall be added, namely:—

"and any member of the company domiciled in that province shall be entitled on application to the company to receive from it a copy of the balance-sheet and revenue account."

Amendment of section 102, Act IV of 1938.

55. In sub-section (2) of section 102 of the said Act, for the words "any provident society which makes default in complying with any of the requirements of Part III" the words "any provident society as defined in Part III which makes default in complying with or acts in contravention of any of the requirements of this Act" shall be substituted and after the word "default", in the second, third and fourth places where it occurs, the words "or contravention" shall be inserted.

Amendment of section 103, Act IV of 1938.

56. In section 103 of the said Act,—

(*a*) in sub-section (1), for the word "transacts" the words "carries on" shall be substituted, the words and figures "section 6" and "section 97" shall be omitted, and for the word "transacted" the words "carried on" shall be substituted;

(*b*) in the proviso to sub-section (2), for the words "this section" the words, brackets and figures "sub-section (1) or sub-section (2)" shall be substituted;

(*c*) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Any provident society or any person acting on behalf of a provident society who carries on any class of insurance business in contravention of any of the provisions of section 70, section 73 or section 83 or does any one or more of the acts constituting the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to one thousand rupees."

Amendment of section 105, Act IV of 1938.

57. Section 105 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer".

Amendment of section 106, Act IV of 1938.

58. (1) Section 106 of the said Act shall be re-numbered as sub-section (1) of that section.

(2) In the section as so re-numbered, after the words "If on the application of" the words "the Superintendent of Insurance or" shall be inserted and to the section as so amended the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

Amendment of section 107, Act IV of 1938.

59. Section 107 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

Amendment of section 110, Act IV of 1938.

60. In section 110 of the said Act, after sub-section (3) the following sub-section shall be added, namely:—

"(4) No appeal under this section shall be entertained unless it is made before the expiration of four months from the date on which the order appealed against was communicated to the appellant".

Amendment of section 113, Act IV of 1938.

61. In section 113 of the said Act,—

(*a*) for sub-sections (1) and (2) the following sub-sections shall be substituted, namely:—

"(1) A policy of life insurance under which the whole of the benefits become payable either on the occurrence, or at a fixed interval or fixed intervals after the occurrence, of a contingency which is bound to happen, shall, if all premiums have been paid for at least three consecutive years in the case of a policy issued by an insurer, or five years in the case of a policy issued by a provident society as defined in Part III, acquire a guaranteed surrender value, to which shall be added the surrender value of any subsisting bonus already attached to the policy, and every such policy issued by an insurer shall show the guaranteed surrender value of the policy at the close of each year after the second year of its currency or at the close of each period of three years throughout the currency of the policy:

Provided that the requirements of this sub-section as to the addition of the surrender value of the bonus attaching to a policy at surrender shall be deemed to have been complied with where the method of calculation of the guaranteed surrender value of the policy makes provision for the surrender value of the bonus attaching to the policy:

Provided further that the requirements of this sub-section as to the showing of the guaranteed surrender value on a policy shall be deemed to have been complied with where the insurer shows on the policy the guaranteed surrender value of the policy by means of a formula accepted in this behalf by the Superintendent of Insurance as satisfying the said requirements:

Provided further that the provisions of this sub-section as to the showing of the guaranteed surrender value on a policy shall not take effect until after the expiry of six months from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

(2) Notwithstanding any contract to the contrary, a policy which has acquired a surrender value shall not lapse by reason of the non-payment of further premiums but shall be kept alive to the extent of the paid-up sum insured, and the paid-up sum insured shall for the purposes of this sub-section include in full all subsisting reversionary bonuses that have already attached to the policy, and shall, where the policy is one on which the maximum number of annual premiums payable is fixed and the premiums are of uniform amount, be before the inclusion of such bonuses not less than the amount bearing to the total sum insured by the policy exclusive of bonuses the same proportion as the total period for which premiums have already been paid bears to the maximum period for which premiums were originally payable.

(3) A policy kept alive to the extent of the paid-up sum insured under sub-section (2) shall not be entitled by virtue of that sub-section to participate in any profits declared distributable after the conversion of the policy into a paid-up policy.";

(*b*) sub-section (3) shall be re-numbered as sub-section (4) and in that sub-section as so re-numbered,—

(*i*) for the words "This section shall not apply to" the following shall be substituted, namely:—

"Sub-section (2) and sub-section (3) shall not apply";

(*ii*) clause (*a*) shall be omitted;

(*iii*) for clause (*b*) the following clause shall be substituted, namely:—

"(*a*) where the paid-up sum insured by a policy, being a policy issued by an insurer, is less than one hundred rupees inclusive of any attached bonus, or takes the form of an annuity of less than twenty-five rupees, or where the paid-up sum insured by a policy, being a policy issued by a provident society as defined in Part III, is less than fifty rupees inclusive of any attached bonus or takes the form of an annuity of less than twenty-five rupees, or";

(*iv*) clauses (*c*) and (*d*) shall be re-lettered as clauses (*b*) and (*c*), respectively.

Amendment of section 114, Act IV of 1938.

62. In sub-section (2) of section 114 of the said Act,—

(*a*) for clause (*b*) the following clause shall be substituted, namely:—

"(*b*) the manner in which it shall be determined which of the transactions of an insurer are to be deemed for the purposes of this Act to be insurance business transacted in India or in British India, as the case may be;";

(*b*) in clause (*g*), after the words "may be" the words "applied for," shall be inserted.

Amendment of section 116, Act IV of 1938.

63. Section 116 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of provident societies as defined in Part III as it applies in respect of insurers."

Insertion of new section 116-A in Act IV of 1938.

64. After section 116 of the said Act the following section shall be inserted, namely:—

Summary of returns to be published.

"116-A. The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished in pursuance of the provisions of this Act to the Superintendent of Insurance during the year preceding the year of publication, and may append to such summary any note of the Superintendent of Insurance or of the Central Government and any correspondence:

Provided that nothing in this section shall require the publication of the statements referred to in sub-section (1) of section 28".

Amendment of section 117, Act IV of 1938.

65. In section 117 of the said Act, after the words "being a company" the words "or a provident society as defined in Part III being a company" shall be inserted.

Amendment of section 118, Act IV of 1938.

66. In section 118 of the said Act, after the words "and to such extent" the words "or subject to such conditions or modifications" shall be inserted.

Substitution of new section for section 119, Act IV of 1938.

67. For section 119 of the said Act the following section shall be substituted, namely:—

Inspection and supply of copies of published prospectus, etc.

"119. Any person may on payment of a fee of five rupees inspect the documents filed by an insurer with the Superintendent of Insurance under clause (*f*) of sub-section (2) of section 3, and may obtain a copy of any such document or part thereof on payment in advance at the prescribed rate for the making of the copy."

Insertion of new section 122 in Act V of 1938.

68. After section 121 of the said Act the following section shall be inserted, namely:—

Amendment of Schedule I, Act IX of 1908.

"122. In Item No. 86 in the First Schedule to the Indian Limitation Act, 1908,—

(*a*) for the entry in the first column the following shall be substituted, namely:—

(*a*) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.

(*b*) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.";

(*b*) for the entry in the third column, the following shall be substituted, namely:—

'(*a*) The date of the death of the deceased.

(*b*) The date of the occurrence causing the loss.' "

Amendment of First Schedule, Act IV of 1938.

69. In Form A contained in Part II of the First Schedule to the said Act,—

(*a*) in the first column, after the entry "Miscellaneous Insurance Business Account" the brackets and letter "(*m*)" shall be added;

(*b*) in the fifth column, after the entry "Outstanding Premiums (*g*)" the brackets and letter "(*d*)" shall be added, and

(*c*) after foot-note (*l*) the following shall be added, namely:—

"(*m*) Where the insurer is required to maintain a separate account in respect of any sub-class of miscellaneous insurance business this heading is to be split up accordingly."

Amendment of Third Schedule, Act IV of 1938.

70. In the Third Schedule to the said Act,—

(*a*) in regulation 1 contained in Part I, after the words "for every class" the words "or sub-class" shall be inserted;

(*b*) in regulation 2,—

(*i*) after the words "miscellaneous insurance" the words "exclusive of any sub-class of such business in respect of which the insurer is required to maintain a separate account" shall be inserted; and

(*ii*) the following sentence shall be added, namely:—

"For a sub-class of miscellaneous insurance in respect of which the insurer is required to maintain a separate account, Form D or Form F as set out in Part II of this Schedule may be used with such modifications as the Superintendent of Insurance may authorise.";

(*c*) in Form D contained in Part II,—

(*i*) in the first column the entry "Commission to insurance agents (less that on Re-insurances)" shall be omitted, and for the entry "1. Allowances and Commission (other than commission to insurance agents)" the following entry shall be substituted, namely:—

"1. (*a*) Commission to insurance agents (less that on Re-insurances).

(*b*) Allowances and Commission [other than commission included in sub-item (*a*) preceding]";

(*ii*) in the first column, after the entry "5. Auditors' fees" the entry "6. Medical fees" shall be inserted, and the existing entries numbered 6 to 12 shall be re-numbered 7 to 13, respectively;

(*iii*) all the horizontal lines appearing in the columns and the letters "Rs." against the entries "Interest, Dividends and Rents" and "Less—Income-tax thereon (*d*)" shall be omitted, and horizontal lines under which the totals of the columns are to be inserted shall be added at the foot of each column;

(*iv*) in note (*a*) the words "In the case of an insurer having his head office in British India" shall be omitted.

Amendment of Fourth Schedule, Act IV of 1938.

71. In Part II of the Fourth Schedule to the said Act,—

(*a*) in the opening paragraph beginning with the words "The following tabular statements"—

(*i*) in clause (*d*), for the semi-colon and the word "and" at the end of the clause the following shall be substituted, namely:—

"for the intervaluation period (except that it shall not be necessary to prepare such statement in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business)";

(*ii*) clause (*e*) shall be omitted;

(*b*) in sub-paragraph (2) of the paragraph numbered 8, for the words "as at the valuation date" the words "as a result of this valuation" shall be substituted;

(*c*) in the paragraph numbered 9, between the word "fourth" and the word "sixth" the word "fifth" shall be inserted;

(*d*) for Form G the form contained in the Schedule to this Act shall be substituted;

(*e*) in Form J, for the heading to the first column "Number of premiums paid" the following heading shall be substituted, namely:—

"Number of annual premiums paid up to the valuation date"

and the following note shall be added after the existing note, namely:—

"NOTE.—The reserve value is to be based on the rate of office premium payable by an insured who entered at the age shown and who had, by the valuation date, paid the number of annual premiums shown in the first column."

SCHEDULE.

[*See* section 71 (*d*).]

Form to be substituted for Form G in the Fourth Schedule of the Insurance Act, 1938.

FORM G.

Consolidated Revenue Account of for years commencing and ending

	Business within India. (*a*)	Total.		Business within India. (*a*)	Total.
	Rs.	Rs.		Rs.	Rs.
Claims under Policies (including provision for claims due or intimated), less Re-insurances— By death .. By maturity .. Annuities, less Re-insurances. Surrenders (including surrenders of Bonus), less Re-insurances.			Balance of Life Insurance Fund at the beginning of the period. Premiums, less Re-insurances— (*i*) First year premiums. (*ii*) Renewal premiums (*iii*) Single premiums. Consideration for Annuities granted, less Re-		

	Business within India. (a)	Total.		Business within India. (a)	Total.
Bonuses in cash, less Re-insurances.	Rs.	Rs.	insurances (c).	Rs.	Rs.
Bonuses in Reduction of Premiums, less Re-insurances.			Interest, Dividends and Rents. Rs. Less — Income-tax thereon (d). Rs.		
Expenses of Management (b) (e)—			Registration fees ..		
1. (a) Commission to insurance agents (less that on Re-insurances).			Other Income (to be specified).		
(b) Allowances and Commission [other than commission included in sub-item (a) preceding].			Loss transferred to Profit and Loss Account.		
2. Salaries, etc. [other than to agents and those contained in sub-item 1 (b) preceding].			Transferred from Appropriation Account.		
3. Travelling expenses.					
4. Directors' fees ..					
5. Auditors' fees ..					
6. Medical fees ..					
7. Law charges ..					
8. Advertisements ..					
9. Printing & Stationery.					
10. Other expenses of management (accounts to be specified).					
11. Other payments (accounts to be specified).					
12. Rent for offices belonging to and occupied by the insurer.					
13. Rents of other offices occupied by the insurer.					
Bad debts ..					
United Kingdom, British Indian, Dominion and Foreign Taxes.					
Other Expenditure (to be specified).					
Profit transferred to Profit and Loss Account.					
Balance of Life Insurance Fund at end of the period as shown in the Balance-sheet.					
Rs.			Rs.		

NOTES.

(a) These columns apply to all business except business the premiums in respect of which are ordinarily paid outside India. If any question arises whether any premiums are ordinarily paid inside or outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.

(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(c) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*d*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*e*) In the case of an insurer having his principal place of business outside British India the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 1941.

ACT No. XIV OF 1941.

[*20th November*, 1941.

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, so as to provide for the sending for service and execution, within the local limits of the jurisdiction of Courts established or continued by the Authority of the Central Government or the Crown Representative in any part of India outside British India, of summonses and warrants for the arrest of accused persons issued in British India, and also for the service and execution in British India of the like processes issued by such Courts;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 1941.

Insertion of new heading and sections 93-A, 93-B and 93-C in Act V of 1898.

2. After section 93 of the Code of Criminal Procedure, 1898, the following heading and sections shall be inserted, namely:—

"E.—*Special Rules regarding processes issued for service or execution outside British India and processes received from outside British India for service or execution within British India.*

Sending of summons for service outside British India.

93-A. (1) Where a Court in British India desires that a summons issued by it to an accused person shall be served at any place outside British India within the local limits of the jurisdiction of a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India, it shall send such summons, in duplicate, by post or otherwise, to the presiding officer of that Court to be served.

(2) The provisions of section 74 shall apply in the case of a summons sent for service under this section as if the presiding officer of the Court to whom it was sent were a Magistrate in British India.

Sending of warrant for execution outside British India.

93-B. Notwithstanding anything contained in section 82, where a Court in British India desires that a warrant issued by it for the arrest of an accused person shall be executed at any place outside British India within the local limits of the jurisdiction of a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India, it may send such warrant, by post or otherwise, to the presiding officer of that Court to be executed.

Service and execution in British India of processes received from outside British India.

93-C. (1) Where a Court has received for service or execution a summons to, or a warrant for the arrest of, an accused person issued by a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India outside British India, it shall cause the same to be served or executed

as if it were a summons or warrant received by it from a Court in British India for service or execution within the local limits of its jurisdiction.

(2) Where any warrant of arrest has been so executed the person arrested shall so far as possible be dealt with in accordance with the procedure prescribed by sections 85 and 86."

THE CODE OF CRIMINAL PROCEDURE (SECOND AMENDMENT) ACT, 1941.

ACT NO. XV OF 1941.

[20*th November*, 1941.

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CRIMINAL PROCEDURE (SECOND AMENDMENT) ACT, 1941.

Amendment of section 162, Act V of 1898.

2. In sub-section (2) of section 162 of the Code of Criminal Procedure, 1898, after the figures "1872" the following words and figures shall be added, namely:—

", or to affect the provisions of section 27 of that Act".

THE FACTORIES (AMENDMENT) ACT, 1941.

ACT NO. XVI OF 1941.

[20*th November*, 1941.

An Act further to amend the Factories Act, 1934.

WHEREAS it is expedient further to amend the Factories Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FACTORIES (AMENDMENT) ACT, 1941.

Substitution of new section for section 5, Act XXV of 1934.

2. For section 5 of the Factories Act, 1934, the following section shall be substituted, namely:—

Power to apply provisions applicable to factories to certain other places.

"5. (1) The Provincial Government may, by notification in the official Gazette, declare that all or any of the provisions of this Act applicable to factories shall apply to any place wherein a manufacturing process is being carried on or is ordinarily carried on whether with or without the use of power whenever ten or more workers are working therein or have worked therein on any one day of the twelve months immediately preceding.

(2) A notification under sub-section (1) may be made in respect of any one such place or in respect of any class of such places or generally in respect of all such places.

(3) Notwithstanding anything contained in clause (*j*) of section 2, a place, to which all or any of the provisions of this Act applicable to factories are for the time being applicable in pursuance of a declaration under sub-section (1), shall, to the extent to which such provisions are so made applicable but not otherwise, be deemed to be a factory."

THE ALIGARH MUSLIM UNIVERSITY (AMENDMENT) ACT, 1941.

ACT NO. XVII OF 1941.

[26th November, 1941.

An Act further to amend the Aligarh Muslim University Act, 1920, *for a certain purpose.*

WHEREAS it is expedient further to amend the Aligarh Muslim University Act, 1920, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE ALIGARH MUSLIM UNIVERSITY (AMENDMENT) ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of section 5, Act XL of 1920.

2. To sub-clause (*a*) of clause (3) of section 5 of the Aligarh Muslim University Act, 1920 (hereinafter referred to as the said Act), the following shall be added, namely:—

"in an institution maintained under sub-section (2) of section 12 or admitted to the privileges of the University under section 12-A, or".

Amendment of section 12-A, Act XL of 1920.

3. In section 12-A of the said Act the word "Intermediate" shall be omitted.

THE MADRAS PORT TRUST (AMENDMENT) ACT, 1941.

ACT NO. XVIII OF 1941.

[26th November, 1941.

An Act to alter the constitution of the Board of Trustees of the Port of Madras.

WHEREAS it is expedient to alter the constitution of the Board of Trustees of the Port of Madras and for this purpose to amend the Madras Port Trust Act, 1905, in the manner hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE MADRAS PORT TRUST (AMENDMENT) ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Substitution of new sections for sections 7 and 8, Madras Act II of 1905.

2. For sections 7 and 8 of the Madras Port Trust Act, 1905 (hereinafter referred to as the said Act), the following sections shall be substituted, namely:—

Constitution of the Board.

"7. The Board shall consist of eighteen Trustees, including the Chairman:

Provided that, if the Chairman is absent on leave for more than a fortnight and if another Chairman is appointed to act for him, the absent Chairman shall cease to be a Trustee during the continuance of the acting appointment, but shall again become a Trustee on his return to duty.

Appointment of Trustees.

8. (1) The Chairman shall be appointed by the Central Government. Of the remaining Trustees, four, of whom one shall be chosen to represent labour interests, shall be appointed by the Central Government, one shall be appointed by the Provincial Government, four shall be elected by the members for the time being of the Madras Chamber of Commerce, three by the members for the time being of the Southern India Chamber of Commerce, two by the members for the time being of the Southern India Skin and Hide

Merchants' Association, one each by the members for the time being of the Madras Trades Association and the Andhra Chamber of Commerce and one by the Corporation of Madras.

(2) The Trustee appointed to represent labour interests shall be chosen after consultation with the registered trade unions, if any, composed of persons employed in the Port.

(3) The Chairman of the Chamber or Association concerned in making an election under sub-section (1) and the Commissioner of the Corporation of Madras shall report to the Central Government the name of each person elected as a Trustee."

Amendment of section 13, Madras Act II 1905.

3. In section 13 of the said Act, after the word "concerned" the words "or by the Corporation of Madras" shall be inserted, and for the words "the Central Government" the words "the authority by which he was appointed" shall be substituted.

Transition from existing constitution of Board of Trustees.

4. The appointments and elections referred to in section 8 of the said Act as amended by this Act, and the publication referred to in section 9 of the said Act may be made at any time after the passing of this Act and before this Act comes into force, but the Trustees so appointed and elected shall not assume office until this Act comes into force, and on the coming into force of this Act the term of office of the Trustees then holding office shall expire.

THE MINES MATERNITY BENEFIT ACT, 1941.

ACT NO. XIX OF 1941.

[26th November, 1941.

An Act to regulate the employment of women in mines for a certain period before and after childbirth and to provide for payment of maternity benefit to them.

WHEREAS it is expedient to regulate the employment of women in mines for a certain period before and after childbirth and to provide for payment of maternity benefit to them;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MINES MATERNITY BENEFIT ACT, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "child" includes a still-born child;

(*b*) "Chief Inspector", "Inspector", "employed", "mine" and "owner" have the meanings assigned, respectively, to these expressions in section 3 of the Indian Mines Act, 1923;

(*c*) "manager" means the manager of the mine appointed in accordance with the provisions of the Indian Mines Act, 1923;

(*d*) "maternity benefit" means the payment referred to in section 5;

(*e*) "prescribed" means prescribed by rules made under this Act.

Prohibition of employment of, and work by, women during certain period.

3. No owner or manager of a mine shall knowingly employ a woman and no woman shall engage in employment in any mine during the four weeks following the day on which she is delivered of a child.

Right to obtain leave of absence in pregnancy and after delivery.

4. (1) If any woman employed in a mine who is pregnant gives notice either orally or in writing in the prescribed form to the manager of the mine that she expects to be delivered of a child within one month from the date of such notice, the manager shall permit her if she so desires to absent herself from work up to the day of her delivery and such absence shall be treated as a period of authorised absence on leave:

Provided that the manager may, on undertaking to defray the cost of such examination, require the woman to be examined by a qualified medical practitioner or midwife, and, if the woman refuses to submit to such examination or is certified on such examination as not pregnant or not likely to be delivered of a child within one month, he may refuse such permission.

(2) Any woman employed in a mine who is delivered of a child shall be permitted by the manager to absent herself from work for a period of four weeks from the date of her delivery, and her absence during such period shall be deemed to be authorised absence on leave if within seven days of her delivery she has given or sent to the manager notice of the delivery and of the date of delivery.

Right to and liability for payment of maternity benefit.

5. Every woman employed in a mine who has been continuously employed in that mine or in mines belonging to the owner of that mine for a period of not less than six months preceding the date of her delivery shall, if she complies with the conditions imposed by this Act, be entitled to receive, and the owner of the mine shall be liable to make to her, in accordance with the provisions of this Act, a payment at the rate of eight annas a day for every day on which she is absent from work owing to her confinement during the four weeks immediately preceding and including the day of her delivery and for each day of the four weeks following her delivery.

Explanation.—Periods of casual absence as defined by rules made under section 15 or authorised absence on account of illness or leave shall count as employment in determining whether employment has been continuous.

Payment of bonus.

6. (1) The Central Government may by rules made under section 15 provide that a woman entitled to maternity benefit under this Act shall, if at the time of her delivery she utilized the services of a qualified midwife or other trained person, receive in addition to the maternity benefit due to her a bonus not exceeding in amount three rupees:

Provided that she shall not receive such bonus if at the place chosen by her for her confinement she would have been entitled free of charge to the services of a qualified midwife or other trained person provided by the owner of the mine.

(2) Such rules may further provide for the determination by the Provincial Government of the amount of the bonus, and of the qualifications which shall be possessed by qualified midwives and other trained persons for the purposes of this section.

Notice of delivery to be given to manager.

7. A woman entitled to maternity benefit under this Act, unless she has given the notice referred to in sub-section (1) of section 4, shall on being delivered of a child give notice of her delivery in the prescribed manner to the manager before the expiry of seven days from the date of her delivery, and shall before the expiry of six months from such date furnish proof of the prescribed nature to the manager both of her delivery and of the date of her delivery:

Provided that a woman giving notice under section 4 or this section may therein nominate a person for the purposes of sub-section (2) of section 9.

Payment of maternity benefit.

8. (1) Where a woman entitled to maternity benefit has given the notice referred to in sub-section (1) of section 4 and has obtained permission to absent herself from work up to the date of her delivery, the manager shall either at once or within three days pay to her maternity benefit for four weeks in advance.

(2) A woman entitled to maternity benefit who has been delivered of a child shall, on furnishing the proof referred to in section 7,—

(*a*) if she has received an advance payment under sub-section (1), be paid the balance of the maternity benefit due to her at the end of the fourth week from the date of her delivery or within three days of the furnishing of proof, whichever date is later;

(*b*) if she has received no such advance payment,—

(i) if the proof is furnished before the end of the fourth week from the date of delivery, be paid at once or within three days so much of the maternity benefit as is then due to her, and be paid the balance at the end of the said fourth week;

(ii) if the proof is furnished after the end of the fourth week from the date of delivery, be paid at once or within three days the whole amount of the maternity benefit due to her.

Disposal of maternity benefit in case of death of woman entitled to receive it.

9. (1) If a woman entitled to maternity benefit who has received an advance under sub-section (1) of section 8 dies before being delivered of the child, the advance shall not be recoverable.

(2) If a woman entitled to maternity benefit having been delivered of a child dies before payment of the maternity benefit, or, where an advance under sub-section (1) of section 8 has been made, of the balance of the maternity benefit due to her is made, the amount due to her up to the date of her death shall, on the prescribed proof of the birth and date of the birth of the child and of the death and date of death of the woman being furnished at any time before the expiry of six months from the date of delivery, be paid if the child is living to the person who undertakes the care of the child, and if the child is not living to the person nominated by her under the proviso to section 7 or if she has made no such nomination to the legal representative of the deceased woman.

Prohibition of dismissal during or on account of absence from work owing to confinement.

10. (1) When a woman absents herself from work in accordance with section 3, or has obtained permission to absent herself in accordance with section 4, it shall be unlawful for the manager to dismiss her during or on account of such absence, or to give notice of dismissal on such a day that the notice will expire during such absence.

(2) The dismissal of a woman at any time within six months before she is delivered of a child, if the woman but for such dismissal would have been entitled to maternity benefit under this Act, shall not have the effect of depriving her of that maternity benefit if the Chief Inspector is satisfied that her dismissal was without sufficient cause.

Power of Chief Inspector or Inspector to direct payments to be made.

11. (1) Any woman claiming that maternity benefit to which she is entitled under this Act and any person claiming that a payment due under sub-section (2) of section 9 is improperly withheld may make a complaint to the Chief Inspector or any Inspector.

(2) On receipt of such complaint or on his own motion without any such complaint being made, the Chief Inspector or Inspector may make inquiry or cause an inquiry to be made, and if satisfied that a payment has been wrongfully withheld may direct the payment to be made in accordance with his orders.

Penalty for contravention of Act by a woman.

12. Any woman who does any work for which she receives payment in cash or kind after she has been permitted under sub-section (1) of section 4 to absent herself from work, or who engages in employment in any mine in contravention of section 3, shall be punishable with fine which may extend to ten rupees, and, if she is entitled to maternity benefit under this Act, shall forfeit her right to any maternity benefit not already paid to her.

Penalty for contravention of Act by owner or manager.

13. (1) Any owner or manager of a mine, who contravenes any provision of this Act for which no express penalty is provided, shall be punishable with fine which may extend to five hundred rupees.

(2) The Court imposing the fine may, if the contravention has resulted in depriving a woman of any maternity benefit due to her, order the whole or any part of the fine when paid to be applied in payment of compensation to the woman for any loss caused to her by the contravention of the provision on account of which the fine has been imposed, and an Appellate Court or the High Court in exercise of its powers of revision may also make such order.

Cognisance of cases.

14. (1) No prosecution under this Act shall be instituted except by or with the sanction of the Chief Inspector.

(2) No Court inferior to that of a Magistrate of the first class shall try an offence punishable under this Act or any rule made thereunder.

(3) No Court shall take cognisance of an offence punishable under this Act or any rule made thereunder, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed:

Provided that in computing the said period of six months any time spent in obtaining the sanction of the Chief Inspector required by sub-section (1) shall be excluded.

Power of Central Government to make rules.

15. (1) The Central Government may, subject to the condition of previous publication, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) require the maintenance of registers and records for the purposes of this Act and prescribe the form thereof;

(*b*) prescribe the form of the notices referred to in section 4 and section 7, and require mines to supply copies thereof to women workers;

(*c*) regulate the examination of women under the proviso to sub-section (1) of section 4, and the grant of the certificates therein referred to;

(*d*) prescribe the nature of and the method of furnishing the proof referred to in section 7, section 8 and section 9;

(*e*) regulate the manner of applying for and paying maternity benefit;

(*f*) assign duties to, and regulate the powers of, the Chief Inspector and Inspectors, for the purposes of this Act.

(3) Any rule made under this section may provide that a contravention thereof shall be punishable with fine which may extend to fifty rupees.

Abstract of this Act and the rules made thereunder to be exhibited in mines.

16. (1) The manager of every mine in which women are employed shall cause an abstract in the local Indian language of the provisions of this Act and of the rules made thereunder to be exhibited in the mine in such manner that they may come to the notice of every woman employed in the mine.

(2) For any contravention of the provisions of this section the manager shall be punishable with fine which may extend to one hundred rupees.

Power of Central Government to exempt mines from operation of Act.

17. The Central Government may, by notification in the official Gazette, exempt any mine or class of mines from the operation of this Act.

Act binding on Crown.

18. The provisions of this Act shall be binding on the Crown.

THE PROFESSIONS TAX LIMITATION ACT, 1941.

ACT NO. XX OF 1941.

[26th November, 1941.

An Act to limit to a maximum of fifty rupees per annum the amount payable in respect of any person by way of tax on professions, trades, callings or employments.

WHEREAS by section 142-A of the Government of India Act, 1935, it is provided that no Provincial law relating to taxes for the benefit of a Province, or of a municipality, district board, local board, or other local authority therein; in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income and that the total amount of such tax payable in respect of any one person shall not, after the 31st day of March, 1939, exceed fifty rupees per annum;

AND WHEREAS it is further provided in the said section that any such tax which was in force during the financial year ending with the 31st day of March, 1939, may continue to be lawfully levied at a rate higher than fifty rupees per annum unless provision to the contrary is made by the Federal Legislature;

AND WHEREAS it is expedient that provision shall be made whereby the total amount payable in respect of any such person by way of such tax shall not exceed fifty rupees per annum;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE PROFESSIONS TAX LIMITATION ACT, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of April, 1942.

Limitation of tax.

2. Notwithstanding the provisions of any law for the time being in force, any taxes payable in respect of any one person to a Province, or to any one municipality, district board, local board or other local authority in any province, by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent to which such taxes exceed fifty rupees per annum.

Saving.

3. The provisions of section 2 shall not apply to any tax specified in the Schedule.

THE SCHEDULE.

(*See* section 3.)

Taxes to which section 2 does not apply.

1. The tax on professions, trades and callings, imposed through fees for annual licences, under Chapter XII of the Calcutta Municipal Act, 1923.

2. The tax on trades, professions and callings, imposed under clause (*f*) of sub-section (1) of section 123 of the Bengal Municipal Act, 1932.

3. The tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services, imposed under

clause (*ii*) of sub-section (1) of section 128 of the United Provinces Municipalities Act, 1916.

4. The tax on persons exercising any profession or art, or carrying on any trade or calling, within the limits of the municipality, imposed under clause (*b*) of sub-section (1) of section 66 of the Central Provinces Municipalities Act, 1922.

THE FEDERAL COURT ACT, 1941.

ACT NO. XXI OF 1941.

[26th *November*, 1941.

An Act to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court.

WHEREAS it is expedient to empower the Federal Court to make rules for regulating the presentation of appeals lying to that Court, and for that purpose to repeal those provisions of the Code of Civil Procedure, 1908, which now regulate that matter;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE FEDERAL COURT ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Repeal of section 111-A and rule 17 of Order XLV of the First Schedule, Act V of 1908.

2. Section 111-A of the Code of Civil Procedure, 1908, and rule 17 of Order XLV of the First Schedule to the said Code shall be omitted.

Power of Federal Court to make rules.

3. The Federal Court may, with the approval of the Governor-General in his discretion, make rules for regulating the presentation and prosecution of appeals lying to that Court, including rules relating to the furnishing of security for costs, the proceedings, if any, to be had in High Courts in connection with such appeals, and the preparation and transmission to the Federal Court of the records in such appeals.

THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1941.

ACT NO. XXII OF 1941.

26th *November*, 1941.

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923, for a certain purpose;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of section 193, Act XXI of 1923.

2. In sub-section (1) of section 193 of the Indian Merchant Shipping Act, 1923,—

(*a*) for the words "sixteen and ninety-six" the words "eighteen and one hundred and eight" shall be substituted;

(*b*) for the word "available" the words "allotted and marked separately" shall be substituted; and

(c) for the word "pilgrims" the words "each pilgrim" shall be substituted.

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1941.

ACT No. XXIII OF 1941.

[26th November, 1941.

An Act further to amend the Indian Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1941.

(2) It shall come into force at once; but effect shall not be given to the amendments hereby made in the Indian Income-tax Act, 1922, by section 4, section 6, section 7, section 8, clause (b) of section 10 and clause (a) of section 13 in the making of any assessment under that Act for any year before the year ending on the 31st day of March, 1943.

Amendment of section 2, Act XI of 1922.

2. In clause (6-C) of section 2 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), for the words "mutual insurance company" the words "mutual Insurance association" shall be substituted.

Amendment of section 4, Act XI of 1922.

3. After clause (ix) of sub-section (3) of section 4 of the said Act the following clauses shall be inserted, namely:—

"(x) Any income received—

(a) by a person accredited as representative in British India for political purposes of an Indian State or the Ruler thereof, as his remuneration from the State or Ruler for service in such capacity;

(b) by a Consul General, Consul, Vice-Consul or Consular Agent of a foreign State, as remuneration from such State for service in such capacity;

(c) by a person employed by the consulate of a foreign State, not being a British subject or the subject of an Indian State, as remuneration from such foreign State for service in such capacity;

(d) by a Trade Commissioner or other official representative in British India of the Government of any other part of the British Empire or of a foreign Government, as his official salary, if the official salary of the corresponding officials, if any, of the Central Government resident for similar purposes in the country concerned enjoy a similar exemption in that country;

(e) by a member of the staff of a Trade Commissioner or official representative referred to in sub-clause (d), as his official salary, when such member is a subject of the country represented, and the country represented has made corresponding provisions for similar exemptions in the case of members of the staff of the corresponding officials of the Central Government.

(xi) With effect from the 2nd day of September, 1939, the income chargeable under the head "Salaries" of a Nepalese member of the Nepalese Military Force serving with His Majesty's Forces, or of any member of an Indian State Force so serving, and any other income accruing or arising without British India which is received in or brought into British India by any such member while the Force to which he belongs is serving with His Majesty's Forces."

Amendment of section 4-A, Act XI of 1922.

4. In clause (a) of section 4-A of the said Act,—

(*a*) to sub-clause (*iii*) the word "or" shall be added; and

(*b*) after sub-clause (*iii*) the following sub-clause shall be added, namely:—

"(*iv*) is in British India for any time in that year and the Income-tax Officer is satisfied that such individual having arrived in British India during that year is likely to remain in British India for not less than three years from the date of his arrival:".

Amendment of section 5-A, Act XI of 1922.

5. To sub-section (2) of section 5-A of the said Act the following proviso shall be added, namely:—

"Provided that the Tribunal shall not be deemed to be invalidly constituted merely by reason of a temporary inequality caused by the death, retirement or removal of any member".

Amendment of section 10, Act XI of 1922.

6. In section 10 of the said Act,—

(*a*) in sub-section (2), in clause (*b*) of the proviso to clause (*vi*), after the words "owing to the profits or gains chargeable being less than the allowance," the following shall be inserted, namely:—

"then, subject to the provisions of clause (*a*) of the proviso to sub-section (2) of section 24."

(*b*) in sub-section (5),—

(i) for clauses (*b*) and (*c*) the following clause shall be substituted, namely:—

"(*b*) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886, was in force:";

(ii) in the first proviso, for the words, brackets and letters "clauses (*a*), (*b*) and (*c*)" the words, brackets and letters "clauses (*a*) and (*b*)" shall be substituted;

(iii) the second proviso shall be omitted.

Amendment of section 12, Act XI of 1922.

7. To section 12 of the said Act the following sub-section shall be added, namely:—

"(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (*iv*), (*v*) and (*vi*) of sub-section (2) of section 10 in respect of such buildings."

Amendment of section 14, Act XI of 1922.

9. In sub-section (2) of section 16 of the said Act,—

(*a*) to clause (*b*) the word "or" shall be added, and

(*b*) after clause (*b*) the following clause shall be added, namely:—

"(*c*) in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee, or are assessable under section 42."

Amendment of section 16, Act XI of 1922.

9. In sub-section (2) of section 16 of the said Act,—

(*a*) for the words beginning with "and shall be increased by the amount of income-tax" and ending with "deemed to have been paid, credited or distributed" the following words shall be substituted, namely:—

"and shall be increased to such amount as would, if income-tax (but not super-tax) at the rate applicable to the total income of a company for the financial year in which the dividend is paid, credited or distributed or deemed to

have been paid, credited or distributed, were deducted therefrom, be equal to the amount of the dividend:;"

(*b*) in the proviso, for the words "the income-tax to be added" the words "the increase to be made" shall be substituted.

Amendment of section 17, Act XI of 1922.

10. In section 17 of the said Act,—

(*a*) in sub-section (1), after the words "a subject of a State in India or Burma", the words "or a native of a Tribal Area", shall be inserted;

(*b*) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Where there is included in the total income of any assessee any income exempted from tax under clause (*c*) of sub-section (2) of section 14, the super-tax payable by the assessee shall be an amount bearing to the total amount of the super-tax which would have been payable on the total income had no part of it been so exempted the same proportion as the total income less the portion so exempted bears to the total income.

(4) Where any income exempted from tax under clause (*c*) of sub-section (2) of section 14 which has been taken into account under sub-section (2) or sub-section (3) of this section as part of the total income of an assessee for the purpose of determining the income-tax super-tax payable by him is in a subsequent year brought into or received in British India by the assessee and becomes chargeable with tax accordingly, the tax including super-tax payable by the assessee on his total income of that subsequent year shall be—

(*a*) the amount which bears to the total amount of the tax including super-tax which would have been payable on his total income as reduced by the amount of the income so brought into or received in British India had such reduced income been his total income the same proportion as his total income bears to such reduced income, or

(*b*) the amount which bears to the total amount of the tax including super-tax which would have been payable on the amount of the income so brought into or received in British India had such income been his total income the same proportion as his total income bears to the amount of the income so brought into or received in British India,

whichever is the greater.".

Amendment of section 18, Act XI of 1922.

11. In sub-section (3-E) of section 18 of the said Act for the brackets and words "(together with the amount of any income-tax payable by the company in respect thereof)" the brackets, words and figures "(increased in accordance with the provisions of sub-section (2) of section 16)" shall be substituted, and for the brackets and words "(together with the amount of such income-tax as aforesaid)" the brackets and words "(increased as aforesaid)" shall be substituted.

Amendment of section 23, Act XI of 1922.

12. To section 23 of the said Act the following sub-section shall be added, namely:—

"(6) Whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners".

Amendment of section 24, Act XI of 1922.

13. In sub-section (2) of section 24 of the said Act,—

(*a*) before the first proviso the following proviso shall be inserted, namely:—

"Provided that—

(*a*) where depreciation allowance is, under clause (*b*) of the proviso to clause (*vi*) of sub-section (2) of section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section;";

(*b*) in the first proviso, for the words "Provided that" the brackets and letter "(*b*)" shall be substituted;

(*c*) in the second proviso, for the words "Provided further that" the brackets and letter "(*c*)" shall be substituted;

(*d*) for the third proviso the following shall be substituted, namely:—

"(*d*) where a change has occurred in the constitution of a firm, nothing in this section shall be deemed to entitle the firm to have set off much of the loss proportionate to the share of a retired or deceased partner computed in accordance with the provisions of clause (*b*) of sub-section (1) of section 16 as exceeds his share of profits, if any, of the previous year in the firm or to entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under the said clause (*b*), and where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains".

Amendment of section 25, Act XI of 1922.

14. To sub-section (4) of section 25 of the said Act the following proviso shall be added, namely:—

"Provided that sub-sections (3) and (4) shall not apply—

(*a*) to super-tax except where the income, profits and gains of the business, profession or vocation were assessed to super-tax for the first time either for the year beginning on the 1st day of April, 1920, or for the year beginning on the 1st day of April, 1921;

(*b*) to a business, profession or vocation on which income-tax was at any time charged in the hands of a company under the Indian Income-tax Act, 1886, or on which income-tax would have been charged in the hands of a company for the assessment year ending on the 31st day of March, 1918, if the company having been in existence in that year had also been in existence in the year ending on the 31st day of March, 1917."

Amendment of section 30, Act XI of 1922.

15. In sub-section (2) of section 30 of the said Act, after the words "objected to" the following shall be inserted, namely:—

"or of the order in writing notifying the amount of total income on which the determination under sub-section (5) of section 23 was based and the apportionment thereof between the several partners or of the loss computed under section 24".

Amendment of section 31, Act XI of 1922.

16. In section 31 of the said Act,—

(*a*) in clause (*a*) of sub-section (3), the words beginning with "and, in the case of an assessment" and ending with "any member of the association", shall be omitted;

(*b*) after sub-section (3) the following sub-sections shall be added, namely:—

"(4) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.

(5) The Appellate Assistant Commissioner shall, on the conclusion of the appeal, communicate the orders passed by him to the assessee and to the Commissioner."

Amendment of section 33, Act XI of 1922.

17. In section 33 of the said Act,—

(a) in sub-section (1), for the words "on which he is served with notice of such order" the words "on which such order is communicated to him" shall be substituted;

(b) in sub-section (2), for the words "at any time before the expiry of sixty days from the date of the order" the words "within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner" shall be substituted;

(c) after sub-section (2) the following sub-section shall be inserted, namely:—

"(2-A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period".

Insertion of new section 33-A in Act XI of 1922.

18. After section 33 of the said Act the following section shall be inserted, namely:—

Power of revision by Commissioner.

"33-A. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(c) the order has been made more than one year previously.

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal:

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub-section (2) shall be accompanied by a fee of twenty-five rupees".

Amendment of section 34, Act XI of 1922.

19. To sub-section (2) of section 34 of the said Act the following proviso shall be added, namely:—

"Provided that nothing contained in this sub-section shall apply to a re-assessment made in pursuance of an order under section 31, section 33, section 66, or section 66-A".

Amendment of section 35, Act XI of 1922.

20. In sub-section (1) of section 35 of the said Act, for the word and figure "section 33" the word, figure and letter "section 33-A" shall be substituted.

Substitution of new section for section 40, Act XI of 1922.

21. For section 40 of the said Act the following section shall be substituted, namely:—

Guardians, trustees and agents.

"40. (1) Where the guardian or trustee of any person being a minor, lunatic or idiot (all of which persons are hereinafter in this sub-section included in the term "beneficiary" is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian or trustee, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.

(2) Where the trustee or agent of any person not resident in British India and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a beneficiary) is entitled to receive on behalf of such beneficiary, or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax, if not levied on the beneficiary direct, may be levied upon and recovered from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly."

Amendment of section 45, Act XI of 1922.

22. In sub-section (1) of section 41 of the said Act, for the words "appointed under a duly executed trust deed" the words "appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise" shall be substituted.

Amendment of section 46, Act XI of 1922.

23. In section 45 of the said Act, the words and figure "or section 32" shall be omitted.

Amendment of section 46, Act XI of 1922.

24. In section 46 of the said Act,—

(*a*) in the proviso to sub-section (2), the words "in respect of the attachment and sale of debts due to the assessee" and the words "in respect of the attachment and sale of debts due to a judgment-debtor" shall be omitted;

(*b*) to sub-section (7) the following proviso shall be added, namely:—

"Provided that where the sum payable is allowed to be paid by instalments the period of one year herein referred to shall be reckoned from the date on which the last of such instalments was due."

Substitution of new section for section 49-B, Act XI of 1922.

25. For section 49-B of the said Act the following section shall be substituted, namely:—

Income-tax on company's dividend deemed to have been paid by shareholder.

"49-B. Where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to any of the persons specified in section 3 who is a shareholder of a company which is assessed to income-tax in British India or elsewhere, such person shall be deemed in respect of such dividend himself to have paid income-tax (exclusive of super-tax at the rate applicable to the total income of a company for the financial year in which the dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company is liable to pay income-tax bears to the whole income of the company."

Amendment of section 49-C, Act XI of 1922.

26. For sub-section (1) of section 49-C of the said Act the following sub-section shall be substituted, namely:—

Relief granted to a company to be deemed relief granted to shareholder.

"(1) Where any dividend has been paid, credited or distributed or is deemed to have been paid, credited or distributed to a shareholder of a company which has obtained the relief referred to in section 49 or granted under section 49-A or under the India and Burma (Income-tax Relief Order, 1936, the shareholders shall be deemed in respect of such dividend himself to have obtained such relief at the rate at which such relief has been granted in respect of income-tax only to the company for the financial year preceding the year in which the dividend was paid, credited or distributed or is deemed to have been paid, credited or distributed."

Addition of *Explanation* to section 49-D, Act XI of 1922.

27. To section 49-D of the said Act the following *Explanation* shall be added, namely:—

"*Explanation*.—The expression "Indian income-tax" in this section means income-tax and super-tax charged in accordance with the provisions of this Act".

Amendment of section 52, Act XI of 1922.

28. In section 52 of the said Act, for the words, brackets and figures "or sub-section (2) of section 32" the words, brackets and figures "or sub-section (3) of section 33" shall be substituted.

Amendment of section 54, Act XI of 1922.

29. In clause (*l*) of sub-section (3) of section 54 of the said Act, for the words "to a Returning Officer" the words "to any person charged by law with the duty of inquiring into the qualifications of electors" shall be substituted.

Amendment of section 58, Act XI of 1922.

30. In sub-section (1) of section 58 of the said Act, for the words, brackets and figures "sub-section (2) of section 14" the words, brackets, letters and figures "clauses (*a*) and (*b*) of sub-section (2) of section 14" shall be substituted.

Amendment of section 58C, Act XI of 1922.

31. In clause (*d*) of sub-section (1) of section 58 C of the said Act, for the words "from the trustees" the words "by the trustees" shall be substituted.

THE EXCESS PROFITS TAX (SECOND AMENDMENT) ACT, 1941.

ACT NO. XXIV OF 1941.

[26th November, 1941.

An Act further to amend the Excess Profits Tax Act, 1940.

WHEREAS it is expedient further to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE EXCESS PROFITS TAX (SECOND AMENDMENT) ACT, 1941.

(2) It shall come into force at once; but effect shall not be given to the amendment hereby made in the Excess Profits Tax Act, 1940, by section 3 in the making of any assessment under that Act in respect of any chargeable accounting period which is a "previous year" for an assessment under the Indian Income-tax Act, 1922, for any year before the year ending on the 31st day of March, 1943.

Amendment of section 4, Act XV of 1940.

2. In sub-section (2) of section 4 o fthe Excess Profits Tax Act, 1940 (hereinafter referred to as the said Act), for the words beginning with "and as if the excess of profits" and ending with "the whole chargeable accounting period" the following shall be substituted, namely:—

"and as if the excess of profits of that separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period determined in accordance with the provisions of section 7A".

Amendment of section 5, Act XV of 1940.

3. In section 5 of the said Act, after the second proviso the following proviso shall be added, namely:—

"Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State; and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemeed to be a separate business the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business."

Insertion of new section 7-A in Act XV of 1940.

4. After section 7 of the said Act the following section shall be inserted, namely:—

Special provision for chargeable accounting period falling partly before and partly after the end of March, 1941.

'7-A. (1) In the case of a chargeable accounting period such as is referred to in sub-section (2) of section 4, the excess of profits of each of the separate chargeable accounting periods into which the whole chargeable period is deemed to be divided for the purposes of that sub-section, shall be determined in accordance with the provisions of sub-sections (2), (3) and (4), and in those sub-sections—

(*a*) references to the whole period, the first part of the period, and the second part of the period shall be construed, respectively, as references to the whole of the chargeable accounting period deemed to be divided, so much thereof as falls before the end of March, 1941, and so much thereof as falls after the said end of March;

(*b*) "excess profits" means the amount by which the profits for any period exceed the standard profits for that period.

(2) The profits or loss of, and the standard profits for, the whole period shall be computed first on the basis that rule 5-A of the First Schedule and rule 2-A of the Second Schedule do not apply to the period, and secondly on the

basis that the said rules do apply to the period, and it shall then be ascertained, on each basis, whether there are excess profits or a deficiency of profits for the whole period, and, if so, what is the amount thereof.

(3) There shall be deemed to be for the first part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the first basis mentioned therein, and there shall be deemed to be for the second part of the period excess profits or a deficiency of profits, as the case may be, equal to an apportioned part of the excess profits or deficiency of profits ascertained under sub-section (2) on the second basis mentioned therein; and, for the purpose of giving relief for deficiencies of profits under section 7, the first part of the period and the second part of the period shall each be treated as if it were a separate chargeable accounting period.

(4) Any apportionment required to be made by sub-section (3) shall be made by reference to the number of months and fractions of months in each of the parts of the whole period.'

Substitution of new section for section 10, Act XV of 1940.

5. For section 10 of the said Act the following section shall be substituted, namely:—

Artificial transactions.

"10. (1) In computing profits for the purposes of this Act no deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.

(2) If the Excess Profits Tax Officer is satisfied that any person has entered into or carried out any transaction or operation by which the profits have been or would be artificially reduced, he may, with the previous approval of the Inspecting Assistant Commissioner, direct that such person shall pay, in addition to any excess profits tax for which he is or, but for such transaction or operation, would be liable, a penalty not exceeding the tax evaded or sought to be evaded."

Insertion of new section 10-A in Act XV of 1940.

6. After section 10 of the said Act the following section shall be inserted, namely:—

Transactions designed to avoid or reduce liability to excess profits tax.

"10-A. (1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected [whether before or after the passing of the Excess Profits Tax (Second Amendment) Act, 1941] was the avoidance or reduction of liability to excess profits tax, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the powers conferred thereby extend—

(*a*) to the charging with excess profits tax of persons who but for the adjustments would not be chargeable with any tax or would not be chargeable to the same extent;

(*b*) to the charging of a greater amount of tax than would be chargeable but for the adjustments.

(3) Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal."

Amendment of section 26, Act XV of 1940.

7. In sub-section (3) of section 26 of the said Act, after clause (*c*) the following word and clause shall be inserted, namely:—

"or

(*d*) in the case of any business which includes the winning of any mineral (including mineral oil) the winning of which is of exceptional importance for the prosecution of the present war, an increase in the output of the mineral which was essential in the national interest and which has had the effect of shortening the period during which but for such increased wartime output the source of the mineral might have been expected to be exhausted;".

Amendment of Schedule I, Act XV of 1940.

8. In Schedule I to the said Act,—

(*a*) after rule 5 the following rule shall be inserted, namely:—

'5-A. (1) In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the profits of a business other than a business to which sub-rule (2) of rule 4 of this Schedule applies, or the profits of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of interest on borrowed money or in respect of any other consideration given for the use of borrowed money:

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act:

Provided further that this rule shall not apply to the computation of profits of any business for any chargeable accounting period the standard profits for which are ascertained by reference to the minimum amount specified in sub-section (4) of section 6 of this Act:

Provided further that where a direction has been given by a Board of Referees under sub-section (3) of section 6, or by the Central Board of Revenue under sub-section (1) of section 26 of this Act, that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just, such amount shall be increased by the amount of the interest on or other consideration for the borrowed money during the standard period.

(2) In this rule and in rule 2-A of the Second Schedule "borrowed money" means borrowed money which, apart from the provisions of the said rule 2-A, would have been deductible in computing capital.';

(*b*) after rule 11 the following rule shall be added, namely:—

"12. (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned:

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal."

Amendment of Schedule II, Act XV of 1940.

9. In Schedule II to the said Act,—

(*a*) after rule 2 the following rule shall be inserted, namely:—

"2-A. In computing for any chargeable accounting period ending after the end of March, 1941, and in relation thereto for the standard period, if any, the average capital of a business other than a business to which sub-rule (2) of rule 4 of the First Schedule applies, or the average capital of a part of a business other than a part of a business to which sub-rule (2-A) of the said rule applies, no deduction shall be made in respect of borrowed money:

Provided that, as respects any such chargeable accounting period which commences before the said end of March, the application of this rule shall be subject to the provisions of section 7-A of this Act:

Provided further that the same deduction shall be made in respect of accruing liabilities for interest as would have been made if this rule had not been enacted.";

(*b*) in rule 6, for the words "second proviso" the words "second or third proviso" shall be substituted.

THE RAILWAYS (LOCAL AUTHORITIES' TAXATION) ACT, 1941.

ACT No. XXV OF 1941.

[*26th November*, 1941.

An Act to regulate the extent to which railway property shall be liable to taxation imposed by an authority within a Province.

WHEREAS it is expedient to regulate the extent to which property vested in His Majesty for the purposes of the Central Government, being property of a railway, shall be liable to taxation imposed by an authority within a Province;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE RAILWAYS (LOCAL AUTHORITIES' TAXATION) ACT, 1941.

(2) It extends to the whole of British India.

Definitions.

2. In this Act,—

(*a*) "local authority" means a local authority as defined in the General Clauses Act, 1897, and includes any authority legally entitled to or entrusted with the control or management of any fund for the maintenance of watchmen or for the conservancy of a river;

(*b*) "railway administration" has the meaning assigned to the expression in clause (6) of section 3 of the Indian Railways Act, 1890.

Liability of railways to taxation by local authorities.

3. (1) In respect of property vested in His Majesty for the purposes of the Central Government, being property of a railway, a railway administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the Official Gazette, declares it to be so liable.

(2) While a notification under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any, as a person appointed in this behalf by the Central Government may, having regard to the services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a Judge of a High Court or a District Judge.

Modification of existing liability to taxation.

4. The Central Government may, by notification in the official Gazette, revoke or vary any notification issued under clause (1) of section 135 of the Indian Railways Act, 1890; and where a notification is so revoked any liability arising out of the notification to pay any tax to any local authority shall cease, and where a notification is so varied the liability arising out of the notification shall be varied accordingly.

Saving.

5. Nothing in this Act shall be construed as debarring any railway administration administering a railway from entering into a contract with any local authority for the supply of water or light or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render within any part of the local area under its control.

THE INDIAN COMPANIES (AMENDMENT) ACT, 1941.

ACT No. XXVI OF 1941.

[26*th November*, 1941.

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN COMPANIES (AMENDMENT) ACT, 1941.

Amendment of section 104, Act VII of 1913.

2. In section 104 of the Indian Companies Act, 1913 (hereinafter referred to as the said Act),—

(*a*) after sub-section (2), the following sub-section shall be inserted, namely:—

"(2-A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit, and, if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the registrar were substituted.";

(*b*) in the proviso to sub-section (3), for the words "within one month after the allotment" the words, brackets and figures "within the time specified in sub-sections (1) and (2)" shall be substituted.

Amendment of section 282-B, Act VII of 1913.

3. In sub-section (2) of section 282-B of the said Act, for the words "shall be invested, and shall be invested only" the words "shall be either deposited in a Post Office Savings Bank account or invested" shall be substituted, and for the words "which are not so invested shall be" the words "which are not so deposited or invested shall be so deposited or" shall be substituted.

THE TRADE MARKS (AMENDMENT) ACT, 1941.

ACT No. XXVII OF 1941.

[26*th November*, 1941.

An Act to amend the Trade Marks Act, 1940.

WHEREAS it is expedient to amend the Trade Marks Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE TRADE MARKS (AMENDMENT) ACT, 1941.

Amendment of section 4, Act V of 1940.

2. In sub-section (1) of section 4 of the Trade Marks Act, 1940 (hereinafter referred to as the said Act),—

(*a*) for the words "Trade Mark Registry" the words "Trade Marks Registry" shall be substituted;

(*b*) after the words "all registered trade marks" the words "except those entered in the Bombay register under Chapter IX" shall be inserted.

Amendment of section 53, Act V of 1940.

3. In sub-section (1) of section 53 of the said Act, after the words "to the Registrar" the words "or the Bombay Registrar, as the case may be" shall be inserted.

Substitution of new sections for section 63, Act V of 1940.

4. For section 63 of the said Act the following sections shall be substituted, namely:—

Separate Trade Marks Registry at Bombay.

"63. (1) For the purpose of facilitating the registration of trade marks in respect of textile goods there shall be established at Bombay a separate Trade Marks Registry (in this Act referred to as the Bombay Registry) and a separate Register of Trade Marks (in this Act referred to as the Bombay register) shall be kept thereat wherein shall be entered, in the manner provided by section 4, all registered trade marks which are under the provisions of this Chapter to be registered by the Bombay Registrar.

(2) Subject to the superintendence and direction of the Central Government, the Bombay register shall be kept under the control and management of an officer appointed by the Central Government who shall be called the Registrar of Textile Trade Marks at Bombay (in this Act referred to as the Bombay Registrar).

(3) In all proceedings under this Act in relation to trade marks, applications for the registration of which lie under the provisions of this Chapter to the Bombay Registrar, the Bombay Registrar shall exercise and discharge the powers and functions of the Registrar to the exclusion of the Registrar, and, in interpreting the provisions of this Act in relation to any such proceedings or any such trade marks, references, except in sub-sections (1) and (2) of section 4 and this Chapter and section 85, to the Patent Office or the Trade Marks Registry shall be construed as references to the Bombay Registry, and references to the Registrar and to the register shall be construed as references to the Bombay Registrar and the Bombay register, respectively:

Provided that the Central Government may, for the purpose of resolving a conflict or preventing an overlap of jurisdiction between the Registrar and the Bombay Registrar, direct by which of the two any particular matter arising out of this Act or out of any proceeding thereunder shall be disposed of.

Jurisdiction of Bombay Registrar and Registrar in respect of trade marks used in relation to textile goods.

63-A. (1) When the applicant for registration of a trade mark used or proposed to be used in relation to textile goods is a person having his principal place of business situated in any one of the following Provinces, namely, Madras, Bombay, the Punjab, the Central Provinces and Berar, the North-West Frontier Province or Sind, the application shall lie only to the Bombay Registrar.

(2) When once an application for registration of a trade mark used in relation to textile goods has been made to the Registrar or the Bombay Registrar, no subsequent change in the location of the principal place of business of the applicant shall divest the Registrar or the Bombay Registrar, as the case may be, of any of his powers or functions under this Act in relation to such trade mark."

Substitution of new section for section 65, Act V of 1940.

5. For section 65 of the said Act the following section shall be substituted, namely:—

Calcutta and Bombay Textile Marks Records and Refused Textile Marks Lists.

"65. (1) The Registrar shall supply a copy of every entry in the register relating to trade marks registered in respect of textile goods to the Bombay Registrar, who shall maintain a permanent record of the copy so received which shall be called the Calcutta Textile Marks Record.

(2) The Bombay Registrar shall supply a copy of every entry in the Bombay register to the Registrar who shall maintain a permanent record of the copy so received which shall be called the Bombay Textile Marks Record.

(3) Trade marks in respect of textile goods of which registration has been refused shall be entered by the Registrar and the Bombay Registrar in separate lists which shall be called the Calcutta Refused Textile Marks Lists, and the Bombay Refused Textile Marks Lists, respectively; a copy of the Calcutta List shall be kept at the Bombay registry and a copy of the Bombay List at the Trade Marks Registry at the Patent Office as permanent records.

(4) The Textile Marks Records and the Refused Textile Marks Lists shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed."

Amendment of section 66, Act V of 1940.

6. In sub-section (2) of section 66 of the said Act, for the words "or the Deputy" the words "and the Bombay" shall be substituted.

Amendment of section 69, Act V of 1940.

7. In section 69 of the said Act, after the word "Registrar" the words "or the Bombay Registrar" shall be inserted.

Amendment of section 75, Act V of 1940.

8. In sub-section (1) of section 75 of the said Act, for the words "proof of production" the words "proof or production" shall be substituted.

Amendment of section 76, Act V of 1940.

9. In sub-section (1) of section 76 of the said Act, for the words "or Deputy" the words "or the Bombay" shall be substituted.

Amendment of section 84, Act V of 1940.

10. In sub-section (2) of section 84 of the said Act,—

(*a*) in clause (*e*), for the word "Record" the word "Records" and for the word "List" the word "Lists" shall be substituted;

(*b*) in clause (*q*), the words and figures "or under section 63" shall be omitted;

(*c*) after clause (*q*) the following clause shall be added, namely:—

"(*r*) make such provisions as are necessary to ensure uniformity of practice between the Registrar and the Bombay Registrar in all matters arising out of the registration of trade marks in respect of textile goods."

MADRAS ACTS, 1941.

THE MADRAS HACKNEY CARRIAGE (AMENDMENT) ACT, 1941.

ACT No. I OF 1941.

[*4th January, 1941.*

An Act further to amend the Madras Hackney Carriage Act, 1911.

WHEREAS it is expedient further to amend the Madras Hackney Carriage Act, 1911, for the purpose hereinafter appearing ;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS HACKNEY CARRIAGE (AMENDMENT) ACT, 1941.

Amendment of section 6, Madras Act V of 1911.

2. After the proviso to section 6 of the Madras Hackney Carriage Act, 1911, the following further proviso shall be added, namely :—

" Provided further that the Commissioner shall have power to limit the number of vehicles of any description which may be registered annually, in which case no vehicle of that description shall be registered in any year in excess of the number so limited. "

THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1941.

ACT No. II OF 1941.

[*15th January, 1941.*

An Act further to amend the Madras State Aid to Industries Act, 1922.

WHEREAS it is expedient further to amend the Madras State Aid to Industries Act, 1922, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE MADRAS STATE AID TO INDUSTRIES (AMENDMENT) ACT, 1941.

Insertion of new section 17-A in Madras Act V of 1923.

2. After section 17 of the Madras State Aid to Industries Act, 1922 (hereinafter referred to as the said Act), the following section shall be inserted, namely :—

"17-A. (1) The Board of Revenue may, if so empowered by the Provincial Government and subject to such conditions, restrictions and limitations, if any, as may be laid down by them, grant aid, in accordance with such rules as may be made under this Act for the purpose, to any cottage industry in one or more of the ways specified in clause (*a*), clause (*b*), clause (*c*) or clause (*f*) of section 6 up to an amount or value not exceeding five hundred rupees in each case.

Grant of aid to cottage industries by the Board of Revenue.

(2) The decision of the Board of Revenue to grant or not to grant aid in any case under sub-section (1) shall not be called in question in any Court of law.

(3) The powers conferred on the Provincial Government by section 12 may also be exercised by the Board of Revenue in cases where aid is granted by the Board under sub-section (1).

(4) Nothing contained in sections 3 and 8, and save as otherwise may be prescribed by rules made under this Act, nothing contained in sections 9 10, 11, 14, 14-A and 17 shall apply to any application for the grant of aid under sub-section (1) or to any case where aid is granted under that sub-section."

Amendment of section 19, Madras Act V of 1923.

3. In sub-section (*b*) of section 19 of the said Act—

(i) the word "and" at the end of clause (14) shall be omitted; and

(ii) after clause (15), the following word and clause shall be inserted, namely :—

"and

(16) all matters connected with, or relating to, the grant of aid by the Board of Revenue under section 17-A, including all matters referred to in the foregoing clauses which are applicable to such grant."

THE MADRAS ELECTRICITY DUTY (AMENDMENT) ACT, 1941.

ACT No. III OF 1941.

[*8th February, 1941.*

An Act to amend the Madras Electricity Duty Act, 1939.

WHEREAS it is expedient to amend the Madras Electricity Duty Act, 1939, for the purposes hereinafter appearing ;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE MADRAS ELECTRICITY DUTY (AMENDMENT) ACT, 1941.

Amendment of section 3, Madras Act V of 1939.

2. (1) In sub-section (1) of section 3 of the Madras Electricity Duty Act, 1939 (hereinafter referred to as the said Act), after the words "all sales of energy", the words and brackets "(except sales to the Central Government for consumption by that Government or to the Federal Railway Authority or a railway company operating a Federal Railway for consumption in the construction, maintenance or operation of a Federal Railway)" shall be inserted.

(2) To the same sub-section, the following Explanation shall be added, namely :—

"*Explanation.*—The expression "Federal Railway" in this sub-section shall have the meaning assigned to it in sub-section (2) of section 311 of the Government of India Act, 1935."

Act to have retrospective effect.

3. The said Act shall be read and construed as if the amendments made by section 2 had formed part of the said Act from its commencement.

THE MADRAS CITY MUNICIPAL (AMENDMENT) ACT, 1941.

ACT NO. IV OF 1941.

[*12th February, 1941.*

An Act further to amend the Madras City Municipal Act, 1919.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, for the purpose hereinafter appearing ;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL (AMENDMENT) ACT, 1941.

Amendment of section 52, Madras Act IV of 1919.

2. In sub-section (2) of section 52 of the Madras City Municipal Act, 1919 (hereinafter referred to as the said Act), the word "or" occurring at the end of clause (*e*) shall be omitted, and after clause (*f*), the following word and clause shall be added, namely:—

"or

(*g*) in arrears of any kind due by him (otherwise than in a fiduciary capacity) to the corporation up to and inclusive of the previous year, in respect of which a bill, notice or direction has been duly served upon him and the time, if any, specified therein for payment has expired."

Amendment of section 53, Madras Act IV of 1919.

3. In sub-section (1) of section 53 of the said Act, the word "or" occurring at the end of clause (*h*) shall be omitted, and after clause (*h*) the following clause shall be inserted, namely:—

"(*hh*) fails to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the corporation, within three months after a bill, notice or direction has been served upon him under this Act, or where in the case of any arrear this Act does not require the service of any bill, notice or direction, within three months after a notice requiring payment of the arrear (which notice it shall be the duty of the commissioner to serve at the earliest possible date) has been duly served upon him by the commissioner; or".

THE MADRAS CHRISTIAN MARRIAGES VALIDATION ACT, 1941.

ACT NO. V OF 1941.

[*7th February, 1941.*

An Act to validate certain marriages solemnized by Mr. Chinnamallela Aaron of the Telugu Church Council of the South India United Church, London Missionary Society, in the district of Anantapur.

WHEREAS a licence was granted by the Government of Madras on the 23rd day of August, 1935, to Mr. Chinnamallela Aaron of the Telugu Church

Council of the South India United Church, London Missionary Society, in the district of Anantapur, to grant certificates of marriage between Indian Christians under section 9 of the Indian Christian Marriage Act, 1872;

AND WHEREAS the said licence was revoked by the said Government with effect on and from the 30th day of April, 1938;

AND WHEREAS after the date of the said revocation the said Mr. Chinnamallela Aaron continued to solemnize marriages and to grant certificates of marriage up to and including the 19th day of August, 1940, as if the said licence had not been revoked;

AND WHEREAS it is doubtful whether the marriages so solemnized and the certificates so granted and the other acts done by the said Mr. Chinnamallela Aaron on and from the 30th day of April, 1938, up to and including the 19th day of August, 1940, are valid in law;

AND WHEREAS there is no reason to doubt that the parties to the said marriages believed in good faith that the said Mr. Chinnamallela Aaron was legally entitled to solemnize marriages and to grant certificates of marriage between the said dates;

AND WHEREAS it is expedient that all such marriages and all certificates of marriage granted and all other acts relating to such marriages or certificates done by the said Mr. Chinnamallela Aaron should be validated;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CHRISTIAN MARRIAGES VALIDATION ACT, 1941.

Validation of certain irregular marriages, certificates and acts.

2. All marriages solemnized, all certificates granted and all acts done by the said Mr. Chinnamallela Aaron on and from the 30th day of April, 1938, up to and including the 19th day of August, 1940, which would be valid if the licence granted to him on the 23rd day of August, 1935, had not been revoked, shall be deemed to be as valid as if he had held the licence under section 9 of the Indian Christian Marriage Act, 1872, on and from the 30th day of April, 1938, and up to and including the 19th day of August, 1940 and no such marriage, certificate or act shall be deemed to be invalid by reason only of the fact that the said licence was revoked.

Validation of records of the said irregular marriages.

3. Certificates of marriages validated by section 2 and register-books and certified copies of true and duly authenticated extracts therefrom deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, shall, in so far as the register-books and extracts relate to such marriages, be received as evidence of such marriages as if such marriages had been duly solemnized under the said Act.

THE FACTORIES (MADRAS AMENDMENT) ACT, 1941.

ACT No. VI OF 1941.

[9th February, 1941.

An Act further to amend the Factories Act, 1934, in its application to the Province of Madras.

WHEREAS it is expedient further to amend the Factories Act, 1934, in its application to the Province of Madras, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE FACTORIES (MADRAS AMENDMENT) ACT, 1941.

Amendment of section 52, Act XXV of 1934.

2. For sub-section (1) of section 52 of the Factories Act, 1934, the following sub-section shall be substituted, namely:—

"(1) A certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory."

THE MADRAS CITY MUNICIPAL (SECOND AMENDMENT) ACT, 1941.

ACT No. VII OF 1941.

[*26th February, 1941.*

An Act further to amend the Madras City Municipal Act, 1919.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL (SECOND AMENDMENT) ACT, 1941.

Amendment of section 282, Madras Act IV of 1919.

2. In sub-section (1) of section 282 of the Madras City Municipal Act, 1919 (hereinafter referred to as the said Act), for the words "shall, in the first month of every year, or in the case of a place to be newly opened, within one month before the opening of such place, apply to the commissioner for a licence," the following words shall be substituted, namely:—

"shall apply to the commissioner for a licence not less than forty-five and not more than ninety days before the opening of such place or the commencement of the year for which the licence is sought to be renewed, as the case may be."

Amendment of section 285-C, Madras Act IV of 1919.

3. In sub-section (2) of section 285-C of the said Act, for the words "not less than thirty days before such place is opened as a cart-stand or not less than thirty days before the commencement of the year", the following words shall be substituted, namely:—

"Not less than forty-five and not more than ninety days before the opening of such place as a cart-stand or the commencement of the year."

Amendment of section 287, Madras Act IV of 1919.

4. In sub-sections (3) and (7) of section 287 of the said Act, for the words "not less than thirty days," the words "not less than forty-five and not more than ninety-days" shall be substituted.

Amendment of section 295, Madras Act IV of 1919.

5. In sub-section (1) of section 295 of the said Act, for the words "shall, not less than thirty days before the commencement of the year for which the licence is sought or in the case of a place to be newly opened, not less than one month before the opening of the same, apply to the commissioner for a licence," the following words shall be substituted, namely:—

"shall apply to the commissioner for a licence not less than forty-five and not more than ninety days before the opening of such place as a slaughter-house or the commencement of the year for which the licence is sought to be renewed, as the case may be."

Amendment of sections 303 and 304, Madras Act IV of 1919.

6. In clause (*b*) of sub-section (2) of section 303 and sub-section (1) of section 304 of the said Act, for the words "not less than thirty days," the words "not less than forty-five and not more than ninety days" shall be substituted.

Amendment of section 365, Madras Act IV of 1919.

7. In section 365 of the said Act, after sub-section (9), the following sub-section shall be inserted, namely:—

"(9-A) Save as otherwise expressly provided in, or may be prescribed under this Act, every application for a licence or permission or for registration or the renewal of a licence or permission or registration, shall be made not less than forty-five and not more than ninety days before the commencement of the year or of such less period as is mentioned in the application."

THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1941.

ACT No. VIII OF 1941.

[*27th February, 1941.*

An Act further to amend the Madras City Municipal Act, 1919, *the Madras District Municipalities Act,* 1920, *and the Madras Local Boards Act,* 1920.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1941.

Amendment of section 413, Madras Act IV of 1919.

2. For sub-section (3) of section 413 of the Madras City Municipal Act, 1919, the following sub-section shall be substituted, namely:—

"(3) Any decision given, whether before or after this sub-section comes into force, under clause (*a*) of sub-section (1) or under sub-section (2) may be

modified from time to time by the Provincial Government in such manner as they deem fit, and any such decision with the modifications, if any, made therein under this sub-section, may be cancelled at any time by the Provincial Government.

Any such decision or any modification therein or cancellation thereof shall be binding on each of the local authorities concerned and shall not be liable to be questioned in any Court of Law."

Amendment of section 369, Madras Act V of 1920.

3. For sub-section (3) of section 369 of the Madras District Municipalities Act, 1920, the following sub-section shall be substituted, namely:—

"(3) Any decision given, whether before or after this sub-section comes into force, under clause (*a*) of sub-section (1) or under sub-section (2) may be modified from time to time by the Provincial Government in such manner as they deem fit, and any such decision with the modifications, if any, made therein under this sub-section, may be cancelled at any time by the Provincial Government.

Any such decision or any modification therein or cancellation thereof shall be binding on each of the local authorities concerned and shall not be liable to be questioned in any Court of Law."

Amendment of section 234, Madras Act XIV of 1920.

4. For sub-section (3) of section 234 of the Madras Local Boards Act, 1920, the following sub-section shall be substituted, namely:—

"(3) Any decision given, whether before or after this sub-section com into force, under clause (*a*) of sub-section (1) or under sub-section (2) mas modified from time to time by the Provincial Government in such manin they deem fit, and any such decision with the modifications, if any, madeern-under this sub-section, may be cancelled at any time by the Provincial ment.

Any such decision or any modification therein or cancellation of shall be binding on each of the local authorities concerned and shall not able to be questioned in any Court of Law."

THE MADRAS FINANCE ACT, 1941.

ACT No. IX OF 1941. [*18th March, 1941.*

ole under the Madras
An Act to continue the reduction in the scale of tax l nning on the
General Sales Tax Act, 1939, for the year
1st day of April 1941.

educed the scale of tax
WHEREAS the Madras Finance Act, 194Q939, for the year beginning
leviable under the Madras General Sales Tax A
on the 1st day of April, 1940;

the reduction in the scale of
AND WHEREAS it is expedient to conti on the 1st day of April, 1941;
tax leviable as aforesaid, for the year begin has, by a Proclamation under
AND WHEREAS the Governor of M 1935, assumed to himself all powers
section 93 of the Government of India A vincial Legislature;
vested by or under the said Act in the the powers so assumed to himself, the
NOW, THEREFORE, in exercise
Governor is pleased to enact as foll:—

Short title and extent.

1. (1) This Act may be called THE MADRAS FINA E ACT, 1941.

(2) It extends to the w le of the Province of Madras.

Amendment of section 3, Madras Act IX of 1939.

2. Sub-section (1) of section 3 of the Madras General Sales Tax Act, 1939, shall, in regard to the tax payable for the year beginning on the 1st day of April, 1941, be construed as if for the words "Five rupees" the words "Four rupees" and for the words "One-half of one per cent." the words "One-quarter of one per cent." were substituted.

THE MADRAS DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1941.

ACT NO. X OF 1941.

[*17th March, 1941.*

An Act further to amend the Madras District Municipalities Act, 1920.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 9: of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the overnor is pleased to enact as follows:—

ort title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES (AMENDMENT) ACT, 1941.

In on of new section 68-A Madras Act V of 1920.

2. After section 68 of the Madras District Municipalities Act, 1920 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

"6 The power conferred by section 68 to make or sanction contracts shall be subject to such rules as may be prescribed in regard to the conditions on which, and the mode in which, contracts may be made or sanctioned by or on behalf of municipal councils."

Rules reg ditions on wh the contracts may be made.

3. In sub ion (2) of section 69 of the said Act, for the words "in conformity with the provisions of this and the last preceding section", the following shall be substituted, namely:—

Amendment of 69, Madras Act V of n

"in conformity h the provisions of this section, of section 68, and of the rules referred to in tion 68-A".

THE MADRAS PRO ITION (SUPPLEMENTARY) ACT, 1941.

A No. XI OF 1941.

[*16th April, 1941.*

An Act to supplement Madras Prohibition Act, 1937.

WHEREAS in Criminal Revis Cases Numbers 1052, 1053 and 1054 of 1940 on its file, the High Court of dicature at Madras has decided that section 4 (1) (a) of the Madras Proh on Act, 1937, in so far as it relates to dangerous drugs, a matter included in t Concurrent Legislative List in the Seventh Schedule to the Government of a Act, 1935, is repugnant to the provisions of an existing Indian law on ch matter, namely, the Madras Abkari Act, 1886 and the rules made thereu r, and is consequently void by